

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes amendments to §§116.12, 116.111, 116.160, 116.610 and 116.611; and new §§116.164, and 116.169.

If adopted, the commission will submit the amendments to §§116.12, 116.111, 116.160, 116.610 and 116.611; and new §§116.164, and 116.169 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 On 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) requirements 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<sub>2</sub>), 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 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 §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 (TWC), 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 GHG 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 revisions to Chapters 39 (Public Notice), 55 (Requests for Reconsideration and Contested Case Hearings; Public Comment), 101 (General Air Quality Rules), 106 (Permits by Rule), 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 rescission of the FIP.

### **Section by Section Discussion**

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

The commission proposes to amend §116.12 to add the definitions of carbon dioxide equivalent (CO<sub>2e</sub>) emissions and the pollutant GHGs. The commission proposes

amendments to the definitions of federally regulated NSR pollutant, major stationary source, and major modification.

The proposed definition of GHGs references the proposed definition in §101.1(42), Definitions, and establishes that the regulated pollutant GHGs is an aggregate group of six greenhouse gases including: carbon dioxide (CO<sub>2</sub>), nitrous oxide (N<sub>2</sub>O), methane (CH<sub>4</sub>), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF<sub>6</sub>). HFCs are compounds containing only hydrogen, fluorine, and carbon atoms. PFCs are compounds containing only carbon and fluorine atoms. This proposed definition is consistent with EPA's definition in 40 Code of Federal Regulations (CFR) §51.166(b)(48)(i). Other gases that are considered greenhouse gases are not included in the definition of the pollutant GHGs.

The proposed definition in §116.12(7) of CO<sub>2</sub>e emissions is consistent with EPA's definition in 40 CFR §51.166(b)(48)(ii). The new definition is necessary to establish the threshold for sources to be considered major for GHGs, consistent with EPA's Tailoring Rule. The CO<sub>2</sub>e emissions are determined by multiplying the mass amount in tons per year (tpy) of emissions of each of the gases (that are included in the definition of the pollutant of GHGs) by the global warming potential (GWP) of the gas, and adding the results. The GWPs are published in the 40 CFR Part 98, Subpart A, Table A-1 - Global Warming Potentials. For example, a source emits 5 tpy CO<sub>2</sub>, 25 tpy of CH<sub>4</sub>, and 10 tpy of

the hydroflourcarbon trifluoromethane ( $\text{CHF}_3$ ). The GWP of  $\text{CO}_2\text{e}$  is 1, the GWP of  $\text{CH}_4$  is 21, and the GWP of  $\text{CHF}_3$  is 11,700. The  $\text{CO}_2\text{e}$  of the source would be 117,530 tpy  $\text{CO}_2\text{e}$ . This value is reached by multiplying 5 tpy  $\text{CO}_2$  times 1, 21 tpy  $\text{CH}_4$  by 25, and 10 tpy  $\text{CHF}_3$  by 11,700, then adding each result to total 117,530 tpy  $\text{CO}_2\text{e}$ .

The proposed definition of  $\text{CO}_2\text{e}$  emissions includes EPA's deferral for  $\text{CO}_2$  emissions from bioenergy and other biogenic sources as published in the July 20, 2011, issue of the *Federal Register* (76 FR 43490). This deferral established that biogenic  $\text{CO}_2$  emissions are not required to be counted for applicability purposes under the PSD program until July 21, 2014. EPA committed to conduct a detailed examination of the science associated with biogenic  $\text{CO}_2$  emissions from stationary sources during the deferral period. In the meantime, certain  $\text{CO}_2$  emissions from the combustion or decomposition of non-fossilized and biodegradable organic material are not required to be included in the total mass of  $\text{CO}_2$  used to determine  $\text{CO}_2\text{e}$  emissions. For example,  $\text{CO}_2$  generated from the combustion of biogas collected from (or the biological decomposition of) waste in landfills, wastewater treatment, or manure management processes is not required to be included in the calculation of  $\text{CO}_2\text{e}$  emissions. Also exempted is  $\text{CO}_2$  generated from the following: fermentation during ethanol production; combustion of the biological fraction of municipal solid waste or biosolids; combustion of the biological fraction of tire-derived fuel; and combustion of biological material, including all types of wood and wood waste, forest residue, and agricultural material. Additional information regarding

the deferral for biogenic sources is available on EPA's Web site

*<http://www.epa.gov/climatechange/ghgemissions/biogenic-emissions.html>*.

The proposed amendment to the definition of federally regulated NSR pollutant in §116.12(15) will establish GHGs emitted over the federal Tailoring Rule thresholds as a pollutant subject to Texas' PSD permitting program.

Sources that emit GHGs are only subject to the PSD permitting program if they meet or exceed the thresholds proposed in new §116.164, Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources.

The proposed new definition of GHGs in §116.12(16) establishes that the regulated pollutant GHGs is the aggregate group of six GHGs including: CO<sub>2</sub>, N<sub>2</sub>O, CH<sub>4</sub>, HFCs, PFCs, and CF<sub>6</sub>. This proposed definition is consistent with EPA's definition in 40 CFR §51.166(b)(48). HFCs are compounds containing only hydrogen, fluorine, and carbon atoms. PFCs are compounds containing only carbon and fluorine atoms. Other gases that are commonly considered GHGs are not included in the definition of the pollutant GHGs.

The proposed amendment to the definition of major stationary source and major modification (in §116.12(19) and (20), respectively) reference proposed new §116.164 in

order to simplify understanding of the thresholds established specifically for GHGs.

The commission also proposes clarifying amendments to §116.12 including renumbering to accommodate the proposed new definitions; deleting the sentence, "The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas" because the definitions apply in attainment areas as well; and clarifying the title and citation of a referenced section in the foot note to Table I - Major Source/Major Modification Emission Thresholds.

*§116.111, General Application*

The commission proposes to amend §116.111 to add subsection (a)(2)(I)(ii) to establish the requirement to obtain authorization under the PSD permitting program for sources of GHGs which meet the thresholds proposed in new §116.164. The proposed amendment is necessary because the existing language in subparagraph (I) only requires PSD review in attainment areas. The proposed amendment clarifies that authorization of GHGs above the tailored thresholds is required statewide. The proposed amendment includes relettering subparagraph (I) to accommodate the two conditions which require PSD review. Consistent with current practice, the commission intends to issue a separate PSD GHG permit.

*§116.160, Prevention of Significant Deterioration Requirements*

The commission proposes to amend subsection (a) to require that new major sources of GHGs or major modifications of GHGs comply with the requirements of the PSD permitting program regardless of the location of the sources. The PSD permitting requirements are proposed to be statewide because there is no NAAQS for GHGs. This is consistent with the federal PSD permitting regulations.

The proposed amendment to subsection (a) will result in the applicable PSD requirements applying to sources that emit GHGs above the thresholds in proposed §116.164. The federal PSD rules, like the preconstruction requirements in the THSC, require a best available control technology (BACT) determination and an air quality analysis. As EPA's guidance on PSD permitting for GHGs indicates, the focus of the application review is on the control technology choice. EPA has recognized that the unique nature of emissions of GHGs and impacts present challenges to permitting authorities conducting PSD review for these emissions. For instance, EPA has indicated that no air quality analysis is required for PSD GHG permits. In "PSD and Title V Permitting Guidance for Greenhouse Gases," (dated March 2011) prepared by EPA's Office of Air Quality Planning and Standards, EPA stated that, "...monitoring for GHGs is not required because EPA regulations provide an exemption in 40 CFR §52.21(i)(5)(iii) and §51.166(i)(5)(iii) for pollutants that are not listed in the appropriate section of the regulations, and GHGs are not currently included in that list. However, 40 CFR

§52.21(m)(1)(ii) and §51.166(m)(1)(ii) of EPA's regulations apply to pollutants for which no NAAQS exists. These provisions call for collection of air quality monitoring data 'as the Administrator determines is necessary to assess ambient air quality for that pollutant in any (or the) area that the emissions of that pollutant would affect.' In the case of GHGs, the exemption in 40 CFR §52.21(i)(5)(iii) and §51.166(i)(5)(iii) is controlling since GHGs are not currently listed in the relevant paragraph. Nevertheless, EPA does not consider it necessary for applicants to gather monitoring data to assess ambient air quality for GHGs under 40 CFR §52.21(m)(1)(ii) and §51.166(m)(1)(ii), or similar provisions that may be contained in state rules based on EPA's rules. GHGs do not affect "ambient air quality" in the sense that EPA intended when these parts of EPA's rules were initially drafted." A NAAQS for GHGs has not been established due to the extreme difficulty in determining what concentration level is requisite to protect public health and welfare. The uniformity of GHG concentrations throughout the ambient air also make localized impacts determinations problematic. Considering the nature of emissions of GHGs and their global impacts, EPA stated that it is not "practical or appropriate to expect permitting authorities to collect monitoring data for purpose of assessing ambient air impacts of GHGs."

Furthermore, consistent with EPA's statement in the Tailoring Rule, EPA stated, "...it is not necessary for applicants or permitting authorities to assess impacts from GHGs in the context of the additional impacts analysis or Class I area provisions of the PSD

regulations for the following policy reasons. Although {it is EPA's position that emissions of GHGs} contribute to global warming and other climate changes that result in impacts on the environment, including impacts on Class I areas and soils and vegetation due to the global scope of the problem, climate change modeling and evaluations of risks and impacts of emissions of GHGs is typically conducted for changes in emissions orders of magnitude larger than the emissions from individual projects that might be analyzed in PSD permit reviews. Quantifying the exact impacts attributable to a specific GHGs source obtaining a permit in specific places and points would not be possible with current climate change modeling. Given these considerations, emissions of GHGs would serve as the more appropriate and credible proxy for assessing the impact of a given facility. Thus, EPA believes that the most practical way to address the considerations reflected in the Class I area and additional impacts analysis is to focus on reducing emissions of GHGs to the maximum extent. In light of these analytical challenges, compliance with the best available control technology analysis is the best technique that can be employed at present to satisfy the additional impacts analysis and Class I area requirements of the rules related to GHGs. "TCEQ intends to implement the PSD GHG permitting requirements consistent with the EPA's recognition of the unique nature of emissions of GHGs. The "PSD and Title V Permitting Guidance for Greenhouse Gases," (EPA-457/B-11-001 March 2011) guidance is available on the EPA's Web site:

*<http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf>*

Further, because GHG emissions are typically non-toxic, relatively inactive and nonflammable, concentrations of GHGs high enough to produce health effects are extremely unlikely to be found in ambient air. Therefore, while health effects of GHG emissions will be evaluated consistent with the preceding statement when determining issuance of a PSD GHG permit, modeling or additional impacts review of GHGs will not be conducted as part of the review of an application for a PSD GHG permit. In addition, it is not necessary to review individual emissions of GHGs for purposes of global effects on the climate because no numerical standard exists. As discussed elsewhere in this preamble, this is because of the inherent difficulty in determining: 1) the appropriate concentration level as well as; 2) localized impacts because of the uniformity of GHG concentrations throughout the ambient air. The impacts review for individual air contaminants will continue to be addressed, as applicable, in the state's traditional minor and major NSR permits program per Chapter 116.

The commission proposes subsection (b)(2) to include references to the netting requirements for applicability thresholds in §116.164 for GHGs. The proposed amendment establishes the emission netting thresholds for GHGs which may cause an existing source to become subject to the PSD permitting program when the source is undergoing a modification. The subsection is proposed to be relettered to clarify that the *de minimis* threshold test (netting) includes the threshold for GHGs on mass basis and CO<sub>2</sub>e emissions for modifications of emissions of GHGs.

The commission proposes the amendment to subsection (c) to clarify that emissions of GHGs have the threshold specified in proposed new §116.164.

*§116.164, Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources*

The commission proposes new §116.164 to establish the specific PSD permitting major source thresholds for emissions of GHGs. Consistent with EPA's Tailoring Rule, emissions of GHGs at sources that emit or will emit GHGs must be evaluated on a mass basis and as CO<sub>2</sub>e emissions. In proposed new subsection (a), there are five circumstances which will require a source to conduct PSD review for emissions of GHGs. Two are considered by EPA as "anyway sources" or "anyway modifications" because they are subject to PSD permitting due to emissions of a regulated NSR pollutant that is not GHGs. In the proposed rule language these two categories are §116.164(a)(1) and (2), respectively. Two categories are considered by EPA as "non-anyway sources" and "non-anyway modifications" because they are not subject to PSD permitting for a regulated NSR pollutant other than GHGs. In the proposed rule language these categories are §116.164(a)(3) and (4), respectively. These sources will become subject to PSD permitting for GHGs as discussed in this preamble. The final category is existing sources that are not major for any pollutants. In the proposed rule language this category is in §116.164(a)(5).

EPA's approach to regulating GHGs is that the emissions of GHGs (on a mass basis) must first meet or exceed the definition of a "major stationary source" in 40 CFR §52.21(b)(1)(i) (for EPA and delegated state air permit programs) or 40 CFR §51.166(b)(1)(i) (for approved state air permit programs). The Tailoring Rule established that emissions of CO<sub>2</sub>e must meet or exceed the tailored thresholds established in the federal definition of "subject to regulation" in 40 CFR §52.21(b)(49) and §51.166(b)(48). EPA details this approach in the preamble for the Tailoring Rule, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31523 and 31524), and page 9 of EPA's guidance (EPA-457/B-11-001 March 2011, PSD and Title V Permitting Guidance for Greenhouse Gases), available on EPA's Web site:

<http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf>.

The EPA evaluated potential streamlining mechanisms as part of Step 3 of the Tailoring Rule. The commission intends to explore options to efficiently process PSD GHG applications. The commission has existing authority to establish a streamlined application review and permit issuance process for groups of sources, such as sources that belong to the same industrial source category, or that have common processes and equipment. The executive director has researched streamlining options presented in the FCAA Advisory Committee GHG Permit Streamlining Workgroup Final Report, available on EPA's Web site:

<http://www.epa.gov/nsr/ghgdocs/20120914CAAACPermitStreamlining.pdf>. The commission will work with stakeholders during implementation of the PSD GHG permitting program to identify and develop appropriate streamlining options.

*Proposed §116.164(a)(1)*

The first circumstance proposed in §116.164(a)(1) is a new major stationary source subject to the PSD permitting program because of emissions of one or more pollutants that are not GHGs. EPA calls this category "new anyway sources" because these are major sources subject to PSD permitting for a pollutant that is not GHGs as defined in 40 CFR §51.166(b)(1). These sources will become subject to PSD permitting for GHGs as a result of Step 1 of the Tailoring Rule (effective January 2, 2011) under 40 CFR §51.166(b)(48)(iv)(a). Additional information on this category can be found in Appendix A and in Table II-A, Summary of PSD Applicability Criteria for New Sources of GHGs, in EPA's guidance.

These sources must include GHGs in the PSD review if the source emits or has the potential to emit 75,000 tpy of CO<sub>2</sub>e or more. For example, a new source is proposed that will have the potential to emit: 300 tpy of volatile organic compounds (VOC); 5,000 tpy CO<sub>2</sub>; and 4,500 tpy CH<sub>4</sub>. Under the existing PSD permitting program in Texas, this source is subject to PSD permitting because its emissions of VOC exceed the major source threshold in 40 CFR §51.166(b)(1). In addition, the emissions of GHGs must be

evaluated against the threshold in proposed §116.164(a)(1) to determine if the PSD review must include GHGs. In this example, the source will have a potential to emit 99,500 tpy CO<sub>2</sub>e (multiply 5,000 tpy CO<sub>2</sub> by the GWP of 1, multiply 4,500 tpy CH<sub>4</sub> by the GWP of 21, and add the two results to get 99,500 tpy CO<sub>2</sub>e). This source would be required to include emissions of GHGs in the PSD review because the source would emit greater than or equal to 75,000 tpy CO<sub>2</sub>e.

*Proposed §116.164(a)(2)*

The second circumstance proposed in §116.164(a)(2) is an existing major stationary source subject to the PSD permitting program because of emissions of a pollutant(s) that are not GHGs. EPA calls these "anyway modifications." These are major sources subject to PSD permitting for a pollutant that is not GHGs as defined in 40 CFR §51.166(b)(1). These sources will become subject to PSD permitting for GHGs as a result of Step 1 of the Tailoring Rule under 40 CFR §51.166(b)(48)(iv)(b) when these sources will have a modification that results in an emissions increase of a regulated NSR pollutant and an emissions increase of CO<sub>2</sub>e as defined in 40 CFR §51.166(b)(48)(iii). Because an emission rate for GHGs is not listed in 40 CFR §51.166(b)(23)(i), any GHGs emission rate greater than zero on a mass basis is considered significant, according to 40 CFR §51.166(b)(23)(ii). The modification must also meet the tailored threshold of 75,000 tpy CO<sub>2</sub>e or more in 40 CFR §51.166(b)(48)(iv)(b). Therefore, if the project causes a significant net emissions increase for a non-GHG pollutant, then the project is a major

modification for GHGs only if it also results in a net emissions increase for GHGs at or above the threshold in proposed 40 CFR §51.166(b)(48)(iv)(b) as well. Additional information on this category can be found in Appendix C and in Table II-B, Summary of PSD Applicability Criteria for Modified Sources of GHGs, in EPA's guidance.

When the existing source has a major modification (as defined in §116.12) of a pollutant(s) that is not GHGs, the source must include GHGs in the PSD review if there is also a net emissions increase equal to or greater than 75,000 tpy CO<sub>2e</sub>. For example, an existing source major for PSD permitting is proposing changes in operation that would have the potential to emit net increases of: 450 tpy of nitrogen oxides (NO<sub>x</sub>), 150 tpy of carbon monoxide (CO); 7,000 tpy CO<sub>2</sub>; and 3,800 tpy CH<sub>4</sub>. Under the existing PSD permitting program in Texas, this action meets the definition of a major modification for NO<sub>x</sub> and CO, and those pollutants are subject to PSD review. In addition, the emissions of GHGs must be evaluated against the threshold in proposed §116.164(a)(2) to determine if the PSD review must include GHGs. In this example, the source will have a potential to emit 86,800 tpy CO<sub>2e</sub> (multiply 7,000 tpy CO<sub>2</sub> by the GWP of 1, multiply 3,800 tpy CH<sub>4</sub> by the GWP of 21, and add the two results to get 86,800 tpy CO<sub>2e</sub>). This source would be required to include emissions of GHGs in the PSD review because the action meets the definition of a major modification in §116.12 for a federally regulated NSR pollutant that is not GHGs, and there would be a net emission increase of GHGs that exceeds zero tpy GHGs on mass basis, and 75,000 tpy CO<sub>2e</sub> or more, as established

in proposed new §116.164(a)(2).

In another example for the second circumstance, an existing source major for PSD permitting (for non-GHGs) is proposing changes in operation that would have the potential to emit net increases of 35 tpy NO<sub>x</sub>, 15 tpy CO, 1,000 tpy CO<sub>2</sub>, and 3,700 tpy CH<sub>4</sub>. The net emission increases of NO<sub>x</sub> and CO do not meet the definition of a major modification in §116.12 because the proposed potential emissions of both NO<sub>x</sub> and CO are below the significant levels in 40 CFR §51.166(b)(23). While the CO<sub>2e</sub> emissions of the proposed modification are 78,700 tpy CO<sub>2e</sub>, which is over the significant threshold in proposed §116.164, the emissions of GHGs are not subject to PSD review for this action because the source is not also undergoing a major modification for a federally regulated NSR pollutant that is not GHGs.

*Proposed §116.164(a)(3)*

The third circumstance proposed in §116.164(a)(3) is a new stationary source that is major for GHGs only (these sources are minor for all non-GHGs pollutants). EPA calls these "non-anyway sources" because they are subject to PSD only because of emissions of GHGs. These sources will become subject to PSD permitting for GHGs as a result of Step 2 of the Tailoring Rule under 40 CFR §51.166(b)(48)(v)(a). Additional information on this category can be found in Appendix B and in Table II-A in EPA's guidance.

These sources will be subject to the PSD permitting program for only GHGs if both the mass basis emissions of GHGs and the CO<sub>2</sub>e emissions meet or exceed the thresholds in proposed §116.164(a)(3). These sources must have mass basis emissions of GHGs that are greater than or equal to 250 tpy, or 100 tpy if the source is listed in 40 CFR §51.166(b)(1)(i). Additionally, these sources must meet or exceed the tailored threshold of 100,000 tpy CO<sub>2</sub>e. If both of the thresholds are met, the source is subject to the PSD permitting program solely because of emissions of GHGs.

For example, a new proposed source would have the potential to emit 35 tpy NO<sub>x</sub>, 20 tpy CO, 500 tpy CO<sub>2</sub>, and 6 tpy of the hydroflurocarbon nitrogen trifluoride (NF<sub>3</sub>) (the GWP for NF<sub>3</sub> is 17,200). The emissions of NO<sub>x</sub> and CO are not over the major source thresholds for those pollutants. The mass basis for GHGs would be 506 tpy, which exceeds the 250 tpy threshold. The CO<sub>2</sub>e emissions would be 103,700, which exceeds the 100,000 tpy threshold. This new source would be subject to PSD permitting solely because of emissions of GHGs. Since this source is not major for any pollutant other than GHGs (the emissions of NO<sub>x</sub> and CO are not over the significant thresholds in 40 CFR §51.166(b)(23)), only the GHGs are subject to PSD review. All other pollutants would be subject to appropriate minor source authorization.

In another example for the third circumstance, a proposed new source would have the potential to emit 45 tpy NO<sub>x</sub>, 15 tpy CO, 90 tpy CO<sub>2</sub>, and 6 tpy NF<sub>3</sub>. The emissions of

NO<sub>x</sub> and CO are below the major source thresholds. The mass basis of emissions of GHGs is 96 (90 tpy CO<sub>2</sub> plus 6 tpy NF<sub>3</sub>). While the CO<sub>2e</sub> emissions are 103,290 tpy CO<sub>2e</sub>, the source is not considered major for GHGs because the mass basis is not over the threshold of 100 tpy GHGs if the source is listed on the named source category list in 40 CFR §51.166(b)(1)(i), or greater than or equal to 250 tpy GHG if the source is not on the list. Both the mass basis threshold and the tailored CO<sub>2e</sub> threshold must be met or exceeded for the source to be considered a major source and subject to the PSD permitting program.

*Proposed §116.164(a)(4)*

The fourth circumstance, proposed in new §116.164(a)(4), is an existing stationary source that is major for GHGs and is proposing a major modification for GHGs. EPA calls these "non-anyway modifications." These sources will become subject to PSD permitting for GHGs in Step 2 of the Tailoring Rule under 40 CFR §51.166(b)(48)(v)(b). These are existing sources that emit or have the potential to emit over the major source thresholds for GHGs. When the source will make changes that result in a net increase in emissions of GHGs above zero on a mass basis and greater than or equal to the tailored threshold of 75,000 tpy CO<sub>2e</sub> in 40 CFR §51.166(b)(48)(v)(b), it becomes subject to PSD permitting. As previously noted, because GHGs are not listed in 40 CFR §51.166(b)(23)(i), any emission rate greater than zero is considered significant according to 40 CFR §51.166(b)(23)(ii). Additional information on this category can be found in

Appendix D and in Table II-B in EPA's guidance.

These sources are existing major sources of GHGs if two thresholds are met or exceeded: the mass basis emissions of GHGs meet or exceed the defined threshold, and CO<sub>2</sub>e meets or exceeds the tailored threshold. These sources must have mass basis emissions of GHGs that are greater than or equal to 250 tpy, or 100 tpy if the source is listed in 40 CFR §51.166(b)(1)(i). Additionally, these sources must meet or exceed the tailored threshold of 100,000 tpy CO<sub>2</sub>e. These existing major sources are subject to the PSD permitting program when there is a physical change or change in method of operation that results in a net emissions increase of greater than zero tpy GHGs on a mass basis and greater than or equal to 75,000 tpy CO<sub>2</sub>e. In the following example, an existing source is authorized to emit the following: 50 tpy NO<sub>x</sub>, 30 tpy CO, 45 tpy SO<sub>2</sub>, 5,000 tpy CO<sub>2</sub>, 250 tpy CH<sub>4</sub>, and 4 tpy SF<sub>6</sub>. The source is currently a minor source in regard to criteria pollutants; however, the source is an existing major source in regard to GHGs. This is because the source currently has the potential to emit 5,000 tpy CO<sub>2</sub>, 250 tpy of CH<sub>4</sub>, and 4 tpy of SF<sub>6</sub>. The total mass basis is 5,254 tpy GHGs. The GWP of CO<sub>2</sub> is 1, CH<sub>4</sub> is 21, and SF<sub>6</sub> is 23,900, so the source emits or has the potential to emit 105,850 tpy CO<sub>2</sub>e emissions. Both the mass basis and tailored GHGs thresholds are exceeded. This source is considered a major stationary source for GHGs. If the source proposes a change in operation that affects emissions of GHGs, the next step would be to calculate the proposed net emissions increases that will result from the proposed change in operation.

If the net emissions increase is greater than zero tpy of GHGs on a mass basis, and greater than or equal to 75,000 tpy CO<sub>2</sub>e, then the emissions of GHGs will be subject to PSD review as part of a major modification.

In another example of the fourth circumstance, an existing source is authorized to emit the following: 500 tpy SO<sub>2</sub>, 95,000 tpy CO<sub>2</sub>, and 250 tpy CH<sub>4</sub>. The source is currently a major source of SO<sub>2</sub> and GHGs. This source is proposing changes in operation that would have the potential to emit net increases of: 15 tpy SO<sub>2</sub>, 70,000 tpy CO<sub>2</sub>; and 500 tpy methane. The netted emission increases of SO<sub>2</sub> does not meet the definition of a major modification in §116.12 because the proposed potential emissions of SO<sub>2</sub> are below the significant levels in 40 CFR §51.166(b)(23). However, because the net emissions increase is greater than zero tpy of GHGs on a mass basis, and greater than or equal to 75,000 tpy CO<sub>2</sub>e (80,500 tpy CO<sub>2</sub>e in this example), then the emissions of GHGs would be subject to PSD review as a major modification.

*Proposed §116.164(a)(5)*

The fifth circumstance in proposed §116.164(a)(5) is an existing minor stationary source with emissions below the major source thresholds for all pollutants. This category of sources was not specifically addressed by EPA in the Tailoring Rule, however, an existing minor source that has a physical change or change in the method of operation that would constitute a major stationary source in and of itself is considered a new major stationary

source and subject to PSD according to 40 CFR §51.166(b)(1)(i)(C). Additional information on this category can be found in Appendix D and Table II-B in EPA's guidance.

For example, the source has the potential to emit 20 tpy NO<sub>x</sub>, 10 tpy CO, 0.5 tpy SO<sub>2</sub>, and 90 tpy CO<sub>2</sub>. The emissions of GHGs for this source are below both the mass basis threshold of 250 tpy (or 100 tpy if the source is on the named source category list), and under the tailored 100,000 tpy CO<sub>2e</sub> threshold. The emissions of GHGs from this source would become subject to the PSD permitting program if the source proposed a change that would result in an emissions increase greater than or equal to 100,000 tpy CO<sub>2e</sub>, and greater than or equal to 250 tpy GHGs (or 100 tpy GHGs, if the source is listed on the named source category list).

*Proposed §116.164(b)*

The commission is proposing new §116.164(b) to clarify that emissions of GHGs at a new or modified facility that are below the thresholds in EPA's Tailoring Rule, as described by the conditions in proposed §116.164(a), do not require preconstruction authorization, consistent with HB 788 and EPA's interpretation of PSD GHG permitting requirements. This proposed amendment is appropriate because 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. The Texas Clean Air Act (TCAA) allows the

commission to develop rules to establish a level of emissions for groups of facilities that do not require preconstruction authorization. In addition, emission increases below those thresholds resulting from a change at an existing permitted facility are not defined as a modification that requires preconstruction authorization under the TCAA. In order to demonstrate that emissions of GHGs from new or modified facilities or sources will not trigger PSD review, owners or operators must keep sufficient records to demonstrate authorization is not required for these GHG emissions. The commission intends to develop guidance to help smaller sources determine the type of records that are necessary to demonstrate compliance with this subsection. Sources will continue to be required to seek authorization for emissions from new or modified sources that are not GHGs.

*§116.169, Greenhouse Gas Transition*

The commission proposes new §116.169 to fulfill requirements established in HB 788. Proposed subsection (a) provides for the transition of certain PSD permitting applications which were previously submitted to EPA. Once EPA approves the SIP revisions and rescinds the FIP, the commission will accept the transfer of and review applications. The commission will work with EPA and applicants to determine if the commission or EPA will complete review of the application and issuance of a PSD GHG permit. Based on these discussions, TCEQ expects EPA will retain PSD permit implementation authority for those specific sources that have submitted PSD GHG

applications to EPA, but for which final agency action or the exhaustion of all administrative and judicial appeals processes have not yet been concluded or completed upon the effective date of EPA's final SIP approval of the new and amended sections in this chapter and rescission of the FIP.

*§116.610, Applicability*

The commission proposes to amend §116.610(a)(1) and (b) to clarify that sources of GHGs may use standard permits to authorize emissions of pollutants that are not GHGs. GHGs will not be authorized under standard permits. Instead, emissions of GHGs which meet or exceed the thresholds set in the EPA's Tailoring Rule are subject to the PSD permitting program. Sources subject to the PSD permitting program solely because of emissions of GHGs may continue to utilize standard permits to authorize emissions of pollutants that are not GHGs, in conjunction with a PSD permit that authorizes GHGs. Projects which trigger PSD requirements due to emissions of non-GHGs cannot qualify for a standard permit.

*§116.611, Registration to Use a Standard Permit*

The commission proposes to amend §116.611. Section §116.611(b) currently allows a source to begin construction 45 days after the executive director receives the registration for a standard permit. The proposed amendment to subsection (b) clarifies that sources which are subject to the PSD permitting program solely because of emissions of GHGs,

and using a standard permit to authorize emissions of pollutants that are not GHGs, may not begin construction until the source is issued a PSD GHG permit.

The commission proposes to amend subsection (c) to establish a deadline for sources that are currently operating to certify emissions of GHGs. Since GHGs were not previously subject to permitting requirements, sources will have the opportunity to evaluate potential to emit GHGs and certify emissions, if necessary. These sources will have 90 days after EPA's final action approving the amendments concurrently proposed for Chapter 122, Federal Operating Permits, Potential to Emit, to certify emissions of GHGs to avoid applicability of Title V permitting. New sources of GHGs would be required to certify emissions no later than the date of operation. The commission invites comments regarding the timing allotted for certifying emissions of GHGs.

### **Fiscal Note: Costs to State and Local Government**

Jeffrey Horvath, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rules are in effect, significant fiscal implications are anticipated for the agency and for some other units of state or local government as a result of administration or enforcement of the proposed rules. The proposed rules would permit air emissions of GHGs under the PSD program.

The proposed rules would implement provisions in HB 788, 83rd Legislature, 2013, to

establish the TCEQ as the permitting authority for major sources of GHG emissions in Texas, consistent with federal law. The proposed changes to Chapter 116 are part of a concurrent rulemaking that involves changes to other TAC chapters intended to implement HB 788. Other chapters in the rulemaking include Chapters 39, 55, 101, 106, and 122. Fiscal notes for proposed revisions to those chapters are provided separately.

The proposed rules establish that GHGs is a federally regulated NSR pollutant which can be subject to PSD permitting and that owners or operators of major sources with emissions of GHGs will be subject to PSD permitting requirements. The proposed rules would provide GHG emission thresholds for new sources and modifications in order to determine when PSD permits will be required.

The proposed rules also contain provisions for the transfer of applications from EPA to TCEQ.

A proposed change to §116.610(b) will allow a facility or project that triggers the requirement for a PSD permit as a result of emissions of GHGs to still use a standard permit to authorize their other minor emissions, to the extent allowed under federal PSD regulations. A change to §116.611(b) specifies that projects which are using a standard permit to authorize non-GHGs cannot begin construction until after the PSD permit for their emissions of GHGs is issued.

Other, minor changes to Chapter 116 clarify the statewide applicability of PSD permitting, and provide instructions on how emissions of GHGs are to be calculated.

PSD fee permit revenue is deposited into the Clean Air Account 0151 and is calculated based on 1% of the capital cost of the project with a minimum assessed fee of \$3,000 and maximum of \$75,000. Agency staff estimates that the implementation of the new rules will result in approximately 400 additional PSD permit applications over the five-year period covered by the fiscal note. Very few additional PSD permit applications are expected to be processed in Fiscal Year 2014 as the new rule is not expected to be in effect and SIP-approved until late in the fiscal year. However, beginning in Fiscal Year 2015, approximately 100 additional PSD permit applications each fiscal year are expected to be received and processed. This fiscal note assumes that of the 100 new major PSD GHG permit applications each year, an estimated 70% would have previously qualified for a Permit By Rule (PBR) or a Standard Permit (SP). It is further assumed that for this 70% or an estimated 70 permit applications per year, most of these would fall in the lower end of the PSD fee scale, which for the purposes of this fiscal note is estimated to be \$20,000. Therefore, given the fee increase for 70 permit applications that would go from a PBR or SP to a PSD permit, the agency could see an increase in PSD fee revenue of \$1,368,500 each year (assuming \$20,000 fee for PSD less \$450 PBR fee x 70 projects/year = \$1,368,500/year). The other 30% of the 100 additional PSD permit

applications expected each year would be those sites that are expected to change from a minor NSR permit to a PSD permit. The anticipated fee increase for the other 30 projects (30% of 100) that went from case-by-case minor NSR to PSD is estimated to result in a \$27,288 fee increase for each permit application. This change in permit type is expected to result in an additional \$818,640 each year (\$27,288 fee increase x 30 permit applications each year). The total estimated increase in PSD fee revenue is anticipated to be \$2,187,140 each year. However, it must be pointed out that the level of additional fee revenue to be collected would depend upon the number of additional PSD applications received and the capital cost of each project involved, both of which are highly variable and difficult to predict. Any additional revenue would be used to support PSD permitting activities.

All PSD permits, including PSD permits for GHGs, require public notice as part of the permit application process. Costs may be associated with these public notice requirements. The costs for public notice associated with PSD GHG permits are not significantly different from the costs of public notice for PSD permits for non-GHG pollutants.

State agencies that operate devices such as boilers or incinerators that are stationary sources of GHG of sufficient size may require a PSD permit. Local governments that own or operate sites of an industrial or heavy commercial nature, such as power generating

stations and landfills would also be affected. Some of these sites already have PSD permits due to major emissions of other pollutants. Agency staff does not have sufficient information to determine how many state agencies may be affected by the proposed rules, but based upon information that is available, it is roughly estimated that 60 local government facilities could be affected (or 15% of the estimated 400 PSD permits anticipated to be affected by the proposed rules). This estimate would result in approximately 15 new governmental permit applications each year (very few if any applications in the first year, but 15 applications for each subsequent year).

Owners or operators of new or modified facilities with emissions of GHGs that meet or exceed defined threshold levels would be required to obtain a PSD permit, and pay the PSD permit fee, and comply with Emissions Inventory (EI) requirements under §101.10. Costs for each facility to implement and conduct the EI each year are estimated to be \$3,000. It is estimated that each of the 60 new governmental permits would have an incremental cost on average of \$21,871. Total costs for the estimated 270 local government facilities for the first five years the proposed rules are in effect are estimated to be \$1,762,260. This figure consists of \$450,000 in cumulative costs for conducting emissions inventories, and \$1,312,260 in cumulative permit fees. Under current federal regulations these sources are already required to get the PSD permit from EPA. It is also not known if permitting costs would be more or less through EPA or the TCEQ.

### **Public Benefits and Costs**

Mr. Horvath has 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 the continued protection of the public health and safety through the implementation of an efficient and effective state permit review process, while maintaining compliance with state and federal law.

The proposed rules will have a fiscal impact on businesses that own or operate new or modified facilities with emissions of GHGs that meet or exceed defined threshold levels. The proposed rules are not anticipated to have direct fiscal implications for individuals unless they own or operate affected facilities. Any business or industry with new or modified stationary sources which have emissions of GHGs in quantities that meet or exceed certain threshold levels must obtain a PSD permit, pay a permit fee, and comply with EI requirements. Under current federal regulations these sources are already required to get the PSD permit from EPA. It is also not known if permitting costs would be more or less through EPA or the TCEQ. However, PSD permit requirements themselves are not expected to be burdensome as best available control technology for GHGs generally does not require add-on controls, and sources are likely already equipped with sufficient monitoring technology to determine their emissions of GHGs (which are generally based on fuel consumption).

Staff estimates that approximately 100 owners and operators of major sources of GHG will be required to submit PSD GHG permit applications each year for at least four of the five years covered by this fiscal note. Of these 100 new applications expected to be submitted each year, approximately 85 (or 85%) are estimated to be commercial or industrial and come from businesses (non-governmental). These sites are likely to be in the oil and gas industry, petrochemical industry, electric utilities, and general manufacturing, but may also be in other types of industries. Owners and operators required to obtain a PSD permit will be required to pay a PSD permit fee, and comply with EI requirements. Very few applications are expected in the first year, as the rules either will not have been approved by EPA, or will have been approved by EPA for only a short time. For the estimated 85 commercial or industrial permit applications each year, the total estimated costs over the first five years the proposed rules would be in effect is estimated to be \$1,859,035 each year. The cumulative total fee increase over the first five years the proposed rules would be in effect is estimated to be \$7,436,140. This estimate comes out to approximately \$21,871 in incremental permit application fees for each application. Costs for each facility to implement and conduct the EI each year are estimated to be \$3,000. Total cumulative EI costs for an estimated 85 facilities over the first five years the proposed rules would be in effect would be \$2,550,000. The EI costs increase year-by-year because it is an ongoing requirement and the number of sources subject to the EI requirement is increasing.

There is substantial uncertainty as to the actual number of permits that would be needed for these sites, and the fee varies widely with project specifics, so this estimate is highly speculative. Permitting costs are not expected to continue at the 85 site per year level after the first five years the proposed rules are in effect.

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

Adverse fiscal implications are anticipated for small or micro-businesses for the first five-year period the proposed rules are in effect. Any business or industry with new or modified stationary sources with emissions of GHGs in quantities that meet or exceed certain threshold levels must obtain a PSD permit, pay a permit fee and comply with EI requirements. Under current federal regulations these sources are already required to get the PSD permit from EPA. It is also not known if permitting costs would be more or less through EPA or the TCEQ. The GHG thresholds set by EPA trigger PSD applicability at some small facilities which previously were not subject to the requirement to get a PSD permit. There is not enough data on emissions of GHGs from small businesses to predict how many will be affected with a high degree of accuracy. Staff estimates that approximately 40 small business sites would be affected by the PSD requirements, but the number could be substantially higher. These sites are likely to be in the oil and gas industry, petrochemical industry, electric utilities, and general manufacturing, but may also be in other types of industries. The one-time incremental cost for the PSD permit is estimated to be approximately \$21,871 for each small or micro-business permit

application. Total permitting costs for an estimated 10 small business sites for each year of the five-year period would be \$218,710/year, or \$874,840 in total for the five-year period. This assumes very few applications in the first year, with the remaining applications coming in over the last four years. Total cumulative EI costs for an estimated 40 small businesses over the first five years the proposed rules are in effect would be \$300,000. The EI costs increase year-by-year because it is an ongoing requirement and the number of sources subject to the EI requirement is increasing.

### **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 by state and federal law and therefore are consistent with the health, safety, or environmental and economic welfare of the state.

### **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 116 is to add six GHGs to the pollutants regulated under the commission's PSD permitting program and to establish the emissions thresholds for applicability of the program consistent with federal requirements in the final PSD and Title V GHG Tailoring Rule in the June 3, 2010, issue of the *Federal Register* (75 FR 31514).

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, §2001.0225(a). Texas Government, §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 rulemaking will implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of emissions of GHGs in Texas and to do so consistent with federal law. Specifically, amendments to Chapter 116 will add the following terms to nonattainment and PSD definitions: GHGs, and CO<sub>2</sub>e emissions. The rulemaking will also amend definitions and the PSD rules in Subchapter B to subject GHGs to PSD permitting requirements at specific Tailoring Rule thresholds.

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 will implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of emissions GHGs in Texas and to do so

consistent with federal law. Specifically, amendments to Chapter 116 will add the following terms to nonattainment and PSD definitions: GHGs, and CO<sub>2</sub>e emissions. The rulemaking will also amend definitions and the PSD rules in Subchapter B to subject GHGs to PSD permitting requirements at specific Tailoring Rule thresholds.

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 and the TWC), 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 the Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking, 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 emissions of GHGs in Texas and to do so consistent with federal law. Specifically, proposed amendments to Chapter 116 would add the following terms to nonattainment and PSD definitions: GHGs, and CO<sub>2e</sub> emissions. The rulemaking will also amend definitions and the PSD rules in Subchapter B to subject GHGs to PSD permitting requirements at specific Tailoring Rule thresholds.

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 GHG emissions. The CMP policy applicable to this rulemaking 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)). 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**

Prevention of Significant Deterioration is an applicable requirement under Chapter 122, Federal Operating Permits. This rulemaking affects the issuance or amendment of a PSD permit for major GHG sources, and therefore would result in new or revised federal operating permits for those sources.

### **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](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: 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; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is 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; 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, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of GHGs. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, 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 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 standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements House Bill 788, 83rd Legislature, 2013, THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.0513, 382.05102, 382.0515, 382.0517, 382.0518, and 383.05195; and Texas Government Code, §2001.004 and

§2001.006; 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 chapter [title] (relating to Nonattainment Review Permits and Prevention of Significant Deterioration Review); and [Chapter 116,] Subchapter C, Division 1 of this chapter [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) Carbon dioxide equivalent (CO<sub>2</sub>e) emissions--shall represent

(A) an amount of greenhouse gases (GHGs) emitted, and shall be computed by multiplying the mass amount of emissions in tons per year (tpy) for the GHGs, as defined in §101.1 of this title (relating to Definitions), by the gas's associated global warming potential as published in 40 Code of Federal Regulations Part 98, Subpart A, Table A-1 – Global Warming Potentials, and summing the resultant values.

(B) for purposes of this paragraph, prior to July 21, 2014, the mass of the GHG carbon dioxide (CO<sub>2</sub>) shall not include CO<sub>2</sub> emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

(8) [(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.

(9) [(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.

(10) [(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.

(11) [(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.

(12) [(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.

(13) [(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.

(14) [(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.

(15) [(14)] Federally regulated new source review pollutant--As defined in subparagraphs (A) - (E) [(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; or [.]

(E) greenhouse gases that meet or exceed the thresholds established in §116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).

(16) Greenhouse gases (GHGs)--as defined in §101.1 of this title (relating to Definitions).

(17) [(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.

(18) [(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.

(19) [(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). For greenhouse gases, the major source thresholds are specified in §116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources). 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).

(20) [(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 and in §116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).

Figure: 30 TAC §116.12(20)(A)

[Figure: 30 TAC §116.12(18)(A)]

**TABLE I**

**MAJOR SOURCE/MAJOR MODIFICATION  
 EMISSION THRESHOLDS**

POLLUTANT designation <sup>1</sup>	MAJOR SOURCE tons/year	SIGNIFICANT LEVEL <sup>2</sup> tons/year	OFFSET RATIO minimum
OZONE (VOC, NO <sub>x</sub> ) <sup>3</sup>	100	40	1.10 to 1
I marginal	100	40	1.15 to 1
II moderate	50	25	1.20 to 1
III serious	25	25	1.30 to 1
IV severe			
CO			
I moderate	100	100	1.00 to 1 <sup>4</sup>
II serious	50	50	1.00 to 1 <sup>4</sup>
SO <sub>2</sub>	100	40	1.00 to 1 <sup>4</sup>
PM <sub>10</sub>			
I moderate	100	15	1.00 to 1 <sup>4</sup>
II serious	70	15	1.00 to 1 <sup>4</sup>
NO <sub>x</sub> <sup>5</sup>	100	40	1.00 to 1 <sup>4</sup>
Lead	100	0.6	1.00 to 1 <sup>4</sup>

<sup>1</sup> Texas nonattainment area designations as defined in §101.1[(70)] of this title (relating to Definitions).

<sup>2</sup> The significant level 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<sub>x</sub> and VOC are specified in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) and for other pollutants are equal to the significant level listed in this table.

<sup>3</sup> VOC and NO<sub>x</sub> 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.

<sup>4</sup> The offset ratio is specified to be greater than 1.00 to 1.  
 VOC = volatile organic compounds  
 NO<sub>x</sub> = oxides of nitrogen  
 NO<sub>2</sub> = nitrogen dioxide  
 CO = carbon monoxide

SO<sub>2</sub> = sulfur dioxide

PM<sub>10</sub> = particulate matter with an aerodynamic diameter less than or equal to ten microns

<sup>5</sup> Applies to the National Ambient Air Quality Standard [NAAQS] for [nitrogen dioxide (NO<sub>2</sub>)].

(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.

(21) [(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.

(22) [(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.

(23) [(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.

(24) [(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).

(25) [(23)] Plant-wide applicability limit effective date--The date of issuance of the plant-wide applicability limit permit.

(26) [(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.

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

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

(29) [(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.

(30) [(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.

(31) [(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 (relating to General Air Quality Rules), 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.

(32) [(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.

(33) [(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.

(34) [(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.

(35) [(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.

(36) [(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.

(37) [(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.*

(38) [(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 1: PERMIT APPLICATION**

#### **§116.111**

##### **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; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is 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; 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, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of greenhouse gases. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, 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 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 standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements House Bill 788, 83rd Legislature, 2013, THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.0513, 382.05102, 382.0515,

382.0517, 382.0518, and 383.05195; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq.*

**§116.111. General Application.**

(a) In order to be granted a permit, amendment, or special permit amendment, the application must include:

(1) a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following.

(A) Protection of public health and welfare.

(i) The emissions from the proposed facility will comply with all rules and regulations of the commission and with the intent of the Texas Clean Air Act (TCAA), including protection of the health and property of the public.

(ii) For issuance of a permit for construction or modification of any facility within 3,000 feet of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility may have on the individuals attending the school(s).

(B) Measurement of emissions. The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Commission on Environmental Quality Sampling Procedures Manual."

(C) Best available control technology (BACT) must be evaluated for and applied to all facilities subject to the TCAA. Prior to evaluation of BACT under the TCAA, all facilities with pollutants subject to regulation under Title I Part C of the Federal Clean Air Act (FCAA) shall evaluate and apply BACT as defined in §116.160(c)(1)(A) of this title (relating to Prevention of Significant Deterioration Requirements).

(D) New Source Performance Standards (NSPS). The emissions from the proposed facility will meet the requirements of any applicable NSPS as listed

under 40 Code of Federal Regulations (CFR) Part 60, promulgated by the United States Environmental Protection Agency (EPA) under FCAA, §111, as amended.

(E) National Emission Standards for Hazardous Air Pollutants (NESHAP). The emissions from the proposed facility will meet the requirements of any applicable NESHAP, as listed under 40 CFR Part 61, promulgated by EPA under FCAA, §112, as amended.

(F) NESHAP for source categories. The emissions from the proposed facility will meet the requirements of any applicable maximum achievable control technology standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA §112, 40 CFR Part 63)).

(G) Performance demonstration. The proposed facility will achieve the performance specified in the permit application. The applicant may be required to submit additional engineering data after a permit has been issued in order to demonstrate further that the proposed facility will achieve the performance specified in the permit application. In addition, dispersion modeling, monitoring, or stack testing may be required.

(H) Nonattainment review. If the proposed facility is located in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review.

(I) Prevention of Significant Deterioration (PSD) review.

(i) If the proposed facility is located in an attainment area, it shall comply with all applicable requirements in this chapter concerning PSD review.

(ii) If the proposed facility or modification meets or exceeds the applicable greenhouse gases thresholds defined in §116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources) then it shall comply with all applicable requirements in this chapter concerning PSD review for sources of greenhouse gases.

(J) Air dispersion modeling. Computerized air dispersion modeling may be required by the executive director to determine air quality impacts from a proposed new facility or source modification. In determining whether to issue, or in conducting a review of, a permit application for a shipbuilding or ship repair operation, the commission will not require and may not consider air dispersion modeling results

predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission shall determine compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

(K) Hazardous air pollutants. Affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) for hazardous air pollutants shall comply with all applicable requirements under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(L) Mass cap and trade allowances. If subject to Chapter 101, Subchapter H, Division 3, of this title (relating to Mass Emissions Cap and Trade Program), the proposed facility, group of facilities, or account must obtain allowances to operate.

(b) In order to be granted a permit, amendment, or special permit amendment, the owner or operator must comply with the following notice requirements.

(1) Applications declared administratively complete before September 1, 1999, are subject to the requirements of [Chapter 116, Subchapter B,] Division 3 of this subchapter (relating to Public Notification and Comment Procedures).

(2) Applications declared administratively complete on or after September 1, 1999, are subject to the requirements of Chapter 39 of this title (relating to Public Notice) and Chapter 55 of this title (relating to Request for Reconsideration and Contested Case Hearings; Public Comment). Upon request by the owner or operator of a facility which previously has received a permit or special permit from the commission, the executive director or designated representative may exempt the relocation of such facility from the provisions in Chapter 39 of this title if there is no indication that the operation of the facility at the proposed new location will significantly affect ambient air quality and no indication that operation of the facility at the proposed new location will cause a condition of air pollution.

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**

**DIVISION 6: PREVENTION OF SIGNIFICANT DETERIORATION REVIEW**

**§§116.160, 116.164, 116.169**

**Statutory Authority**

The amendments and new sections 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 and new sections 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, §382.003, concerning Definitions, which defines certain terms used in the Chapter 382; 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, §382.05101 concerning De Minimis Air Contaminants, which authorizes the commission to develop by rule criteria to establish a de minimis level of air contaminants below which a permit, standard permit or permit by rule is not required; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of greenhouse gases.

Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, 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 amendments and new sections 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 new and amended sections implement House Bill 788, 83rd Legislature, 2013, THSC, §§382.002, 382.003, 382.011, 382.012, 382.017, 382.051, 382.05101, 382.0513, 382.05102, 382.0515, 382.0517, 382.0518, and 383.05195; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq.*

**§116.160. Prevention of Significant Deterioration Requirements.**

(a) Each proposed new major source or major modification in an attainment or unclassifiable area shall comply with the requirements of this section. In addition, each proposed new major source of greenhouse gases (GHGs) or major modification involving GHGs shall comply with the applicable requirements of this section. The owner or operator of a proposed new or modified facility that will be a new major stationary source for the prevention of significant deterioration air contaminant shall meet the additional requirements of subsection (c)(1) - (4) of this section.

(b) *De minimis* [The deminimis] threshold test (netting):

(1) 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 major modification thresholds for the pollutant identified in 40 Code of Federal Regulations (CFR) §52.21(b)(23); and [.]

(2) is required for GHGs at existing major sources if the proposed modification results in an emissions increase, without regard to decreases, as required in §116.164(a)(2) and (4)(B) of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).

(c) In applying the *de minimis* threshold test (netting), if the net emissions increases are greater than the major modification levels for the pollutant identified in 40 CFR §52.21(b)(23) and for GHGs in §116.164 of this title, the following requirements apply.

(1) In addition to those definitions in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) the following definitions from prevention of significant deterioration of air quality regulations promulgated by the United States Environmental Protection Agency (EPA)

in 40 CFR §52.21 and the definitions for protection of visibility and promulgated in 40 CFR §51.301 as amended July 1, 1999, are incorporated by reference:

(A) 40 CFR §52.21(b)(12) - (15), concerning best available control technology, baseline concentrations, dates, and areas;

(B) 40 CFR §52.21(b)(19), concerning innovative control technology; and

(C) 40 CFR §52.21(b)(24) - (28), concerning federal land manager, terrain, and Indian reservations/governing bodies.

(2) The following requirements from prevention of significant deterioration of air quality regulations promulgated by the EPA in 40 CFR §52.21 are hereby incorporated by reference:

(A) 40 CFR §52.21(c) - (k), concerning increments, ambient air ceilings, restrictions on area classifications, exclusions from increment consumption, redesignation, stack heights, exemptions, control technology review, and source impact analysis;

(B) 40 CFR §52.21(m) - (p), concerning air quality analysis, source information, additional impact analysis, and sources impacting federal Class I areas;

(C) 40 CFR §52.21(r)(4), concerning relaxation of an enforceable limitation; and

(D) 40 CFR §52.21(v), concerning innovative technology.

(3) The term "facility" shall replace the words "emissions unit" in the referenced sections of the CFR.

(4) The term "executive director" shall replace the word "administrator" in the referenced sections of the CFR except in 40 CFR §52.21(g) and (v).

(d) All estimates of ambient concentrations required under this subsection shall be based on the applicable air quality models and modeling procedures specified in the EPA Guideline on Air Quality Models, as amended, or models and modeling procedures currently approved by the EPA for use in the state program, and other specific provisions made in the prevention of significant deterioration state implementation plan. If the air quality impact model approved by the EPA or specified in the guideline is inappropriate, the model may be modified or another model substituted on a case-by-case basis, or a

generic basis for the state program, where appropriate. Such a change shall be subject to notice and opportunity for public hearing and written approval of the administrator of the EPA.

**§116.164. Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources.**

(a) Greenhouse Gases (GHGs) are subject to Prevention of Significant Deterioration review under the following conditions:

(1) New source, major for non-GHGs. The stationary source is a new major stationary source for a federally regulated new source review (NSR) pollutant that is not GHGs, and will emit or have the potential to emit 75,000 tons per year (tpy) or more carbon dioxide equivalent (CO<sub>2</sub>e); or

(2) Existing source, major for non-GHGs. The stationary source is an existing major stationary source for a federally regulated NSR pollutant that is not GHGs, and will have a significant net emissions increase of a federally regulated NSR pollutant that is not GHGs, and a net emissions increase greater than zero tpy GHGs on a mass basis and 75,000 tpy or more CO<sub>2</sub>e.

(3) New source, major for GHGs Only. The new stationary source that will emit or has the potential to emit greater than or equal to 100 tpy GHGs on a mass basis, if the source is listed on the named source category list in 40 Code of Federal Regulations (CFR ) §51.166(b)(1)(i), or greater than or equal to 250 tpy GHGs on a mass basis; and 100,000 tpy or more CO<sub>2</sub>e.

(4) GHGs major modification at an existing major source.

(A) The existing stationary source emits or has the potential to emit greater than or equal to 100 tpy GHGs on a mass basis, if the source is listed on the named source category list in 40 CFR §51.166(b)(1)(i), or greater than or equal to 250 tpy GHGs on a mass basis; and 100,000 tpy or more CO<sub>2</sub>e; and

(B) the stationary source undertakes a physical change or change in the method of operation that will result in a net emissions increase greater than zero tpy GHGs on a mass basis, and a net emissions increase of 75,000 tpy or more CO<sub>2</sub>e.

(5) Existing source that is not major. The existing stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase greater than or equal to 100 tpy GHGs on a mass basis, if the source is

listed on the named source category list in 40 CFR §51.166(b)(1)(i), or greater than or equal to 250 tpy GHGs on a mass basis; and 100,000 tpy or more CO<sub>2</sub>e.

(b) New stationary sources with emissions of GHGs, or existing stationary sources that undertake a physical change or change in the method of operations that includes emissions of GHGs, that do not meet any of the conditions in subsection (a) of this section do not require authorization under this subchapter, Subchapter F of this chapter (relating to Standard Permits), Subchapter G of this chapter (relating to Flexible Permits), and Chapter 106 of this title (relating to Permits by Rule) for emissions of GHGs. Owners or operators of these sources must keep records sufficient to demonstrate the amount of emissions from the source. Records must be made available at the request of personnel from the commission or any local air pollution control agency having jurisdiction.

**§116.169. Greenhouse Gases (GHGs) Application Transition.**

Upon the effective date of the United States Environmental Protection Agency (EPA) approval of this chapter and rescission of the Federal Implementation Plan as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178), the commission will accept transfer of and review applications previously filed with EPA for

greenhouse gas prevention of significant deterioration permits. These applications will be subject to the applicable requirements of this chapter.

## **SUBCHAPTER F: STANDARD PERMITS**

### **§116.610**

#### **Statutory Authority**

The amendment is and new sections 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 amendment is 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; 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, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; THSC, §382.05102, which relates to the permitting authority of the commission for emissions of GHGs; and THSC, §382.05195 concerning Standard Permits, which authorizes the commission to issue standard permits for new or existing similar facilities. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, 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 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 standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements House Bill 788, 82rd Legislature, 2013, THSC,

§§382.002, 382.011, 382.012, 382.017, 382.051, 382.0513, 382.05102, 382.0515, 382.0517, 382.0518 and 383.05195; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq.*

**§116.610. Applicability.**

(a) Under the Texas Clean Air Act, §382.051, a project that meets the requirements for a standard permit listed in this subchapter or issued by the commission is hereby entitled to the standard permit, provided the following conditions listed in this section are met. For the purposes of this subchapter, project means the construction or modification of a facility or a group of facilities submitted under the same registration.

(1) Any project that results in a net increase in emissions of air contaminants from the project other than [carbon dioxide,] water, nitrogen, [methane,] ethane, hydrogen, oxygen, or greenhouse gases (GHGs) as defined in §101.1 of this title (relating to Definitions), or those for which a national ambient air quality standard has been established must meet the emission limitations of §106.261 of this title (relating to Facilities (Emission Limitations)), unless otherwise specified by a particular standard permit.

(2) Construction or operation of the project must be commenced prior to the effective date of a revision to this subchapter under which the project would no longer meet the requirements for a standard permit.

(3) The proposed project must comply with the applicable provisions of the Federal Clean Air Act (FCAA), §111 (concerning New Source Performance Standards) as listed under 40 Code of Federal Regulations (CFR) Part 60, promulgated by the United States Environmental Protection Agency (EPA).

(4) The proposed project must comply with the applicable provisions of FCAA, §112 (concerning Hazardous Air Pollutants) as listed under 40 CFR Part 61, promulgated by the EPA.

(5) The proposed project must comply with the applicable maximum achievable control technology standards as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA, §112, 40 CFR Part 63)).

(6) If subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) the proposed facility, group of facilities, or account must obtain allocations to operate.

(b) Any project that constitutes a new major stationary source or major modification as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) because of emissions of air contaminants other than greenhouse gases is subject to the requirements of §116.110 of this title (relating to Applicability) rather than this subchapter. A new major stationary source or major modification which is subject to Chapter 116, Subchapter B, Division 6 of this chapter (relating to Prevention of Significant Deterioration Review) due solely to emissions of greenhouse gases may use a standard permit under this chapter for air contaminants that are not greenhouse gases.

(c) Persons may not circumvent by artificial limitations the requirements of §116.110 of this title.

(d) Any project involving a proposed affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) shall comply with all applicable requirements under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40

CFR Part 63)). Affected sources subject to Subchapter E of this chapter may use a standard permit under this subchapter only if the terms and conditions of the specific standard permit meet the requirements of Subchapter E of this chapter.

**§116.611. Registration to Use a Standard Permit.**

(a) If required, registration to use a standard permit shall be sent by certified mail, return receipt requested, or hand delivered to the executive director, the appropriate commission regional office, and any local air pollution program with jurisdiction, before a standard permit can be used. The registration must be submitted on the required form and must document compliance with the requirements of this section, including, but not limited to:

(1) the basis of emission estimates;

(2) quantification of all emission increases and decreases associated with the project being registered;

(3) sufficient information as may be necessary to demonstrate that the project will comply with §116.610(b) of this title (relating to Applicability);

(4) information that describes efforts to be taken to minimize any collateral emissions increases that will result from the project;

(5) a description of the project and related process; and

(6) a description of any equipment being installed.

(b) Construction may begin any time after receipt of written notification from the executive director that there are no objections or 45 days after receipt by the executive director of the registration, whichever occurs first, except where a different time period is specified for a particular standard permit or the source obtains a prevention of significant deterioration permit for greenhouse gases as provided in §116.164(a) of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).

(c) In order to avoid applicability of Chapter 122 of this title (relating to Federal Operating Permits), a certified registration shall be submitted. The certified registration must state the maximum allowable emission rates and must include documentation of the basis of emission estimates and a written statement by the registrant certifying that the maximum emission rates listed on the registration reflect the reasonably anticipated maximums for operation of the facility. The certified registration shall be amended if the basis of the emission estimates changes or the maximum emission rates listed on the

registration no longer reflect the reasonably anticipated maximums for operation of the facility. The certified registration shall be submitted to the executive director; to the appropriate commission regional office; and to all local air pollution control agencies having jurisdiction over the site. Certified registrations must also be maintained in accordance with the requirements of §116.115 of this title (relating to General and Special Conditions).

(1) Certified registrations established prior to December 11, 2002, [the effective date of this rule] shall be submitted on or before February 3, 2003.

(2) Certified registrations established on or after December 11, 2002, [the effective date of this rule] shall be submitted no later than the date of operation.

(3) Certified registrations established for greenhouse gases (as defined in §101.1 of this title (relating to Definitions) on or after the effective date of EPA's final action approving amendments to §122.122 of this title (relating to Potential to Emit) into the State Implementation Plan:

(A) for existing sites that emit or have the potential to emit greenhouse gases, no later than 90 days after the effective date of EPA's final action on §122.122 of this title; or

(B) for new sites that emit or have the potential to emit greenhouse gases, no later than the date of operation.