The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes amendments to §§122.10, 122.122 and 122.130.

If adopted, the commission will submit §122.122 to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

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

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

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

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

the statutory term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

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

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

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

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

submit revisions to its SIP by December 1, 2011.

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

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

all non-GHG pollutants).

Although Texas has an EPA-approved Title V operating permit program, it currently lacks the approval to permit sources that are major sources subject to Title V as a result of their emissions of GHG. In EPA's "Action to Ensure Authority to Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule," as published in the December, 30, 2010, issue of the *Federal Register* (75 FR 82254), EPA stated in footnote 8 that in this situation, there is no obligation for these major GHG sources to apply for a Title V permit until such time as the state amends its rules to make the permit program applicable to them.

House Bill (HB) 788, 83rd Legislature, 2013, added new Texas Health and Safety Code (THSC), §382.05102. The new section grants TCEQ authority to authorize emissions of GHGs consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code, Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to

EPA, if (at a future date) emissions of GHGs are no longer required to be authorized under federal law. The amendments to §§122.10, 122.122 and 122.130 will be submitted to EPA for approval as revisions to Texas' Federal Operating Permits Program.

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

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

Concurrently with this proposal, the commission is proposing new and amended rules to 30 TAC Chapters 39 (Public Notice), 55 (Requests for Reconsideration and Contested Case Hearings; Public Comment), 101 (General Air Quality Rules), 106 (Permits by Rule), and 116 (Control of Air Pollution by Permits for New Construction or

Modification) 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

*§122.10, Definitions*

The commission proposes to amend §122.10 by modifying the definition of air pollutant to include the pollutant GHGs, amend the definition of applicable requirement, add the definition of carbon dioxide equivalent ($CO_2e$) emissions, and amend the definition of major source. The commission also proposes non-substantive amendments to correct errors and appropriately renumber paragraphs.

The commission proposes to amend the definition of "Air pollutant" in §122.10(1) to include the pollutant GHGs. The proposed definition of GHGs establishes that the regulated pollutant GHGs is the aggregate group of six GHGs including: $CO_2$, nitrous oxide ($N_2O$), methane ($CH_4$), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride ($SF_6$). This proposed definition is consistent with EPA's definition in 40 Code of Federal Regulations (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 definition of "Applicable requirement" in §122.10(2)(I)(xi) is proposed to be amended to add EPA-issued PSD permits to the list of federal requirements applicable to a site. Federal operating permits must include all state and federal air quality related requirements applicable to the particular site covered by the permit. This addition is necessary to incorporate EPA-issued GHG permits in operating permits as applicable requirements, as these are not currently included in the definition.

The proposed definition of $CO_2e$ emissions in §122.10(3) is consistent with EPA's definition in 40 CFR §51.166(b)(48). The new definition is necessary to establish the threshold for sites to be considered major for GHGs, consistent with EPA's Tailoring Rule. The $CO_2e$ 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 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 site has the potential to emit 5 tpy $CO_2$, 25 tpy of $CH_4$, and 10 tpy of the hydrofluorcarbon trifluoromethane ($CHF_3$). The GWP of $CO_2e$ is 1, the GWP of $CH_4$ is 21, and the GWP of $CHF_3$ is 11,700. The $CO_2e$ emissions of the source would be 117,530 tpy $CO_2e$. This value is reached by multiplying 5 tpy $CO_2$ times 1, 25 tpy $CH_4$ by 21, and 10 tpy CHF3 by 11,700; then adding each result to total 117,530

tpy $CO_2e$.

The proposed definition of $CO_2e$ emissions includes EPA's deferral for $CO_2$ 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 $CO_2$ emissions are not required to be counted for applicability purposes under the PSD program and the Title V program until July 21, 2014. EPA committed to conduct a detailed examination of the science associated with biogenic $CO_2$ emissions from stationary sources during the deferral period. In the meantime, certain $CO_2$ emissions from the combustion or decomposition of non-fossilized and biodegradable organic material are not required to be included in the total mass of $CO_2$ used to determine $CO_2e$ emissions. For example, $CO_2$ 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 $CO_2e$ emissions. Also exempted is $CO_2$ 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 commission proposes to amend the definition of major source in §122.10(14) to establish the specific Title V permitting major source thresholds for emissions of GHGs. The major source thresholds for Title V sources are contained in proposed subparagraph (H) and referenced in subparagraph (C). Consistent with EPA's Tailoring Rule, sites that emit or have the potential to emit GHGs must evaluate both their emissions of GHGs on a mass basis and as $CO_2e$ emissions to determine Title V applicability. To evaluate the mass basis element of applicability, the potential emissions (in tpy) of each of the six GHGs would be added together. If the total meets or exceeds 100 tpy, the $CO_2e$ emissions total must also be calculated to determine Title V applicability. The potential emissions of each of the six GHGs would be multiplied by its respective GWP, and the results would be added together. If the total is greater than or equal to 100,000 tpy $CO_2e$, the site would be subject to the Title V permitting program. If either one of the thresholds is not met or exceeded, the site is not subject to the Title V permitting program. For example, a site emits or has the potential to emit 10,000 tpy $CO_2$ and 3,500 tpy $CH_4$. The total emissions of GHGs on a mass basis exceed 100 tpy GHGs, so the $CO_2e$ emissions must be calculated. The GWP of $CO_2$ is one and the GWP of $CH_4$ is 21. Multiply 10,000 tpy $CO_2$ by the GWP of 1, multiply 3,500 tpy $CH_4$ by the GWP of 21, and add the two results to get 83,500 tpy $CO_2e$. This site would not be subject to the Title V permitting program, because both thresholds were not exceeded.

In another example, a site emits or has the potential to emit 20,000 tpy $CO_2$ and 4,500 tpy $CH_4$. This site would be a major source and subject to the Title V permitting program because the 24,500 tpy GHGs on a mass basis is equal to or greater than 100 tpy GHGs, and the 114,500 $CO_2e$ emissions are greater than 100,000 tpy $CO_2e$. To get this result, multiply 20,000 tpy $CO_2$ by the GWP of 1, multiply 4,500 tpy $CH_4$ by the GWP of 21, and add the two results to get 114,500 tpy $CO_2e$.

The commission proposes to amend §122.10(2)(F)(iii) and (J)(vii) to correct the title of referenced sections.

*§122.122, Potential to Emit*

The commission proposes to amend §122.122(e) to clarify that existing sites may certify emissions below major source thresholds. Since the pollutant GHGs is being added to the Title V (and PSD) permitting program, sites with sources of GHGs which are currently operating may have the potential to emit over the major source thresholds, but actual emissions may be below the thresholds. These sites will have 90 days after EPA's final action approving amendments to §122.122 into the SIP to certify emissions of GHGs in order to avoid applicability of Title V permitting. Sites with 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.

Subsection (e)(1) and (2) was updated to reflect the current requirements and reference the specific date those provisions were effective.

*§122.130, Initial Application Due Dates*

The commission proposed subsection (b)(3) to establish the deadline for sources that are subject to Title V permitting to submit an application. If a source becomes subject to the Title V program for the first time because of emissions of GHGs, owners or operators will have to submit an abbreviated application no later than 12 months after either EPA's final action approving the amendments to Chapter 122, or EPA's final action approving amended §122.122 in to the SIP, whichever action occurs later in time.

The commission proposes nonsubstantive amendments to §122.130(c) to expand the acronym for Code of Federal Regulations.

**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. Sites owned or operated by units of state or local government with major air emissions

of GHGs may become subject to Title V federal operating permit requirements and subject to paying emissions fees.

The proposed rules would implement provisions in HB 788, 83rd Legislature, 2013, to establish the TCEQ as the permitting authority for major sources of emissions of GHGs in Texas, consistent with federal law. The proposed changes to Chapter 122 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 116. Fiscal notes for proposed revisions to those chapters will be provided separately.

HB 788 requires that TCEQ adopt rules to allow for permitting of emissions of GHGs, under the PSD and Federal Operating Permits (Title V) programs.

The proposed changes to Chapter 122 rules will require sites with major emissions of GHGs to become subject to Title V federal operating permit requirements. The proposed changes revise the definition of "Air pollutant" under §122.10(1)(G) so that GHGs will now be covered as a pollutant subject to federal operating permit requirements. The proposed changes also revise the §122.10(14) definition of "Major source" to set a 100,000 tpy $CO_2e$ threshold for sites which will be required to obtain a Title V permit. (Sites must also exceed 100 tpy of GHG on a mass basis to become a

major source.) A definition of "Carbon dioxide equivalent ($CO_2e$) emissions" is also added to §122.10(3) to specify how that value is calculated.

It is anticipated that as a result of these proposed rules, TCEQ will have to review Title V permit applications for the large number (estimated to be approximately 1,800 over the first five years the proposed rules are in effect) of additional sites that will now be subject to Title V federal operating permits due to emissions of GHGs. Additional resources also will be required to support enforcement and compliance with these permits.

The agency is required by federal law to assess and collect fees sufficient enough to support the Title V permitting program. It is anticipated that increased emissions fee revenue will be sufficient to cover the costs of implementing the Title V operating permit program. Although there is not a direct fee assessed on emissions of GHGs, the rule changes will cause a substantial number of additional sites to become subject to the §101.27 emissions fee rule, which will require them to pay fees on their emission of non-GHGs pollutants. Estimated revenue to Account 5094 Operating Permit Fees is estimated to be $76,460 in Fiscal Year 2014, $886,722 in Fiscal Year 2015, and increase up to $3,049,989 in Fiscal Year 2018.

The Legislature appropriated TCEQ $58,680 in Fiscal Year 2014 and $726,682 in Fiscal

Year 2015 out of Operating Permit Fees Account 5094 to implement HB 788. The agency was also granted authority for one additional full time equivalent (FTE) position in Fiscal Year 2014 and ten FTEs in Fiscal Year 2015. Starting in Fiscal Year 2016, it is anticipated that the TCEQ would need to add nine additional FTEs to perform compliance investigations for GHG Title V permits, process and issue GHG Title V permits, perform emissions inventories, load emissions data, enhance reporting tools, assess emission fees, provide reporting assistance, review inventories, and audit fee data. Starting in Fiscal Year 2017, the TCEQ would need to add an estimated ten additional FTEs to perform compliance investigations for GHG Title V permits, supervise the additional regional investigators, perform emission inventory activities, and process enforcement cases. Starting in Fiscal Year 2018, the TCEQ would need to add an estimated ten additional FTEs to perform compliance investigations for GHG Title V permits, supervise the additional regional investigators, perform emissions inventory activities, and process enforcement cases. The agency will need a total of 39 FTEs as of Fiscal Year 2018 to implement HB 788.

State agencies which operate a stationary source of emissions of GHGs of sufficient size may require a Title V permit, and thus may become subject to emission fees. Agencies may have boilers, incinerators, or other equipment that could be subject to Title V requirements because of emissions of GHGs. Agency staff does not have enough information to know how many state agencies could be affected. Some units of local

government operate stationary sources of GHGs of sufficient size to be affected and would include sites of an industrial or commercial nature, such as power generating stations and landfills. Sites with $CO_2e$ emissions meeting or exceeding 100,000 tpy (and 100 tpy GHGs on a mass basis) would be required to obtain a Title V permit, and would become subject to emission fees for their non-GHG emissions. Some of these sites will already have a Title V permit and already be subject to fees due to major emissions of other pollutants. Based on available information, staff estimate approximately 270 local government sites could be affected for the five-year period after the rules are implemented (270 sites would be 15% of the 1,800 total sites estimated to be affected).

Assuming 15% of the total new emissions fee revenue comes from units of local government, it is estimated that costs to units of government who own or operate affected sites would be $11,469 in Fiscal Year 2014, $470,516 in Fiscal Year 2015, $571,201 in Fiscal Year 2016, $684,549 in Fiscal Year 2017, and $794,998 in Fiscal Year 2018. A typical Title V application for these additional GHGs Title V sites is estimated to cost the applicant $5,000 to develop and produce the application. Assuming that GHGs Title V permitting begins in Fiscal Year 2015, and one fourth of the projected 270 sites will be permitted each year, then total permit application costs for local governments each year are estimated to be $337,500. Total annual emissions fee costs and application costs beginning in Fiscal Year 2015 are estimated to be $808,016 in Fiscal Year 2015, $908,701 in Fiscal Year 2016, $1,022,049 in Fiscal Year 2017, and

$1,132,498 in Fiscal Year 2018.

**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 GHGs Title V permitting process, while maintaining compliance with state and federal law.

The proposed rules will have a fiscal impact on businesses that own or operate a site which has stationary sources which emit GHGs in quantities that meet or exceed 100,000 tpy CO2e. The proposed rules are not anticipated to have direct fiscal implications for individuals unless they own or operate affected facilities. In order to comply, affected businesses will be required to obtain a Title V federal operating permit and pay emission fees.

Staff estimates that approximately 1,530 (about 85% of the total estimated 1,800 affected sites) industrial sites will be affected by the proposed rule changes. These sites are likely to be in the oil and gas industry, petrochemical industry, electric utilities, and general manufacturing, but also may include other types of industries.

Assuming 85% of the total new emission fee revenue comes from business and industry, it is estimated that emission fee costs to businesses that own or operate affected sites would be $64,991 in Fiscal Year 2014, $753,756 in Fiscal Year 2015, $1,324,306 in Fiscal Year 2016, $1,966,611 in Fiscal Year 2017, and $2,592,490 in Fiscal Year 2018. A typical Title V application for these additional GHGs Title V sites is estimated to cost the applicant $5,000 to develop and produce the application. Assuming that GHGs Title V permitting begins in Fiscal Year 2015, and one fourth of the projected 1,530 sites will be permitted each year, then total permit application costs each year are estimated to be $1,912,500. Total annual emission fee costs and application costs beginning in Fiscal Year 2015 are estimated to be $2,666,256 in Fiscal Year 2015, $3,236,806 in Fiscal Year 2016, $3,879,111 in Fiscal Year 2017, and $4,504,990 in Fiscal Year 2018.

**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. The proposed rules will have a fiscal impact on small or micro-businesses that own or operate a site which has stationary sources which emit GHGs in quantities that meet or exceed 100,000 tpy CO2e. In order to comply, affected businesses will be required to obtain a Title V federal operating permit and pay emissions fees. 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 at least 150 (about 10% of the total 1,530 affected sites owned by

business) small business sites could be affected by the proposed requirements, at a minimum, 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.

If 10% of the total new emission fee revenue from business and industry comes from small or micro-businesses, it is estimated then that emission fee costs to businesses that own or operate affected sites would be $6,499 in Fiscal Year 2014, $75,375 in Fiscal Year 2015, $132,430 in Fiscal Year 2016, $196,661 in Fiscal Year 2017, and $259,249 in Fiscal Year 2018. A typical Title V application for these additional GHGs Title V sites is estimated to cost the applicant $5,000 to develop and produce the application. Assuming that GHGs Title V permitting begins in Fiscal Year 2015, and one fourth of the projected 150 sites will be permitted each year, then total permit application costs each year are estimated to be $187,500. Total annual emission fee costs and application costs beginning in Fiscal Year 2015 are estimated to be $262,875 in Fiscal Year 2015, $319,930 in Fiscal Year 2016, $384,161 in Fiscal Year 2017, and $446,749 in Fiscal Year 2018.

**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 122

is to implement relevant provisions of HB 788 to add six GHGs to the pollutants subject to the Operating Permits program and to establish the emissions thresholds for applicability of the program consistent with federal requirements in the final Prevention of Significant Deterioration and Title V Greenhouse Gas 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 Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include

programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. Title V of the FCAA (42 USC, §§7661 - 7661e) requires each state to adopt and implement an operating permits program consistent with EPA regulations. This rulemaking will implement provisions in HB 788 to establish the TCEQ as the Title V permitting authority for major sources of emissions of GHGs in Texas and will do so consistent with federal law governing this program. Specifically, the proposed amendments to Chapter 122 would add six GHGs to the pollutants subject to the Operating Permits program and establish the emissions thresholds for applicability of the program consistent with federal requirements in the Tailoring Rule, and to ensure that relevant sections of Chapter 122 can be a federally approved part of the Texas SIP.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 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. 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 do not exceed an express requirement in federal or state law. This rulemaking implements relevant provisions of THSC, §382.05102, as added by HB 788, 83rd Legislature, 2013. The proposed rules do not exceed a requirement of a delegation agreement or any contract between the state and a federal agency, because there is no agreement applicable to this rulemaking, and are not adopted solely under the general powers of the agency but are authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble. Therefore, this proposed rulemaking 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 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, the proposed amendments to Chapter 122 would add six GHGs to the pollutants subject to the Federal Operating Permits program and to establish the emissions thresholds for applicability of

the program consistent with federal requirements in the Tailoring Rule.

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 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 Title V program to major sources of emissions of GHGs. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 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**

This proposal impacts owners and operators of sites subject to the Texas Operating Permits Program (Title V) requiring applications for or revisions to operating permits. The proposal would also create new Title V sources subject to the program for only emissions of GHGs.

**Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on December 5, 2013, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

**Submittal of Comments**

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-040-116-AI. The comment period closes December 9, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at

*http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Tasha Burns, Operational Support, Air Permits Division at (512) 239-5868.

## SUBCHAPTER A: DEFINITIONS

## §122.10

### 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), §382.011, concerning General Powers and Duties, which authorizes the commission to administer the requirements of the Texas Clean Air Act (TCAA), THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; 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, §382.054, concerning Federal Operating

Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541, concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating 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), §§7661 - 7661e, which requires states to develop and submit permit programs to EPA that implement the requirements of the Title V program.

The proposed amendment implements House Bill 788, 83rd Legislature, 2013, TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.0513, 382.0515, 382.054, 382.0541, 382.0543, 382.05102, 382.0515, and 382.0518; Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7661 - 7661e.

**§122.10. General Definitions.**

The definitions in the Texas Clean Air Act, Chapter 101 of this title (relating to General Air Quality Rules), and Chapter 3 of this title (relating to Definitions) apply to this chapter. In addition, the following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Air pollutant--Any of the following regulated air pollutants:

(A) nitrogen oxides;

(B) volatile organic compounds;

(C) any pollutant for which a national ambient air quality standard has been promulgated;

(D) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111 (Standards of Performance for New Stationary Sources);

(E) unless otherwise specified by the United States Environmental Protection Agency (EPA) by rule, any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI (Stratospheric Ozone Protection); [or]

(F) any pollutant subject to a standard promulgated under FCAA, §112 (Hazardous Air Pollutants) or other requirements established under §112, including §112(g), (j), and (r), including any of the following:

(i) any pollutant subject to requirements under FCAA, §112(j). If the EPA fails to promulgate a standard by the date established under FCAA, §112(e), any pollutant for which a subject site would be major shall be considered to be regulated on the date 18 months after the applicable date established under FCAA, §112(e); and

(ii) any pollutant for which the requirements of FCAA, §112(g)(2) have been met, but only with respect to the individual site subject to FCAA, §112(g)(2) requirement<u>; or</u> [.]

<u>(G) Greenhouse gases (GHGs)--as defined in §101.1 of this title (relating to Definitions).</u>

(2) Applicable requirement--All of the following requirements, including requirements that have been promulgated or approved by the United States Environmental Protection Agency (EPA) through rulemaking at the time of issuance but have future-effective compliance dates:

(A) all of the requirements of Chapter 111 of this title (relating to Control of Air Pollution From Visible Emissions and Particulate Matter) as they apply to the emission units at a site;

(B) all of the requirements of Chapter 112 of this title (relating to Control of Air Pollution from Sulfur Compounds) as they apply to the emission units at a site;

(C) all of the requirements of Chapter 113 of this title (relating to Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants), as they apply to the emission units at a site;

(D) all of the requirements of Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) as they apply to the emission units at a site;

(E) all of the requirements of Chapter 117 of this title (relating to Control of Air Pollution From Nitrogen Compounds) as they apply to the emission units at a site;

(F) the following requirements of Chapter 101 of this title (relating to General Air Quality Rules):

(i) Chapter 101, Subchapter A of this title (relating to General Rules), §101.1 of this title (relating to Definitions), insofar as the terms defined in this section are used to define the terms used in other applicable requirements;

(ii) Chapter 101, Subchapter A, §101.3 and §101.10 of this title (relating to Circumvention; and Emissions Inventory Requirements);

(iii) Chapter 101, Subchapter A, §101.8 and §101.9 of this title (relating to Sampling; and Sampling Ports [Reports]) if the commission or the executive director has requested such action;

(iv) Chapter 101, Subchapter F of this title (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities),

§§101.201, 101.211, 101.221, 101.222, and 101.223 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements; Operational Requirements; Demonstrations; and Actions to Reduce Excessive Emissions); and

(v) Chapter 101, Subchapter H of this title (relating to Emissions Banking and Trading) as it applies to the emission units at a site;

(G) any site-specific requirement of the state implementation plan;

(H) all of the requirements under Chapter 106, Subchapter A of this title (relating to Permits by Rule), or Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and any term or condition of any preconstruction permit;

(I) all of the following federal requirements as they apply to the emission units at a site:

(i) any standard or other requirement under Federal Clean Air Act (FCAA), §111 (Standards of Performance for New Stationary Sources);

(ii) any standard or other requirement under FCAA, §112 (Hazardous Air Pollutants);

(iii) any standard or other requirement of the Acid Rain or Clean Air Interstate Rule Programs;

(iv) any requirements established under FCAA, §504(b) or §114(a)(3) (Monitoring and Analysis or Inspections, Monitoring, and Entry);

(v) any standard or other requirement governing solid waste incineration under FCAA, §129 (Solid Waste Combustion);

(vi) any standard or other requirement for consumer and commercial products under FCAA, §183(e) (Federal Ozone Measures);

(vii) any standard or other requirement under FCAA, §183(f) (Tank Vessel Standards);

(viii) any standard or other requirement under FCAA, §328 (Air Pollution from Outer Continental Shelf Activities);

(ix) any standard or other requirement under FCAA, Title VI (Stratospheric Ozone Protection), unless EPA has determined that the requirement need not be contained in a permit; [and]

(x) any increment or visibility requirement under FCAA, Title I, Part C or any national ambient air quality standard, but only as it would apply to temporary sources permitted under FCAA, §504(e) (Temporary Sources); and

(xi) any FCAA, Title I, Part C (relating to Prevention of Significant Deterioration) permit issued by EPA; and

(J) the following are not applicable requirements under this chapter, except as noted in subparagraph (I)(x) of this paragraph:

(i) any state or federal ambient air quality standard;

(ii) any net ground level concentration limit;

(iii) any ambient atmospheric concentration limit;

(iv) any requirement for mobile sources;

(v) any asbestos demolition or renovation requirement under 40 Code of Federal Regulations (CFR) Part 61, Subpart M (National Emissions Standards for Asbestos);

(vi) any requirement under 40 CFR Part 60, Subpart AAA (Standards of Performance for New Residential Wood Heaters); and

(vii) any state only requirement (including §111.131 of this title (relating to Definitions), §111.133 of this title (relating to Testing Requirements), §111.135 of this title (relating to Control Requirements for Surfaces with Coatings Containing Lead), §111.137 of this title (relating to Control Requirements for Surfaces with [Surface] Coatings Containing Less Than [containing less than] 1.0% Lead), and §111.139 of this title (relating to Exemptions).

(3) Carbon dioxide equivalent ($CO_2e$) 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 ($CO_2$) shall not include $CO_2$ 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).

(4) [(3)] Continuous compliance determination method--For purposes of Subchapter G of this chapter (relating to Periodic Monitoring and Compliance Assurance Monitoring), a method, specified by an applicable requirement, which satisfies the following criteria:

(A) the method is used to determine compliance with an emission limitation or standard on a continuous basis consistent with the averaging period established for the emission limitation or standard; and

(B) the method provides data either in units of the emission limitation or standard or correlated directly with the emission limitation or standard.

(5) [(4)] Control device--For the purposes of compliance assurance monitoring applicability, specified in §122.604 of this title (relating to Compliance Assurance Monitoring Applicability), the control device definition specified in 40 Code of Federal Regulations Part 64, concerning Compliance Assurance Monitoring, applies.

(6) [(5)] Deviation--Any indication of noncompliance with a term or condition of the permit as found using compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit and any other credible evidence or information.

(7) [(6)] Deviation limit--A designated value(s) or condition(s) which establishes the boundary for an indicator of performance. Operation outside of the boundary of the indicator of performance shall be considered a deviation.

(8) [(7)] Draft permit--The version of a permit available for the 30-day comment period under public announcement or public notice and affected state review. The draft permit may be the same document as the proposed permit.

(9) [(8)] Emission unit--A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a point of origin of air pollutants, including appurtenances.

(A) A point of origin of fugitive emissions from individual pieces of equipment, e.g., valves, flanges, pumps, and compressors, shall not be considered an individual emission unit. The fugitive emissions shall be collectively considered as an emission unit based on their relationship to the associated process.

(B) The term may also be used in this chapter to refer to a group of similar emission units.

(C) This term is not meant to alter or affect the definition of the term "unit" for purposes of the Acid Rain Program.

(10) [(9)] Federal Clean Air Act, §502(b)(10) changes--Changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

(11) [(10)] Final action--Issuance or denial of the permit by the executive director.

(12) [(11)] General operating permit--A permit issued under Subchapter F of this chapter (relating to General Operating Permits), under which multiple similar stationary sources may be authorized to operate.

(13) [(12)] Large pollutant-specific emission unit--An emission unit with the potential to emit, taking into account control devices, the applicable air pollutant in an amount equal to or greater than 100% of the amount, in tons per year, required for a source to be classified as a major source, as defined in this section.

(14) [(13)] Major source--

(A) For pollutants other than radionuclides, any site that emits or has the potential to emit, in the aggregate the following quantities:

(i) ten tons per year (tpy) or more of any single hazardous air pollutant listed under Federal Clean Air Act (FCAA), §112(b) (Hazardous Air Pollutants);

(ii) 25 tpy or more of any combination of hazardous air pollutant listed under FCAA, §112(b); or

(iii) any quantity less than those identified in clause (i) or (ii) of this subparagraph established by the United States Environmental Protection Agency (EPA) through rulemaking.

(B) For radionuclides regulated under FCAA, §112, the term "major source" has the meaning specified by the EPA by rule.

(C) Any site which directly emits or has the potential to emit, 100 tpy or more of any air pollutant <u>except for greenhouse gases (GHGs)</u>. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the following categories of stationary sources:

(i) coal cleaning plants (with thermal dryers);

(ii) kraft pulp mills;

(iii) portland cement plants;

(iv) primary zinc smelters;

(v) iron and steel mills;

(vi) primary aluminum ore reduction plants;

(vii) primary copper smelters;

(viii) municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) hydrofluoric, sulfuric, or nitric acid plants;

(x) petroleum refineries;

(xi) lime plants;

(xii) phosphate rock processing plants;

(xiii) coke oven batteries;

(xiv) sulfur recovery plants;

(xv) carbon black plants (furnace process);

(xvi) primary lead smelters;

(xvii) fuel conversion plant;

(xviii) sintering plants;

(xix) secondary metal production plants;

(xx) chemical process plants;

(xxi) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units (Btu) per hour heat input;

(xxii) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) taconite ore processing plants;

(xxiv) glass fiber processing plants;

(xxv) charcoal production plants;

(xxvi) fossil fuel-fired steam electric plants of more than 250 million Btu per hour heat input; or

(xxvii) any stationary source category regulated under FCAA, §111 (Standards of Performance for New Stationary Sources) or §112 for which the EPA has made an affirmative determination under FCAA, §302(j) (Definitions).

(D) Any site, except those exempted under FCAA, §182(f) ($NO_X$ Requirements), which, in whole or in part, is a major source under FCAA, Title I, Part D (Plan Requirements for Nonattainment Areas), including the following:

(i) any site with the potential to emit 100 tpy or more of volatile organic compounds (VOC) or nitrogen oxides ($NO_X$) in any ozone nonattainment area classified as "marginal or moderate";

(ii) any site with the potential to emit 50 tpy or more of VOC or $NO_X$ in any ozone nonattainment area classified as "serious";

(iii) any site with the potential to emit 25 tpy or more of VOC or $NO_X$ in any ozone nonattainment area classified as "severe";

(iv) any site with the potential to emit ten tpy or more of VOC or $NO_X$ in any ozone nonattainment area classified as "extreme";

(v) any site with the potential to emit 100 tpy or more of carbon monoxide (CO) in any CO nonattainment area classified as "moderate";

(vi) any site with the potential to emit 50 tpy or more of CO in any CO nonattainment area classified as "serious";

(vii) any site with the potential to emit 100 tpy or more of inhalable particulate matter (PM-10) in any PM-10 nonattainment area classified as "moderate";

(viii) any site with the potential to emit 70 tpy or more of PM-10 in any PM-10 nonattainment area classified as "serious"; and

(ix) any site with the potential to emit 100 tpy or more of lead in any lead nonattainment area.

(E) The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source under subparagraph (D) of this paragraph, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this paragraph.

(F) Any temporary source which is located at a site for less than six months shall not affect the determination of a major source for other stationary sources at a site under this chapter or require a revision to the existing permit at the site.

(G) Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not the units are in a contiguous area or under common control, to determine whether the units or stations are major sources under subparagraph (A) of this paragraph.

(H) For GHGs, any site that emits or has the potential to emit 100 tpy or more of GHGs on a mass basis and 100,000 tpy carbon dioxide equivalent ($CO_2e$)

emissions or more. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this paragraph.

(15) [(14)] Notice and comment hearing--Any hearing held under this chapter. Hearings held under this chapter are for the purpose of receiving oral and written comments regarding draft permits.

(16) [(15)] Permit or federal operating permit--

(A) any permit, or group of permits covering a site, that is issued, renewed, or revised under this chapter; or

(B) any general operating permit issued, renewed, or revised by the executive director under this chapter.

(17) [(16)] Permit anniversary--The date that occurs every 12 months after the initial permit issuance, the initial granting of the authorization to operate, or renewal.

(18) [(17)] Permit application--An application for an initial permit, permit revision, permit renewal, permit reopening, general operating permit, or any other similar application as may be required.

(19) [(18)] Permit holder--A person who has been issued a permit or granted the authority by the executive director to operate under a general operating permit.

(20) [(19)] Permit revision--Any administrative permit revision, minor permit revision, or significant permit revision that meets the related requirements of this chapter.

(21) [(20)] Potential to emit--The maximum capacity of a stationary source to emit any air pollutant under its physical and operational design or configuration. Any certified registration established under §106.6 of this title (relating to Registration of Emissions), §116.611 of this title (relating to Registration to Use a Standard Permit), or §122.122 of this title (relating to Potential to Emit), or a permit by rule under Chapter 106 of this title (relating to Permits by Rule) or other new source review permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) restricting emissions or any physical or operational limitation on the capacity of a stationary source to emit an air pollutant, including air

pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the United States Environmental Protection Agency. This term does not alter or affect the use of this term for any other purposes under the Federal Clean Air Act (FCAA), or the term "capacity factor" as used in Acid Rain provisions of the FCAA or the Acid Rain rules.

(22) [(21)] Preconstruction authorization--Any authorization to construct or modify an existing facility or facilities under Chapter 106 and Chapter 116 of this title (relating to Permits by Rule; and Control of Air Pollution by Permits for New Construction or Modification). In this chapter, references to preconstruction authorization will also include the following:

(A) any requirement established under Federal Clean Air Act (FCAA), §112(g) (Modifications); and

(B) any requirement established under FCAA, §112(j) (Equivalent Emission Limitation by Permit).

(23) [(22)] Predictive emission monitoring system--A system that uses process and other parameters as inputs to a computer program or other data reduction system to produce values in terms of the applicable emission limitation or standard.

(24) [(23)] Proposed permit--The version of a permit that the executive director forwards to the United States Environmental Protection Agency for a 45-day review period. The proposed permit may be the same document as the draft permit.

(25) [(24)] Provisional terms and conditions--Temporary terms and conditions, established by the permit holder for an emission unit affected by a change at a site, or the promulgation or adoption of an applicable requirement or state-only requirement, under which the permit holder is authorized to operate prior to a revision or renewal of a permit or prior to the granting of a new authorization to operate.

(A) Provisional terms and conditions will only apply to changes not requiring prior approval by the executive director.

(B) Provisional terms and conditions shall not authorize the violation of any applicable requirement or state-only requirement.

(C) Provisional terms and conditions shall be consistent with and accurately incorporate the applicable requirements and state-only requirements.

(D) Provisional terms and conditions for applicable requirements and state-only requirements shall include the following:

(i) the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards;

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph; and

(iii) where applicable, the specific regulatory citations identifying any requirements that no longer apply.

(26) [(25)] Renewal--The process by which a permit or an authorization to operate under a general operating permit is renewed at the end of its term under §§122.241, 122.501, or 122.505 of this title (relating to Permit Renewals; General

Operating Permits; or Renewal of the Authorization to Operate Under a General Operating Permit).

(27) [(26)] Reopening--The process by which a permit is reopened for cause and terminated or revised under §122.231 of this title (relating to Permit Reopenings).

(28) [(27)] Site--The total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control). A research and development operation and a collocated manufacturing facility shall be considered a single site if they each have the same two-digit Major Group Standard Industrial Classification (SIC) code (as described in the Standard Industrial Classification Manual, 1987) or the research and development operation is a support facility for the manufacturing facility.

(29) [(28)] State-only requirement--Any requirement governing the emission of air pollutants from stationary sources that may be codified in the permit at the discretion of the executive director. State-only requirements shall not include any requirement required under the Federal Clean Air Act or under any applicable requirement.

(30) [(29)] Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant. Nonroad engines, as defined in 40 Code of Federal Regulations Part 89 (Control of Emissions from New and In-use Nonroad Engines), shall not be considered stationary sources for the purposes of this chapter.

## SUBCHAPTER B: PERMIT REQUIREMENTS

## DIVISION 2: APPLICABILITY

## §122.122

### Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also proposed under Texas Health and Safety Code (THSC), §382.011, concerning General Powers and Duties, which authorizes the commission to administer the requirements of the Texas Clean Air Act (TCAA), THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; 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, §382.054, concerning Federal Operating Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541, concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating 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 amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661 - 7661e, which requires states to develop and submit permit programs to the United States Environmental Protection Agency that implement the requirements of the Title V program.

The proposed amendments implement House Bill 788, 83rd Legislature, 2013, TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.0513, 382.0515, 382.054, 382.0541, 382.0543, 382.05102, 382.0515, and 382.0518; Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7661 - 7661e.

**§122.122. Potential to Emit.**

(a) For purposes of determining applicability of the Federal Operating Permit Program under this chapter, the owner or operator of stationary sources without any other federally-enforceable emission rate may limit their sources' potential to emit by maintaining a certified registration of emissions, which shall be federally-enforceable. Emission rates in new source review permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and certified registrations provided for under Chapter [Chapters] 106 of this title (relating to Permits by Rule) or Chapter 116 of this title are also federally-enforceable emission rates.

(b) All representations in any registration of emissions under this section with regard to emissions, production or operational limits, monitoring, and reporting shall become conditions upon which the stationary source shall operate. It shall be unlawful for any person to vary from such representation unless the registration is first revised.

(c) The registration of emissions shall include documentation of the basis of emission rates and a certification, in accordance with §122.165 of this title (relating to Certification by a Responsible Official), that the maximum emission rates listed on the

registration reflect the reasonably anticipated maximums for operation of the stationary source.

(d) In order to qualify for registrations of emissions under this section, the maximum emission rates listed in the registration must be less than those rates defined for a major source in §122.10 of this title (relating to General Definitions).

(e) The certified registrations of emissions 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.

(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 (GHGs) (as defined in §101.1 of this title (relating to Definitions)) on or after the effective date of the United States Environmental Protection Agency's final action approving amendments to this section shall be submitted:

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

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

(f) All certified registrations and records demonstrating compliance with a certified registration shall be maintained on-site and shall be provided, upon request, during regular business hours to representatives of the appropriate commission regional office and any local air pollution control agency having jurisdiction over the site. If however, the site normally operates unattended, certified registrations and records demonstrating compliance with the certified registration must be maintained at an office within Texas having day-to-day operational control of the site. Upon request, the commission shall make any such records of compliance available to the public in a timely manner.

## SUBCHAPTER B: PERMIT REQUIREMENTS
## DIVISION 3: PERMIT APPLICATION
## §122.130

### Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also proposed under Texas Health and Safety Code (THSC), §382.011, concerning General Powers and Duties, which authorizes the commission to administer the requirements of the Texas Clean Air Act (TCAA), THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; 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, §382.054, concerning Federal Operating Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541,

concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating 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 amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661 - 7661e, which requires states to develop and submit permit programs to the United States Environmental Protection Agency that implement the requirements of the Title V program.

The proposed amendments implement House Bill 788, 83rd Legislature, 2013, TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.0513, 382.0515, 382.054, 382.0541, 382.0543, 382.05102, 382.0515, and 382.0518; Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7661 - 7661e.

**§122.130. Initial Application Due Dates.**

(a) Owners or operators of any site subject to the requirements of this chapter on February 1, 1998, shall submit abbreviated initial applications by February 1, 1998. The executive director shall inform the applicant in writing of the deadline for submitting the remaining application information.

(b) Owners and operators of sites identified in §122.120 of this title (relating to Applicability) that become subject to the requirements of this chapter after February 1, 1998 are subject to the following requirements.

(1) If the site is a new site or a site that will become subject to the program as the result of a change at the site, the owner or operator shall not operate the change, or the new emission units, before an abbreviated application is submitted under this chapter. The executive director shall inform the applicant in writing of the deadline for submitting the remaining information.

(2) If the site becomes subject to the program as the result of an action by the executive director or the United States Environmental Protection Agency (EPA) [EPA], the owner or operator will submit an abbreviated application no later than 12 months after the action that subjects the site to the requirements of this chapter.

(3) If the site becomes subject to the program as a result of rulemaking that adds greenhouse gas sources to the Federal Operating Permits Program, the owner or operator will submit an abbreviated application no later than 12 months after EPA's final action approving either the Federal Operating Permits Program revision or the revision of §122.122 of this title (relating to Potential to Emit) into the State Implementation Plan, whichever is later.

(c) Applications submitted under 40 Code of Federal Regulations (CFR) Part [CFR] 71 (Federal Operating Permit Programs).

(1) If 40 CFR Part 71 is implemented in Texas by the EPA, applications will only be required to be submitted to the EPA.

(2) If all or part of 40 CFR Part 71 is delegated to the commission, information required by this chapter and consistent with the delegation will be required to be submitted to the commission.