No. 10-60891

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUMINANT GENERATION CO. LLC, OAK GROVE MANAGEMENT CO. LLC, BIG BROWN POWER CO. LLC, LUMINANT MINING CO. LLC, & SANDOW POWER CO. LLC,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LISA JACKSON, Administrator, United States Environmental Protection Agency,

Respondents.

PRINCIPAL BRIEF OF PETITIONERS LUMINANT GENERATION CO. LLC, OAK GROVE MANAGEMENT CO. LLC, BIG BROWN POWER CO. LLC, LUMINANT MINING CO. LLC, & SANDOW POWER CO. LLC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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REQUEST FOR ORAL ARGUMENT

Petitioners Luminant Generation Co. LLC, Oak Grove Management Co. LLC, Big Brown Power Co. LLC, Luminant Mining Co. LLC, & Sandow Power Co. LLC (collectively "Luminant"), respectfully request oral argument. Oral argument will assist the Court in resolving the legal issues presented in the case.

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[1] All citations to the Texas Administrative Code in this brief are to the versions as submitted to and considered by EPA in the Final Rule, copies of which are included in the Addendum of Statutes, Rules, and Regulations. Any subsequent revisions to the regulations are not before the Court and not relevant to this appeal.

Miscellaneous

GLOSSARY OF TERMS AND ACRONYMS

BACT	Best Available Control Technology
CAA	Clean Air Act
EPA	U.S. Environmental Protection Agency
Hg	Mercury
NAAQS	National Ambient Air Quality Standards
NESHAP	National Emission Standards for Hazardous Air Pollutants
NNSR	Nonattainment New Source Review
NO_X	Nitrogen oxide
NSPS	New Source Performance Standards
NSR	New Source Review
PCP	Pollution Control Project
PSD	Prevention of Significant Deterioration
PTE	Potential to Emit
Section 110	42 U.S.C. § 7410
SIP	State Implementation Plan
SO_2	Sulfur dioxide
Standard Permit for PCPs	30 Tex. Admin. Code § 116.617
Standard Permit Program	30 Tex. Admin. Code §§ 116.601–116.615
TCEQ	Texas Commission on Environmental Quality

STATEMENT OF JURISDICTION

Jurisdiction in this Court is proper under section 307(b) of the Clean Air Act. *See* 42 U.S.C. § 7607(b). EPA's Final Rule concerns only the Texas State Implementation Plant ("SIP") and is not nationally applicable.

STATEMENT OF THE ISSUES

I. Whether EPA acted arbitrarily and capriciously and contrary to law when it disapproved revisions to the Texas State Implementation Plan ("SIP") that created a Standard Permit for Pollution Control Projects,[2] where EPA concluded only that the revision was inconsistent with other Texas regulations, not that the revision failed to meet the statutory requirements of the Clean Air Act.

II. Alternatively, whether EPA acted arbitrarily and capriciously and contrary to law when it concluded that the Standard Permit for Pollution Control Projects is inconsistent with Texas's Standard Permit Program regulations.

[2] Luminant's Petition for Review is challenging only that aspect of EPA's Final Rule that disapproves Texas's Standard Permit for Pollution Control Projects and related provisions (30 Tex. Admin. Code §§ 116.610 & 116.617). *See* 75 Fed. Reg. at 56,424, 56,443–47.

STATEMENT OF THE CASE

Texas created a regulatory program in 1994 to encourage the installation and use of pollution control equipment that reduces the emission of air pollutants from industrial facilities in the State. Specifically, Texas adopted a Standard Permit Program that authorizes industrial facilities to undertake certain defined activities using a registration and review process that imposes standardized requirements, instead of applying for and obtaining an individual permit under Texas's general permitting regulations.[3] Texas's Standard Permit Program included two Standard Permits for Pollution Control Projects ("PCPs"), which were later merged into one Standard Permit for PCPs.[4]

Texas submitted the Standard Permit Program, including the Standard Permit for PCPs, to the U.S. Environmental Protection Agency ("EPA") for review and approval into Texas's State Implementation Plan or "SIP."[5] Even though the Clean Air Act gives EPA a deadline of eighteen months to act on a SIP revision,

[3] This brief uses the phrase "Standard Permit Program" to refer to the Texas regulations found at 30 Tex. Admin. Code §§ 116.601–116.615. The "Standard Permit for PCPs" is found at 30 Tex. Admin. Code § 116.617. In fact, the two are part of one set of regulations developed and issued by Texas at the same time. *See* 18 Tex. Reg. 8145 (Nov. 9, 1993) (proposed regulations). Activities that are not eligible for a Standard Permit must receive an individual permit under 30 Tex. Admin. Code § 116.111. *Id*.

[4] *See infra* note 9.

[5] A SIP is the overall body of regulations that govern air emissions in a state. It is approved by EPA and revised from time to time by the State. *Sierra Club v. EPA*, 315 F.3d 1295, 1296 (11th Cir. 2002).

EPA did not act on Texas's submission at all for almost a decade, with no explanation for its delay. Meanwhile, businesses in Texas relied on the Standard Permit for PCPs to expeditiously authorize the installation and operation of PCPs, reducing emissions by hundreds of thousands of tons. In 2003, EPA approved Texas's Standard Permit Program regulations (30 Tex. Admin. Code §§ 116.601–116.615), finding that they meet all the requirements of the Clean Air Act and EPA regulations. EPA did not, however, take any action in 2003 on the Standard Permit for PCPs (30 Tex. Admin. Code § 116.617).

EPA finally took action on the Standard Permit for PCPs in 2010, disapproving it. EPA did not challenge the reasonableness or practicality of the Standard Permit for PCPs or its scope, nor did EPA conclude that it violates the Clean Air Act or any applicable federal regulation. *See* 75 Fed. Reg. 56,424, 56,446 (Sept. 15, 2010). Instead, EPA's rationale for disapproving the Standard Permit for PCPs was that it is not consistent with EPA's view of other Texas regulations—*i.e.*, Texas's Standard Permit Program that was submitted simultaneously to EPA with the Standard Permit for PCPs and approved by EPA in 2003. *Id.*

On November 12, 2010, Luminant timely filed the Petition for Review in this case, challenging EPA's disapproval of Texas's Standard Permit for PCPs as arbitrary and capricious and contrary to law.

STATEMENT OF THE FACTS

I. Texas Promulgated the Standard Permit Program in 1994

In 1993, exercising its authority under the Texas Clean Air Act[6] and the federal Clean Air Act, the Texas Natural Resource Conservation Commission ("TNRCC")[7] proposed a Standard Permit Program as a revision to the Texas SIP. *See* 18 Tex. Reg. 8145 (Nov. 9, 1993). As described by TCEQ, the new regulations "establish[] a new category of new source review permits referred to as standard permits," which "simplif[y] and accelerate[] the permit review process[.]" *Id.* at 8145.[8] One purpose of the Standard Permit Program was to "streamline the agency review process, and allow more rapid approval than would be possible under the generalized permit review process." *Id.*

Two standard permits dealing with Pollution Control Projects ("PCPs") were included in the regulations proposed in 1993—"Standard Permit Number 1" allowing for the "[i]nstallation of emissions control equipment or implementation of control techniques as required by any state or federal rule, standard, or

[6] Tex. Health & Safety Code § 382.001 et seq.

[7] TNRCC later became the Texas Commission on Environmental Quality or "TCEQ." For the sake of convenience, this brief will use "TCEQ" throughout to refer to the State of Texas's air permitting agency.

[8] Generally speaking, "New Source Review" or "NSR" is the phrase used to refer to the process for obtaining authorization for the construction of new sources, or the modification of existing sources, that involve the emission of air pollutants. As discussed in detail in subsequent sections, NSR can be either "Major" or "Minor," depending on the amount of anticipated emissions.

regulation" (then § 116.617(1)); and "Standard Permit Number 2" for "[v]oluntary installation of emissions control equipment" (then § 116.617(2)).[9] 18 Tex. Reg. at 8145–46, 8149. These PCP Standard Permits launched the Standard Permit Program.

TCEQ requested comments on the Standard Permit for PCPs, "particularly from the regulated community and U.S. Environmental Protection Agency," regarding the requirements in Standard Permit Number 1 to perform "netting calculations."[10] 18 Tex. Reg. at 8146. EPA did not oppose the Standard Permit Program as a whole or the specific Standard Permit for PCPs. Instead, EPA responded to TCEQ's request for comments by stating that it "supported" TCEQ's proposal with respect to netting calculations. 19 Tex. Reg. 3055, 3061 (Apr. 22, 1994). EPA also commented that "§ 116.617(1)(D)(ii)(I) and (2)(D)(ii)(I) should include emissions of pollutants which are precursors to the primary pollutant," and

[9] When originally adopted, section 116.617 was entitled "Standard Permits List," and TCEQ contemplated listing all standard permits in section 116.617. *See* 19 Tex. Reg. 3055, 3064 (Apr. 22, 1994). Since that time, Subchapter F has been revised several times. For instance, in 1996, TCEQ added a new standard permit for oil and gas facilities. *See* 20 Tex. Reg. 6324, 6324 (Aug. 18, 1995). In 1997, TCEQ revised section 116.617 to contain only "Standard Permits for Pollution Control Projects" and consolidated the requirements for required emission control projects and voluntary emission control projects. *See* 22 Tex. Reg. 4242, 4247–48 (May 13, 1997).

[10] "Netting calculations" are part of the calculations that are performed to determine the amount of increased emissions that are expected to result from the construction or modification activity at issue. Netting calculations are not at issue in this appeal.

TCEQ incorporated EPA's suggested changes into the Standard Permit for PCPs (30 Tex. Admin. Code § 116.617).[11] *Id.*

In 1994, after public notice and comment and a public hearing, TCEQ adopted the regulations implementing the Standard Permit Program and the Standard Permit for PCPs, as revised to reflect EPA's comments. *See* 19 Tex. Reg. 3055 (Apr. 22, 1994).

A. Pollution Control Projects

In general, a Pollution Control Project is the installation of technology or equipment, or the use of a technique, that reduces emissions. Under TCEQ's rules, PCPs include "(A) the installation or replacement of emissions control equipment; (B) the implementation or change to control techniques; or (C) the substitution of compounds used in manufacturing processes" "that reduce or maintain currently authorized emission rates." 30 Tex. Admin. Code § 116.617(a)(1), (2)(A)–(C). PCPs reduce air pollutants of primary concern, such as sulfur dioxide (SO_2) and nitrogen oxides (NO_X); the type of PCP that is used in a given situation is selected based on the pollutant to be reduced. Examples[12] of PCPs used to reduce

[11] A precursor is a compound that undergoes a chemical reaction to produce another compound (for example, NO_X and volatile organic compounds react in sunlight to make ozone or smog).

[12] *See* Tex. Comm'n on Envtl. Quality, New Source Review Air Permits, http://www5.tceq.state.tx.us/airperm/index.cfm?fuseaction=airpermits.start (select "STANDARD PERMIT" for "Permit Type," "POLLUTION CONTROL

emissions of SO_2 include flue gas desulfurization ("FGD") systems, *i.e.*, wet and dry "scrubbers."[13] For control of NO_X (an ozone precursor), control technologies include installation of low-NO_X burners,[14] over-fire air systems,[15] selective catalytic reduction ("SCR"), and selective non-catalytic reduction ("SNCR").[16] Mercury (Hg) emissions may be controlled by a process known as activated carbon injection ("ACI").

A PCP that involves construction or modification activity at the facility in order to install the emission-reducing equipment (for example, installing low-NOx burners) may require a pre-construction permit known as an NSR permit. The NSR permit is a "Major" or "Minor" one, depending on the amount of any

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PROJECTS" for "Unit Rule," and "ALL" for "Status"; then click "Search") (listing of current Standard Permits for PCPs).

[13] Most FGD systems involve addition of a sorbent (like limestone) to "scrub" SO_2 out of the exhaust stream.

[14] Rather than removing NO_X, low-NO_X burners are used to limit NO_X formation in the combustion process. This design regulates the mixing of the fuel with air, resulting in reduced oxygen, reduced flame temperature, and/or reduced residence time at peak temperature—conditions that limit NO_X formation but may increase carbon monoxide emissions.

[15] Often used with low-NO_X burners, over-fire air systems divert a portion of the total combustion air from the burners. The goal is to delay the mixing of fuel with air, thus limiting NO_X formation.

[16] While low-NO_X burners and over-fire air systems are used during the combustion process, NO_X can also be controlled by the installation of post-combustion technology, *i.e.*, SCRs or SNCRs.

increases in collateral pollutants that may occur as a result of the operation of the PCP.[17]

B. The benefits of Standard Permits for PCPs

Since Texas adopted Standard Permits for PCPs in 1994, scores of businesses throughout the State have installed and operated emission-reducing pollution controls using the permit. The result has been a significant reduction in emissions and improved air quality in Texas. For instance, electric utilities, cement kilns, refineries, and oil and gas companies have used these permits to expeditiously authorize voluntary projects that reduce SO_2 and NO_X and also to satisfy specific legal mandates.[18]

The Standard Permit for PCPs has allowed electric generating facilities, including Luminant's, to significantly reduce SO_2, NO_X, and Hg emissions in Texas without delay. For instance, since 1995, SO_2 emissions in Texas have

[17] For example, a low-NO_X burner will dramatically reduce NO_X emissions but has the potential to cause small collateral increases in carbon monoxide emissions due to the changes in the combustion process that reduce NO_X. The difference between "Major" and "Minor" NSR is the amount of additional emissions anticipated (in this example, any collateral increases in carbon monoxide). The difference between "Major" and "Minor" NSR and the significance of it are discussed in more detail in Section I.A.3. of the Argument.

[18] For example, Senate Bill 7 amended the Texas Utilities Code and required TCEQ to establish a program to require certain electric generating facilities to substantially reduce NO_X and SO_2 emissions. S.B. 7, 76th Leg. (Tex. 1999), 1999 Tex. Gen. Laws 405.

declined from 621,241 tons to 453,933 tons—a 27% reduction.[19] For NO_X, emissions have dropped from 376,777 tons in 1995 to 144,612 tons in 2009—a 61% reduction.[20] Additionally, according to EPA, ozone levels in Texas have decreased by 27% from 2000 to 2009, the largest decrease of any State in the nation and a byproduct of NO_X reductions in the State from PCPs.[21]

C. Luminant has a substantial interest in the Standard Permit for PCPs

Luminant is a competitive power generation business in Texas that, among other things, operates electric generating plants and sells electricity. Like other companies in Texas, since 1994, Luminant has utilized the Standard Permit for PCPs, which EPA had not disapproved, to install important and necessary pollution controls at its units. Luminant has obtained almost forty Standard Permits for PCPs, authorizing the installation of low-NO_X burners, NO_X-reducing selective catalytic (and non-catalytic) reduction systems, mercury-reducing sorbent injection systems, and dust suppression systems—all to reduce emissions dramatically.[22]

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[19] Acid Rain Program 2009 Progress Report, Collected Tables and Chart Source Data, http://www.epa.gov/airmarkets/progress/ ARP09_downloads/ ARP_Progress_Report_2009_ECM_Data_Supporting_Tables.xls.

[20] *Id.*

[21] Tex. Comm'n on Envtl. Quality, Texas Air Quality Successes, http://www.tceq.texas.gov/implementation/air/airsuccess/airsuccess.

[22] Tex. Comm'n on Envtl. Quality, New Source Review Air Permits, http://www5.tceq.state.tx.us/airperm/index.cfm?fuseaction=airpermits.start (select

For instance, in 2001, Luminant installed selective catalytic reduction on Unit 2 at its Lake Hubbard Plant under the requirements of the Standard Permit for PCPs. As a result of that project, NO_X emissions were reduced by more than 85%.[23]

II. EPA Approved Texas's Standard Permit Program in 2003

Texas submitted its regulations implementing the Standard Permit Program and the Standard Permit for PCPs to EPA as revisions to its SIP in 1994 and submitted various revisions in the years following. *See* 68 Fed. Reg. 40,865, 40,868 (July 9, 2003) (listing Texas's submissions from 1994 to 2002). The Standard Permit Program and the specific Standard Permits were drafted and submitted to EPA as one integrated regulatory regime, not as separate provisions. 18 Tex. Reg. at 8145–46 (explaining new final regulations). EPA, however, chose to sever the overall Standard Permit Program from the specific Standard Permits and consider them separately.

In 2003, after almost ten years of taking no action, EPA approved Texas's Standard Permit Program. 68 Fed. Reg. 64,543 (Nov. 14, 2003). EPA found that Texas's Standard Permit Program was approvable because it (1) prohibited the use of Standard Permits for Major sources or Major modifications; (2) required sources

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"STANDARD PERMIT" for "Permit Type," "POLLUTION CONTROL PROJECTS" for "Unit Rule," and "ALL" for "Status"; then click "Search").

[23] Based on EPA Clean Air Markets Division data. *See* Emissions, Clean Air Markets – Data and Maps, http://camddataandmaps.epa.gov/gdm/index.cfm?fuseaction =emissions.wizard.

to meet all applicable New Source Performance Standards ("NSPS") and all National Emission Standards for Hazardous Air Pollutants ("NESHAP"); (3) included all required administrative procedures "which support the issuance and enforcement of a Standard Permit"; and (4) required public notice and comment. *Id.* at 64,546–47; *see also* 68 Fed. Reg. at 40,870 (proposed rule).

These same four requirements apply to the current Standard Permit for PCPs at issue in this case. *See* 30 Tex. Admin. Code § 116.617(b)(1) (requiring compliance with general requirements for Standard Permits). In fact, the Standard Permit Program regulations approved by EPA specifically allow for and accommodate the Standard Permit for PCPs found in section 116.617. *See, e.g.*, 30 Tex. Admin. Code § 116.601(a)(1) ("For the purposes of this chapter a standard permit is . . . one that was adopted by the commission . . . into §§ 116.617, 116.620, and 116.621 . . . ."); *id.* § 116.610(a)(1) (". . . unless otherwise specified by a particular standard permit.").

However, at the time EPA approved Texas's Standard Permit Program, it did not approve the Standard Permit for PCPs in section 116.617. EPA gave no reasons, but stated that it would review section 116.617 separately. 68 Fed. Reg. at 64,547.

III. Texas Promulgated the Standard Permit for PCPs at Issue Here in 2006

In 2006, even though EPA had still not acted to approve or disapprove its Standard Permit for PCPs, Texas revised and updated the permit. *See* 31 Tex. Reg. 515 (Jan. 27, 2006) (adopting a new 30 Tex. Admin. Code § 116.617). Texas took this step in consideration of a court decision that vacated a federal regulatory exemption for PCPs created by EPA regulations. *Id.* at 517 (citing *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005)).

Specifically, Texas revised the Standard Permit for PCPs in 2006 so that, prospectively, it would be limited *to Minor NSR permitting only*[24] and thus would not run afoul of the D.C. Circuit's reasoning on the statutory definition of "modification" for Major NSR.[25] 30 Tex. Reg. 6183, 6183 (Sept. 30, 2005) ("If

[24] "Major" NSR applies to new sources with the potential to emit 100 or 250 tons per year (depending on the type of source) of one of a specified list of pollutants. "Major" NSR also applies to "major modifications," *i.e.*, changes at an existing facility that result in an increase in emissions over specified "significance" levels. Depending on the pollutant, these significance levels range from 100 tons per year (tpy) for carbon monoxide (CO), to 40 tpy for pollutants such as NO_X and SO_2, to 0.6 tpy for lead. 40 C.F.R. § 52.21(b)(23)(1). "Minor" NSR, in contrast, applies to new sources with the potential to emit less than 100 or 250 tons per year of the specified pollutants and to "minor modifications" of an existing facility, *i.e.*, those changes that result in emissions increases below the specified significance levels.

[25] In *New York v. EPA*, the D.C. Circuit reviewed an EPA rule creating a regulatory *exemption* for PCPs from Major NSR permitting. 413 F.3d at 40–42. Under the EPA rule, a facility that was modified in a way that resulted in an increase in emissions above Major NSR levels as part of a PCP was exempted from the statutory requirement to obtain a PSD permit, by excluding PCPs altogether from the statutory definition of "modification" found at 42 U.S.C. §

the total [increased emissions] exceeds the major modification threshold, then the modification is subject to federal NSR."). Thus, a modification at a source that results in an increase in emissions above Major NSR thresholds cannot be authorized by the Standard Permit for PCPs.[26] 30 Tex. Reg. at 6205 ("Any project which constitutes a new major source or major modification under the new source review requirements of the [Federal Clean Air Act] . . . is subject to the requirements of § 116.110 . . . rather than this subchapter."). TCEQ's revisions included revisions to section 116.617 and corresponding revisions to 116.610. TCEQ submitted its revised and more limited Standard Permit for PCPs to EPA on February 1, 2006. 75 Fed. Reg. at 56,444.

IV. EPA Disapproved Texas's Standard Permit for PCPs in 2010

Four years after Texas submitted its revised Standard Permit for PCPs to EPA, and after more than fifteen years of sources in Texas utilizing the Standard Permits for PCPs, EPA finally took action on it in 2010. Despite EPA's prior approval of Texas's Standard Permit Program, under which the Standard Permit

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7411(a)(4). *Id.* at 40. The court held that EPA lacked authority to create PCP exemptions from the statutory requirements of Major NSR. *Id.* at 41. Texas's Standard Permit for PCPs as amended in 2006 does not apply to Major modificiations ans is otherwise substantially different from the federal PCP exemption vacated in *New York v. EPA.* Importantly, TCEQ's Standard Permit for PCPs is not an exemption at all—it is a permit with requirements and emission limits.

[26] Such activities would instead need an individual permit under other Texas regulations (30 Tex. Admin. Code § 116.111).

for PCPs was promulgated, EPA disapproved the Standard Permit for PCPs and related revisions to the Standard Permit Program regulations in September 2010. 75 Fed. Reg. 56,424 (Sept. 15, 2010) (final rule); 74 Fed. Reg. 48,467 (Sept. 23, 2009) (proposed rule). Specifically, EPA disapproved section 116.617 in its entirety (the section containing the Standard Permit for PCPs) and also disapproved corresponding revisions to section 116.610 (a section that is part of the general regulations for the Standard Permit Program). *See* 75 Fed. Reg. at 56,424, 56,450.[27]

EPA did not disapprove section 116.617 because the Standard Permit for PCPs is inconsistent with the Clean Air Act or federal regulations. Rather, its stated reason for disapproval was that the Standard Permit for PCPs is inconsistent *with other Texas regulations—i.e.*, the Standard Permit Program regulations that EPA had already approved.[28] EPA did not base its disapproval on the federal statutory and regulatory requirements for a Minor NSR program. Instead, EPA concluded that the Standard Permit for PCPs "does not meet the requirements of the *Texas* Minor NSR Standard Permits Program," which EPA had approved in

[27] As to section 116.610, EPA disapproved, without any explanation, TCEQ's limitation on the Standard Permit for PCPs to Minor NSR activities only (section 116.610(b)) and certain non-substantive revisions to section 116.610(a). 75 Fed. Reg. at 56,452–53.

[28] EPA gave no explanation in the Final Rule for its disapproval of the proposed revisions to section 116.610(a) & (b). *See generally* 75 Fed. Reg. at 56,443–44, 56,452–53; 74 Fed. Reg. at 48,475–76.

2003, because EPA concluded that it "does not apply to similar sources." 75 Fed. Reg. at 56,447 (emphasis added).[29] EPA claimed that, "[u]nder the Texas Standard Permits Minor NSR SIP, an individual Standard Permit *must* be limited to new or existing *similar* sources[.]" *Id.* at 56,444 (emphasis added). EPA asserted that "[b]ecause of the broad types of source categories covered by the PCP Standard Permit, this Standard Permit lacks replicable standardized permit conditions specifying how the Director's discretion is to be implemented for the individual determinations, *e.g.*, the air quality determination, the controls, and even the monitoring, recordkeeping, and reporting." *Id.* On this stated basis, EPA disapproved Texas's Standard Permit for PCPs. This is the EPA action on review before this Court that Luminant requests the Court vacate and set aside.

[29] Importantly, at the time Texas proposed its Standard Permit Program and Standard Permit for PCPs together in 1993, EPA commented on the proposal but never indicated that the proposed Standard Permit for PCPs did not meet the requirements of Texas's Standard Permit Program or the Clean Air Act. In fact, essentially the same Standard Permit for PCPs at issue here was in the program in 1993 (without the Minor limitation). *See* 19 Tex. Reg. 3055, 3061 (Apr. 22, 1994) (summarizing EPA's comments on the proposed rule).

SUMMARY OF THE ARGUMENT

EPA's disapproval of Texas's Standard Permit for PCPs is arbitrary and capricious, an abuse of discretion, and contrary to law. EPA has acted contrary to the Clean Air Act and this Court's precedent by judging the Standard Permit for PCPs against EPA's interpretation of other Texas regulations, and not against the requirements of the Clean Air Act. This is a fatal legal flaw that requires vacatur and remand. EPA is required to approve Texas's SIP revision if it meets the requirements of the Clean Air Act, and is not authorized to look elsewhere for reasons to disapprove Texas's revision and substitute its own policy preferences.

Further, EPA is wrong when it concludes that the Standard Permit for PCPs is not consistent with these other Texas regulations—*i.e.*, the Standard Permit Program. EPA approved the Standard Permit Program in 2003 as fully meeting the Clean Air Act. The specific Standard Permit for PCPs meets all the essential requirements for approval that EPA identified in 2003. EPA itself does not dispute that the Standard Permit for PCPs covers a reasonable and practical category of activities. Moreover, as evidenced by the plain language of the regulations, the Standard Permit for PCPs has well-defined limitations and contains replicable, standard, and enforceable permit terms that protect air quality.

STANDARD OF REVIEW

Under the Administrative Procedure Act ("APA"), final agency action must be set aside if it is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law," or if it exceeds the agency's statutory authority. 5 U.S.C. § 706(2).[30] An agency's action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *La. Envtl. Action Network v. EPA*, 382 F.3d 575, 582 (5th Cir. 2004) (citations omitted).

At a minimum, the agency must "examine[] the relevant data and articulate[] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *BCCA Appeal Group*, 355 F.3d at 824 (internal quotation omitted). The agency's action must satisfy these standards based *only* on the administrative record before the agency at the time of its decision and *only* on the agency's stated rationale at that time. *See Camp v. Pitts*, 411 U.S. 138, 142–43 (1973) ("The focal point for judicial review should be the administrative record

[30] The standard of review for an EPA action under the Clean Air Act is the standard of review found in the APA. *Texas v. EPA*, 499 F.2d 289, 296 (5th Cir. 1974); *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 68 (D.C. Cir. 2000).

already in existence, not some new record made initially in the reviewing court."); *Geyen v. Marsh*, 775 F.2d 1303, 1309 (5th Cir. 1985) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729 (1982)) ("Review of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision."); *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1060 (5th Cir. 1985) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)) ("'An agency's action must be upheld, if at all, on the basis articulated by the agency at the time of the rule making.'").

ARGUMENT

I. EPA Has Made No Showing that Texas's Standard Permit for PCPs Is Inconsistent with Federal Law

EPA's Final Rule disapproving Texas's Standard Permit for PCPs suffers from a fundamental flaw—it uses the wrong legal standard. Nowhere in the Final Rule is there any determination by EPA that Texas's Standard Permit for PCPs would violate any applicable requirement of the Clean Air Act. The Texas Standard Permit for PCPs (found in section 116.617 of the Texas Administrative Code) meets all federal statutory and regulatory requirements for Minor NSR programs. EPA has made no effort to show on this record that TCEQ's regulation creating the Texas Standard Permit for PCPs is inappropriate or would result in violation of any federal standards or requirements.

A. The Clean Air Act mandates a cooperative federalism approach that divides responsibilities between the States and EPA

This case takes place against the backdrop of the cooperative federalism paradigm of the Clean Air Act. The Clean Air Act "establishes a comprehensive program for controlling and improving the nation's air quality through state and federal regulation." *BCCA Appeal Group v. EPA*, 355 F.3d 817, 821–22 (5th Cir. 2003). Congress chose a "cooperative federalism" structure to implement the statute, dividing authority between the federal government and the States. *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001); *see also Fla. Power &*

Light Co. v. Costle, 650 F.2d 579, 581 (5th Cir. 1981) ("Congress chose a balanced scheme of state-federal interaction to implement the goals of the [Clean Air] Act.").

Consistent with this structure, EPA's job is to promulgate National Ambient Air Quality Standards ("NAAQS") for certain pollutants (like SO_2 and NO_X), and to ensure that the minimum requirements for air pollution control programs are met. *BCCA Appeal Group*, 355 F.3d at 822. The Clean Air Act, however, gives to the States "the primary responsibility" for determining how to achieve those standards and meet those requirements within their own borders.[31] *Id.* (citing 42 U.S.C. § 7407(a)); *see also* 42 U.S.C. § 7401(a)(3) ("[A]ir pollution prevention . . . is the primary responsibility of States and local governments.").

1. Congress gave States great flexibility to adopt pollution control rules best-suited to achieve air quality standards

States achieve the NAAQS set by EPA through the development and administration of State Implementation Plans, or "SIPs." *Fla. Power & Light Co.*, 650 F.2d at 586–87. A SIP is the overall body of regulations that govern air

[31] NAAQS—as the name indicates—deal with *ambient* air quality, *i.e.*, the overall quality of the air in the environment. *See Sierra Club v. EPA*, 314 F.3d 735, 737 (5th Cir. 2002); 42 U.S.C. § 7409(b). NAAQS are translated by States into limitations on sources or groups of sources in order to achieve the overall mandated quality of the ambient air. *See Galveston-Houston Ass'n for Smog Prevention*, 289 Fed. Appx. 745, 747 (5th Cir. 2008); *Sierra Club*, 314 F.3d at 737; 42 U.S.C. § 7410.

emissions in a State. It is approved by EPA and revised from time to time by the State. *See Sierra Club v. EPA*, 315 F.3d 1295, 1296 (11th Cir. 2002).

In general, a State's SIP must, "among other things . . . 'include enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate' to meet" the applicable NAAQS; "'appropriate devices, methods, systems, and procedures' to 'monitor, compile, and analyze data on ambient air quality;'" and an enforcement program. *See BCCA Appeal Group*, 355 F.3d at 822 (summarizing 42 U.S.C. § 7410(a)(2)). But, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt *whatever mix* of emission limitations it deems best suited to its particular situation." *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) (emphasis added); *see also CleanCOALition v. TXU Power*, 536 F.3d 469, 472 n.3 (5th Cir. 2008) ("[T]he EPA has no authority to question the wisdom of a State's choices of emission limitations if they are part of a SIP that otherwise satisfies the standards set forth in 42 U.S.C. § 7410(a)(2)."). The Clean Air Act "supplies the goals and basic requirements of [SIPs], but the states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements." *BCCA Appeal Group*, 355 F.3d at 822.

2. EPA has a sharply limited role in reviewing and approving SIPs and SIP revisions

When States revise their SIPs, as Texas has done here, those revisions are submitted to EPA for approval. *See* 40 C.F.R. § 51.104(a) ("States may revise the plan from time to time consistent with the requirements applicable to implementation plans under this part."). EPA's role in reviewing those SIP revisions is limited. As this Court has explained, "The great flexibility accorded the states under the Clean Air Act is . . . illustrated by the sharply contrasting, narrow role to be played by EPA." *Fla. Power & Light Co.*, 650 F.2d at 587.[32] Accordingly, EPA's review of SIP revisions is cabined and delineated by 42 U.S.C. § 7410, also referred to as section 110 of the Clean Air Act. *Fla. Power & Light Co.*, 650 F.2d at 586–87 (explaining statutory standards for EPA review of SIP revisions).

Section 110 of the Clean Air Act is the benchmark against which a SIP revision must be judged. Under section 110(*l*)—entitled "Plan revisions"—EPA is to approve a SIP revision unless it determines that "the revision *would* interfere with [1] any applicable requirement concerning attainment [of the NAAQS] and reasonable further progress [toward attainment] . . . or [2] any other applicable

[32] EPA is a creature of statute and has only the authority conferred upon it by statute—in this case, the Clean Air Act. *North Carolina v. EPA*, 531 F.3d 896, 922 (D.C. Cir. 2008) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)).

requirement[.]" 42 U.S.C. § 7410(*l*) (emphasis added); *see also Ky. Res. Council, Inc. v. EPA*, 467 F.3d 986, 994 (6th Cir. 2006) ("[W]here the EPA does not find that a SIP revision would interfere with attainment, approval of the revision does no violence to the statute."). If the SIP revision meets the requirements in the Clean Air Act, EPA is required to approve it. *Id.*; 42 U.S.C. §7410(k)(3) ("[T]he Administrator shall approve [a SIP or SIP revision] as a whole if it meets all of the applicable requirements of this chapter.").

3. "Minor" and "Major" New Source Review Programs are categorically different

Texas's Standard Permit for PCPs is strictly limited and expressly authorizes only Minor NSR activities. 30 Tex. Reg. at 6205 ("Any project which constitutes a new major source or major modification under the new source review requirements of the FCAA . . . is subject to the requirements of § 116.110 . . . rather than this subchapter.").[33] That is significant to this Court's review.

"New Source Review," or "NSR," is the Clean Air Act program that regulates and authorizes the construction of new facilities and the "modification" of existing facilities that emit air pollutants. *See* 42 U.S.C. § 7410(a)(2)(C). NSR is relevant to the Standard Permit for PCPs because a PCP (for example, the installation of low-NOx burners) may involve construction or modification activity

[33] Thus, a source that does not qualify for a standard permit must obtain an individual permit under separate regulations (*i.e.*, 116.110). *See* 30 Tex. Admin. Code § 116.617(b)(1)(C).

that triggers the need for a pre-construction permit—Major or Minor, depending on the amount of any increase in collateral emissions.[34] States are authorized to develop and implement their own NSR permitting programs, which apply in lieu of an EPA federal NSR program. *See* 42 U.S.C. § 7410(a)(2)(C). Texas has implemented and run its own NSR program since 1972. 37 Fed. Reg. 10,841, 10,895–99 (May 31, 1972).

The NSR requirements in the Clean Air Act for "Major" new sources and modifications differ dramatically from the requirements for "Minor" ones. *See* 42 U.S.C. §§ 7470–7503 (major), *id.* § 7410(a)(2)(C) (minor). Unsurprisingly, requirements are more detailed for Major NSR. *See La. Envtl. Action Network v. EPA*, 382 F.3d 575, 578 (5th Cir. 2004). For Minor NSR, the statute directs only that States provide for "regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved." 42 U.S.C. § 7410(a)(2)(C). How States achieve this goal is left to their discretion, as reflected by EPA's regulations that set out the requirements for a State's Minor NSR program. These

[34] It may seem counterintuitive that a PCP—a project that reduces emissions—would potentially increase emissions. The potential for an emissions increase exists, not with the primary pollutant to be reduced, but with collateral or incidental increases in other pollutants caused by the change at the facility. For example, the use of a low-NO_X burner will dramatically reduce NO_X emissions (an ozone precursor and the primary pollutant targeted by the PCP) but has the potential to cause increases in carbon monoxide emissions due to the changes in the combustion process that reduce NO_X.

EPA regulations contain very generic requirements for a State's Minor NSR program. *See* 40 C.F.R. §§ 51.160–51.164. Accordingly, EPA recognizes that "approved minor NSR programs can vary quite widely from State to State" because "the Act includes no specifics regarding the structure or functioning of minor NSR programs." 74 Fed. Reg. 51,418, 51,421 (Oct. 6, 2009).[35] Again, this regulatory scheme is critical in this case because the Texas Standard Permit for PCPs is available only for projects below the Major NSR threshold, affording Texas much greater discretion to design its Standard Permit and narrowing EPA's role in reviewing it.

B. EPA erroneously compared the Standard Permit for PCPs to other Texas regulations, instead of the requirements of the Clean Air Act

EPA must approve a SIP revision unless it violates a requirement of the federal Clean Air Act or would cause a violation of the NAAQS. 42 U.S.C. § 7410(k), (*l*); *see also Fla. Power & Light Co.*, 650 F.2d at 586–87 (citing *Train*, 421 U.S. at 80). But EPA disregarded that mandate here. Instead of measuring the Standard Permit for PCPs promulgated by Texas against the requirements of the

[35] One need only look to the number of pages in EPA's regulations to see the difference between Major and Minor NSR programs. *See* 40 C.F.R. pt. 51, subpt. I. While Major NSR regulations span 85 pages in the Code of Federal Regulations, *see* 40 C.F.R. §§ 51.165–51.166, pt. 51 app. S, Minor NSR regulations span less than two pages. *See* 40 C.F.R. §§ 51.160–51.164. EPA describes its own implementing regulations for Minor NSR as being "stated in very general terms." 74 Fed. Reg. at 51,421.

Clean Air Act, it compared the proposed revision to *other Texas regulations—i.e.*, the Standard Permit Program regulations that Texas submitted to EPA simultaneously with the Standard Permit for PCPs. 75 Fed. Reg. at 56,447 ("EPA is disapproving the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision because the PCP Standard Permit . . . does not meet the requirements *of the Texas Minor NSR Standard Permits Program*.") (emphasis added).[36] This is not a criterion that Congress authorized EPA to consider when reviewing a SIP revision, as EPA itself has acknowledged elsewhere. *See* 73 Fed. Reg. 60,957, 60,961 (Oct. 15, 2008) ("Section 110(l) requires us to evaluate proposed SIP revisions in relation to applicable requirements of the CAA, not state rules.").

Nowhere in the Final Rule, and nowhere in the administrative record, did EPA make any determination that Texas's SIP revision "would interfere with any applicable requirement concerning attainment [of the NAAQS] and reasonable further progress [toward attainment]," or violate any other provision of the Clean Air Act. *See* 42 U.S.C. § 7410(*l*). In the Final Rule, EPA did not point to even a single provision of the Clean Air Act or EPA's Minor NSR regulations that is allegedly violated by Texas's Standard Permit for PCPs. 75 Fed. Reg. at 56,443–

[36] EPA's disapproval of the separate revisions to section 116.610(a) & (b) (which is part of the Standard Permit Program) is arbitrary and capricious on its face because EPA has provided no explanation for its action, much less a reasoned one. *See BCCA Appeal Group*, 355 F.3d at 824.

47. In fact, in response to a commenter that argued that the proposed revision violated section 110 of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(C), EPA simply said that it "agrees with the comments that the submitted PCP Standard Permit does not meet *the requirements of the Texas Minor NSR Standard Permits SIP*." 75 Fed. Reg. at 56,445 (emphasis added). Thus, even when squarely presented with the opportunity, EPA refused to justify its decision based on any alleged failure of the SIP revision to comply with the Clean Air Act.

EPA's "Technical Support Document" underlying its decision vividly illustrates that EPA used the wrong standard in disapproving the Standard Permit for PCPs.[37] *See* 75 Fed. Reg. at 56,426. The Technical Support Document analyzes Texas's submittal subsection by subsection and, EPA claims, "includes comments indicating whether the submitted changes meet the Federal requirements." Index #2, App. A, at EPA_AR00000039. With respect to the provision on Standard Permits for PCPs (30 Tex. Admin. Code § 116.617), EPA indicates that many of the subsections "meet Federal requirements" and provides specific citations to the federal requirements that are met. *Id.* at EPA_AR00000111–13 (citing 40 C.F.R. §§ 51.160, 51.163). But, just as in the *Federal Register*, EPA never determines that any provision of the Standard Permit

[37] EPA's Technical Support Document is part of EPA's certified index of record materials (cited as "Index # __, App. __"). An appendix containing those portions of the administrative record cited by the parties will be filed separately in accordance with 5th Cir. R. 30.2(a).

for PCPs *does not meet* a federal requirement. *Id.* at EPA_AR00000110–13. Instead, for the subsections that EPA finds objectionable, it simply states "Please see Section VII in the Federal Register proposal for this action." *Id.* Unsurprisingly, Section VII of the proposal, like the Final Rule, does not cite to *any* requirement in section 110 of the Clean Air Act or EPA's implementing regulations that the Standard Permit for PCPs fails to satisfy. 74 Fed. Reg. at 48,475–76.

This is a fatal flaw. The statute and the case law are clear that EPA may disapprove a SIP revision only if it finds that the revision violates a requirement of the Clean Air Act or would interfere with attainment of the NAAQS. 42 U.S.C. § 7410(k)(3) ("[T]he Administrator *shall* approve such submittal as a whole if it meets all of the applicable requirements of this chapter.") (emphasis added); *see also BCCA Appeal Group*, 355 F.3d at 826 ("EPA must approve a plan if it meets minimum statutory requirements[.]"); *Fla. Power & Light Co.*, 650 F.2d at 587–88 (holding that EPA went beyond its authority in incorporating a two-year variance limitation into Florida's proposed SIP revision because "EPA can point to no provision [in the Clean Air Act]" requiring it). EPA has made no determination here that the Standard Permit for PCPs violates a requirement of the Clean Air Act or would interfere with attainment of the NAAQS, and the record is devoid of any evidence that would support such a determination.

By basing its decision to disapprove exclusively on its view of other Texas regulations, EPA has "entangled itself in a matter beyond its proper concern." *Id.* at 589; *see also* 73 Fed. Reg. at 60,961 ("Section 110(l) requires us to evaluate proposed SIP revisions in relation to applicable requirements of the CAA, not state rules."). In APA terms, EPA has "relied on factors which Congress has not intended it to consider" and has perforce acted in an arbitrary and capricious manner. *La. Envtl. Action Network*, 382 F.3d at 582. EPA's disapproval is "clearly an abuse of discretion; it is agency action beyond the Congressional mandate," and it is therefore due to be set aside. *Fla. Power & Light Co.*, 650 F.2d at 589; 5 U.S.C. § 706(2).

C. Texas's SIP revision meets all federal requirements

If EPA had judged the Standard Permit for PCPs by the requirements of the Clean Air Act, EPA necessarily would have approved it because it is fully consistent with and complies in all respects with the Clean Air Act. But instead of focusing on the requirements that make Standard Permits "approvable" under the Clean Air Act (as EPA articulated in 2003, 68 Fed. Reg. 64,543, 64,546–47 (Nov. 14, 2003)), EPA sought to impose new requirements found nowhere in the Clean Air Act (or in the Texas regulations, for that matter) to justify its disapproval of the Standard Permit for PCPs. EPA asserts that "an individual Standard Permit *must* be limited to new or existing *similar sources*." 75 Fed. Reg. at 56,444 (emphasis

added). And it further concludes that the Standard Permit for PCPs is not approvable because "it applies to numerous types of pollution control projects" and "does not lend itself to standardized, enforceable, replicable permit conditions." *Id.*

The Clean Air Act contains no "similar source" or "replicability" requirement, and EPA is without authority to unilaterally incorporate such requirements into the Standard Permit for PCPs and the Texas SIP. EPA does not cite any statute or regulation that provides the legal basis for this finding. Moreover, the Standard Permit for PCPs is, in fact, limited to a single defined category (pollution control projects)—a category that EPA does not dispute is "defined" in the Texas rules in a "reasonable and practical" way. *Id*. at 56,446. Furthermore, under the plain text of the rules, this reasonable and practical category of activities is subject to standardized requirements that are enforceable by TCEQ, EPA, and aggrieved members of the public.

1. The Standard Permit for PCPs cannot violate the NAAQS

The proper initial inquiry under section 110 is whether the proposed SIP revision would violate the NAAQS. Under section 110(*l*)—entitled "Plan revisions"—EPA is to approve a SIP revision unless it determines that "the revision *would* interfere with [1] any applicable requirement concerning attainment

and reasonable further progress [toward attainment] . . . or [2] any other applicable requirement[.]" 42 U.S.C. § 7410(*l*) (emphasis added).

The Standard Permit for PCPs meets this requirement and is fully protective of the NAAQS. The rule promulgated by TCEQ expressly prohibits authorization of PCPs that even have the potential to cause a violation of the NAAQS. 30 Tex. Admin. Code § 116.617(a)(3)(B). As TCEQ explained in its 2006 final rule adopting the current version of Texas's Standard Permit for PCPs, "New subsection [116.617](a)(3)(B) states that any collateral emission increase associated with the state pollution control project standard permit *must not cause or contribute to any exceedance of an NAAQS or cause adverse health effects*." 31 Tex. Reg. at 522 (emphasis added). Given TCEQ's conservative approach in drafting the rule, it is textually impossible for EPA to justify its disapproval using the section 110(*l*) standard, under which EPA may disapprove a revision only if it "would" cause a violation of the NAAQS. Here, in order to be authorized by the Standard Permit for PCPs, a PCP *must not even have the potential to cause* a violation of the NAAQS. *Id.*

2. The Texas Standard Permit for PCPs is, in fact, limited to a reasonable and practical category

EPA is also wrong to suggest that Texas's Standard Permit for PCPs is somehow unbounded and not "standard." The Standard Permit for PCPs is limited in scope to a reasonable and practical category of activities.

a. The Standard Permit for PCPs is limited to Minor NSR only

The most significant and unalterable limitation on the scope and application of the Standard Permit for PCPs is that it applies only to Minor NSR activities. 30 Tex. Reg. at 6205 ("Any project which constitutes a new major source or major modification under the new source review requirements of the FCAA . . . is subject to the requirements of § 116.110 . . . rather than this subchapter."). *See also* 30 Tex. Admin. Code § 116.617(b)(1)(C) (incorporating § 116.610(b)). This limits and circumscribes *all* projects that can be covered by the Standard Permit for PCPs. EPA has identified this "Minor" limitation as the key factor in approving other States' SIP revisions related to PCPs. For example, on February 9, 2010, EPA approved a PCP *exemption* into Georgia's SIP. *See* 75 Fed. Reg. 6309 (Feb. 9, 2010). The Georgia SIP revision exempts PCPs from the requirement to obtain a construction permit, so long as the project is a "Minor" one. In approving this revision, EPA stated:

> This rule applies to minor sources only, and limits any emissions increases from the pollution control project to below the major source

> threshold for all pollutants. A project subject to major new source review permitting does not qualify for this exemption. *EPA is approving the revised permit exemptions, as emissions may not exceed the limits set for major sources, and is consistent with Section 110 of the CAA.*

75 Fed. Reg. at 6312 (emphasis added). The same, of course, is true for Texas's Standard Permit for PCPs.

EPA has provided no rational explanation why Texas's similarly limited Standard Permit for PCPs does not also meet the requirements of section 110. The Georgia rule that EPA approved is not limited to any particular "category of similar sources" and involves a wide range of PCPs. *See* Ga. Comp. R. & Regs. 391-3-1-.01(qqqq). EPA's disparate treatment of the Texas submission without any explanation or rationale is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (internal quotation omitted) ("[I]t is the agency's responsibility . . . to explain its decision. . . . [A]n agency changing its course must supply a reasoned analysis."); *Acadian Gas Pipeline Sys. v. FERC,* 878 F.2d 865, 870 (5th Cir. 1989) (internal quotation omitted) ("Our holding that the Commission acted arbitrarily and capriciously . . . is based primarily on our conclusion that the Commission has, without a sufficiently articulated justification, impermissibly deviated from past practice. . . . [A]n agency must provide a reasoned explanation for any failure to adhere to its own precedents.").

b. EPA does not contest that the Standard Permit for PCPs is limited to a "reasonable and practical" category

Moreover, contrary to EPA's suggestion, the Texas Standard Permit is limited to a defined and identifiable category—pollution control projects. A Standard Permit for PCPs may be used only for "pollution control projects . . . that reduce or maintain currently authorized emission rates for facilities authorized by a permit, standard permit, or permit by rule." 30 Tex. Admin. Code § 116.617(a)(1). Such projects are defined by the rules. *Id*. at § 116.617(a)(2). EPA itself does not dispute that this category is "defined" in a "reasonable and practical" manner. 75 Fed. Reg. at 56,446.

Texas's Standard Permit for PCPs properly allows for a range of PCP projects because the necessary safeguards for protection of public health and compliance with other applicable legal requirements are all included in the text of section 116.617. The Standard Permit for PCPs may not be used to authorize PCPs that involve the complete replacement of an existing production facility or reconstruction of a production facility. 30 Tex. Admin. Code § 116.617(a)(3)(A). Furthermore, TCEQ's Standard Permit for PCPs only authorizes projects that: (1) result in emissions reductions (30 Tex. Admin. Code § 116.617(a)(1), (2)); (2) involve limited minor collateral increases in other pollutants (*id.* § 116.617(b)(1)(C) (incorporating § 116.610(b))); (3) have no adverse health effects

and no potential to exceed the NAAQS (*id*. 116.617(a)(3)(B)); and (4) comply with the specific standard limitations incorporated from the approved Standard Permit Program (*id*. at § 116.617(a)(3), (b)). EPA has provided no reason that would require separate regulatory provisions for individual types of PCPs containing the exact same permit conditions. Standard Permits for PCPs are thus limited to a specific category—one with boundaries defined and constrained by the text of the regulations. EPA's generalized and unsupported assertions to the contrary should be rejected.

3. The Texas Standard Permit for PCPs has standardized, enforceable, and replicable permit conditions

Based on its (erroneous) conclusion that the Standard Permit for PCPs is not limited to a defined category, EPA further extrapolates that the Standard Permit for PCPs "does not lend itself to standardized, enforceable, replicable permit conditions," focusing specifically on "the air quality determination, the controls, and . . . the monitoring, recordkeeping, and reporting." 75 Fed. Reg. at 56,444. This is all unfounded and unsupported speculation on EPA's part and is completely unhinged from the plain text of the Standard Permit for PCPs. The Standard Permit for PCPs not only "lends itself" to standardized, enforceable, and replicable permit terms, the text of the rule expressly contains them.

Texas law requires that all facilities obtain a permit prior to construction or modification. *See* Tex. Health & Safety Code § 382.0518; 30 Tex. Admin. Code §

116.610. TCEQ has implemented this requirement through its Major and Minor NSR programs. 40 C.F.R. § 52.2270. Anyone failing to comply with these requirements is subject to enforcement under the Texas Clean Air Act. Construction and operation under a standard permit, like Texas's Standard Permit for PCPs, requires compliance with the applicable TCEQ rules. *See* 30 Tex. Admin. Code § 116.615(10). Applicable conditions are specifically included in the Standard Permit for PCPs.

As to air quality and controls, the Standard Permit for PCPs only authorizes projects "that reduce or maintain currently authorized emission rates"—*i.e.*, emissions of primary pollutants must go down or stay the same. 30 Tex. Admin. Code § 116.617(a)(1). If there are any collateral increases of other pollutants as a result of installing or operating the PCP, they must be below defined Major NSR thresholds, which are standard numeric limitations. *Id*. § 116.617(b)(1)(C) (incorporating § 116.610(b)). And a Standard Permit may not be used if it has even the potential to cause a violation of the NAAQS. *Id*. § 116.617(a)(3)(B). As TCEQ explained in its 2006 final rule adopting the current version of Texas's Standard Permit for PCPs, "[n]ew subsection [116.617](a)(3)(B) states that any collateral emission increase associated with the state pollution control project standard permit must not cause or contribute to any exceedance of an NAAQS or cause adverse health effects." 31 Tex. Reg. at 522.

The Standard Permit for PCPs also contains sufficient registration, reporting, and recordkeeping requirements to make the permit enforceable. EPA has failed to identify even a single provision of the Clean Air Act or its Minor NSR regulations that the Standard Permit fails to comply with in this regard. *See* 40 C.F.R. § 51.160 (setting forth requirements for enforceability). Indeed, most of the oversight and enforcement requirements of the Standard Permit for PCPs are incorporated wholesale from Texas's Standard Permit Program, which EPA has already approved and deemed adequate.

Among other things, section 116.617(b)(1) states that those using the Standard Permit for PCPs to authorize a project must meet the registration requirements of section 116.611. The registrant must: (1) document the basis of any emission estimates; (2) quantify all emissions increases or decreases; (3) include sufficient information as necessary to determine that the project is, in fact, a "Minor" source not subject to Major NSR permitting; (4) supply information that describes efforts to minimize collateral emissions; (5) supply a description of the project and related processes; and (6) provide a description of any equipment being installed. 30 Tex. Admin. Code § 116.611(a).

And section 116.617 contains additional registration requirements specific to PCPs. For instance, all registrations to use the Standard Permit for PCPs must include: (1) a description of process units affected by the project; (2) a description

of the project; (3) identification of existing permits or registrations affected by the project; (4) quantification and basis of emissions increases and/or decreases associated with the project, including identification of affected existing or proposed emission points, all air contaminants, and hourly and annual emissions rates; (5) a description of proposed monitoring and recordkeeping that will demonstrate that the project decreases or maintains emission rates as represented; and (6) a description of how the standard permit will be administratively incorporated into any existing permit(s). *Id.* § 116.617(d)(2). These registration requirements become enforceable parts of the permit.[38]

Upon installation of a PCP, the owner or operator must comply with the operating requirements of section 116.617(e) and keep records to prove such compliance. *Id.* § 116.617(e). Any facility covered by the Standard Permit for PCPs "may not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations." *Id.* § 116.615(9).

[38] Section 116.617 incorporates the general conditions of the standard permit program found under section 116.615. *See id.* § 116.617(b)(1)(F). Section 116.615(2) specifies that "[a]ll representations with regard to construction plans, operating procedures, and maximum emission rates in any registration for a standard permit become conditions upon which the facility or changes thereto, must be constructed and operated." *Id.* § 116.615(2). It is expressly unlawful for any permittee to "vary from such representations if the change will affect that person's right to claim a standard permit under this section," unless authorized by TCEQ. *Id.*

There are also strict reporting and recordkeeping requirements. TCEQ must be notified of completion of construction within fifteen working days. *Id.* § 116.615(4). TCEQ must also be notified prior to commencement of operations. *Id.* § 116.615(5). The permit holder must maintain detailed records including "data sufficient to demonstrate applicability of and compliance with the standard permit." *Id.* § 116.615(8). The permittee must also notify TCEQ of all emission events and scheduled maintenance in accordance with TCEQ regulations. *Id.* § 116.615(9). And permittees must consent to TCEQ inspections "to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the standard permit." *Id.* § 116.615(10).

EPA's Final Rule does not take issue with any of these specific enforcement and oversight regulations, nor could it. Most of these requirements are incorporated wholesale from Texas's Standard Permit Program already approved by EPA. There is no basis for EPA to now argue that Texas's Standard Permit Program as applied to *emission-reducing* PCPs does not contain adequate enforcement mechanisms. EPA's conclusory allegation that the Director's "discretion" is overly broad simply does not stand up to the facts. Without any facts or record evidence to the contrary, EPA's review of Texas's SIP revision can and should "assume that the [TCEQ] would enforce its regulations." *City of Seabrook, Texas v. EPA*, 659 F.2d 1349, 1367 (5th Cir. 1981) (rejecting challenge

to EPA approval of Texas SIP based on allegation of lack of "enforceable measures" and explaining that "EPA could assume [the] state would implement [its] plan despite absence of detail [and] [i]f the [TCEQ] fails to do so, then either the EPA or a concerned citizen may bring an enforcement action").

4. Federal law does not require a Standard Permit Program to have "similar source" or "replicability" rules

EPA's repeated invocation of so-called "similar source" and "replicability" requirements is misplaced. In fact, there are no such requirements. EPA cites no applicable provision of federal law in support of its conclusion that a standard permit must be limited to "similar sources" based on "replicable" permit terms.

There is no such requirement in Texas's Standard Permit Program either, contrary to EPA's claim.[39] These limitations simply do not appear in the Texas Standard Permit Program, which EPA approved in 2003 as fully meeting the requirements of the Clean Air Act. 68 Fed. Reg. at 64,546 (setting out reasons that "Texas' Standard Permits are approvable as meeting the requirements of [the Clean Air Act]"). And EPA points to no provision of the Standard Permit Program that contains such requirements.

[39] In fact, Texas statutes expressly permit standard permits for "similar facilities"—*i.e.*, pollution control projects. *See* Tex. Health & Safety Code § 382.051(b)(3) ("the commission may issue . . . a standard permit for similar facilities . . . ."); *id.* § 382.05195(a) ("The commission may issue a standard permit for new or existing similar facilities . . . .").

Moreover, EPA has not adopted any rules that provide detailed requirements for standard permits or any rules prohibiting them, much less any "similar source" or "replicability" requirements for standard permits. EPA's Minor NSR regulations span less than two pages of the Federal Code of Regulations. *See* 40 C.F.R. §§ 51.160–51.164. EPA describes its implementing regulations for Minor NSR as being "stated in very general terms." 74 Fed. Reg. at 51,421. These implementing regulations basically require minimal oversight by the implementing State agency. 40 C.F.R. §§ 51.160–51.164. Nowhere in these regulations is there any discussion of "similar sources" or "replicability" as requirements for Minor NSR programs or standard permits.[40]

[40] The only "authority" for a "similar source" requirement cited by EPA is found in a cryptic footnote in EPA's proposed rule on Texas's Standard Permit for PCPs in which EPA references a handful of internal EPA guidance documents from the 1990s regarding Title V permitting (an entirely different part of the Clean Air Act than is at issue here). *See* 74 Fed. Reg. at 48,476 n.11. Resort to administrative guidance, however, is not necessary or appropriate here because the statute and regulations are clear and do not impose a similar source rule for standard permits. Moreover, these informal guidance documents do not have the force of law, *see United States v. Mead*, 533 U.S. 218 (2001), they do not provide a valid legal basis for EPA's Final Rule, and they are not legally binding on States. *See Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 805 (5th Cir. 2010). For EPA to adopt binding requirements, it must do so through notice and comment rulemaking. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021–23 (D.C. Cir. 2000). These guidance documents are also not relevant because they do not cite or interpret the Minor NSR statutory requirements or regulations at issue in this case, nor were they intended to affect State Minor NSR programs. The one document that does cite to the relevant statutory and regulatory provisions at issue here (section 110 and 40 C.F.R. § 51.160) is an unsigned document allegedly from EPA Region 7 (and Texas is not in EPA Region 7). Index #12, App. B, at

By creating out of whole cloth "similar source" and "replicability" rules, EPA is relying on factors that Congress never intended EPA to consider. Its disapproval is therefore arbitrary and capricious and should be vacated. *See La. Envtl. Action Network v. EPA*, 382 F.3d 575, 582 (5th Cir. 2004) (quoting *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998)) ("Our court will find an agency action arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider . . . .'").

II. EPA's Determination That the Texas Standard Permit for PCPs Is Inconsistent with the Texas Standard Permit Program Is Wrong

EPA's justification for rejecting the Texas Standard Permit for PCPs is that it is inconsistent with Texas's Minor NSR Standard Permit Program, as interpreted by EPA. Specifically, in the Final Rule, EPA explains:

> EPA is disapproving the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision because the PCP Standard Permit, as adopted and submitted by Texas to EPA for approval into the Texas Minor NSR SIP, *does not meet the requirements of the Texas Minor NSR Standard Permits Program*.

75 Fed. Reg. at 56,447 (emphasis added).

EPA_AR00001785–87. That document, however, does not address standard permits and does not attempt to create a "similar source" rule for standard permit programs. *Id*. Lastly, the *Federal Register* notices cited in footnote 11 of EPA's proposed rule do not concern standard permits for PCPs and do not involve disapprovals based on any failure to meet applicable legal requirements for Minor NSR SIPs. 74 Fed. Reg. at 48,476 n.11.

In addition to applying the wrong legal standard, this determination is demonstrably false and contrary to the plain language of the regulations. The Standard Permit for PCPs meets the requirements of the Texas Minor NSR Standard Permit Program. This is demonstrated by both the plain text of the regulations and EPA's own review of the regulations in 2003.

First, a review of the plain language of the regulations shows that the Standard Permit for PCPs is textually integrated and consistent with the overall Standard Permit Program regulations. *Compare, e.g.*, 30 Tex. Admin. Code § 116.617(b)(1) (incorporating registration and other requirements in the program regulations into the Standard Permit for PCPs) *and* § 116.610 (recognizing that limitations may "otherwise [be] specified by a particular standard permit"). This is how TCEQ intended it. In 1994 and again in 2006, TCEQ applied its general Standard Permit Program regulations to a specific subset of activities—pollution control projects. TCEQ's 2006 approval of a new section 116.617 emphasized the connection between the Standard Permit for PCPs and the previously-approved Standard Permit Program regulations:

> New subsection [116.617](b) is organized into paragraphs (1) – (5) and includes the general requirements dispersed throughout current §116.617. Subsection (b)(1) requires compliance with the specific conditions of §116.604, Duration and Renewal of Registrations to Use Standard Permits; §116.605, Standard Permit Amendment and Revocation; §116.610, Applicability; §116.611, Registration to Use a Standard Permit; §116.614, Standard Permit Fees; and §116.615, General Conditions. *While these requirements are not new, they are*

> *reorganized to emphasize and remind applicants of these conditions . . . .*

31 Tex. Reg. at 522 (emphasis added). Instead of focusing on these *actual* elements of the Texas Standard Permit Program, however, EPA posits new "requirements" for standard permits (like its new "similar source" rule) that are nowhere to be found in TCEQ's regulations or anywhere else. EPA's reading of Texas's regulations is thus contrary to their plain language and must be rejected. *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000); *see also Rodriguez-Barajas v. Holder*, 624 F.3d 678, 679–80 (5th Cir. 2010); *Hardy Wilson Mem'l Hosp. v. Sebelius*, 616 F.3d 449, 458 (5th Cir. 2010).[41]

Second, when EPA itself approved the Standard Permit Program in 2003, it specifically identified the essential elements of the program that made it approvable. 68 Fed. Reg. 64,543, 64,546–47 (Nov. 14, 2003). The Standard Permit for PCPs meets each of these requirements. In approving the Standard Permit Program regulations, EPA identified four requirements that a "facility must

[41] Further, given their integrated nature, for EPA to approve the program regulations but reject the standard permit that incorporates requirements from those regulations is the epitome of arbitrary and capricious action. By arbitrarily dividing the Standard Permit for PCPs from the general program regulations, EPA has unlawfully turned both into something TCEQ did not intend. *See Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1035–37 (7th Cir. 1984) (holding that EPA cannot dissect a SIP submission, approving some parts but not others, to "convert[] the proposal into something completely unpalatable to the state" and "overrid[e] state policy").

meet to qualify for a Standard Permit" and concluded that these requirements make "Texas' Standard Permits [] approvable." 68 Fed. Reg. at 64,546. As Table 1 below illustrates, Texas's Standard Permit for PCPs incorporates each of these elements from the Standard Permit Program regulations.

TABLE 1: The Standard Permit for PCPs Includes all the Necessary Requirements for Approval as Identified by EPA

Requirements making "Texas'[s] Standard Permits [] approvable" according to EPA	**EPA's Rationale in 2003**	**Citation in Standard Permit Program (Title 30 Tex. Admin. Code)**	**Citation in Standard Permit for PCPs (Title 30 Tex. Admin. Code)**
Only available to "Minor" new sources or modifications, not "Major" ones	"This meets 40 CFR 51.165 (Permit requirements) and 51.166 [NSR]." 68 Fed. Reg. at 64,546.	§ 116.610(b)	§ 116.617(b)(1)(C) (incorporating § 116.610(b))
Must meet all applicable NSPS and NESHAP	"[T]his satisfies the requirements of 40 CFR 51.160(d) . . . ." *Id*.	§ 116.610(a)(3)–(6)	§ 116.617(b)(1)(C) (incorporating § 116.610(a)(3)–(6))
Includes all registration and recordkeeping requirements to support issuance and enforcement	"This includes registration of emissions which limit a source's PTE [potential to emit] and Recordkeeping[.] These provisions satisfy the requirements in 40 CFR 51.163 . . . ." *Id*. at 64,546–47.	§ 116.611 (registration) & § 116.615 (general conditions including notice, registration, and recordkeeping)	§ 116.617(b)(1)(D) & (F) (incorporating § 116.611 & § 116.615)
Adopted through public notice and comment	"This meets the requirements of 40 C.F.R. 51.161." *Id*. at 64,547.	§ 116.603	30 Tex. Reg. 6183 (Sept. 30, 2005) (public notice)

Thus, the Standard Permit for PCPs meets all the very same requirements that previously caused EPA to conclude that "Texas' Standard Permits are approvable." 68 Fed. Reg. at 64,546. Had EPA properly judged the Standard Permit for PCPs against these same federal requirements, it would have necessarily found it fully approvable under the Clean Air Act.

TCEQ shaped the Standard Permit for PCPs to conform to the Clean Air Act by incorporating the general requirements of Texas's Standard Permit Program, which EPA has already approved, and adding further specifications and clarifications. *See, e.g.*, 31 Tex. Reg. at 523 (explaining that the Standard Permit for PCPs incorporates requirements in the general program regulations but "expands, clarifies, and focuses those requirements specifically for the state pollution control projects standard permit"). As an individual application of the Standard Permit Program, the Standard Permit for PCPs is naturally tailored to its specific purpose and the category of activities it authorizes and thus is different in some respects from the overall Standard Permit Program regulations. But the differences are not material and do not contravene federal requirements. For example, the Standard Permit for PCPs contains additional registration and record-keeping requirements. 30 Tex. Admin. Code § 116.617(d) & (e). EPA does not have a problem with these provisions and, in fact, has found that they meet federal requirements. Index #2, App. A, at EPA_AR00000112 (noting that additional

registration provisions in section 116.617(d) "[m]eet[] 40 C.F.R. 51.160(c)"). The Standard Permit Program regulations themselves, previously approved by EPA, also expressly contemplate that there will be differences as between particular standard permits. For example, section 116.610(a)(1) contains limitations that apply to a Standard Permit "unless otherwise specified by a particular standard permit." 30 Tex. Admin. Code § 116.610(a)(1). The Standard Permit for PCPs reflects this by providing that the limitations in section 116.610(a)(1) "do not apply to this standard permit." 30 Tex. Admin. Code § 116.617(b)(3). EPA specifically found that differences between the overall program regulations and the provision creating the Standard Permit for PCPs, such as this one, are acceptable and "[m]eet[] Federal requirements." Index #2, App. A, at EPA_AR00000111 (analysis of section 116.617(b)(3)).

Thus, EPA has not and cannot point to any aspect of the Standard Permit for PCPs that deviates materially from the essential requirements for an approvable Standard Permit that EPA itself articulated in 2003. For this reason, EPA's disapproval is arbitrary and capricious and must be vacated. *See La. Envtl. Action Network*, 382 F.3d at 582 (agency action is arbitrary and capricious if "the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."); *BCCA Appeal Group*, 355 F.3d at

824 (internal quotation omitted) (agency must "examine[] the relevant data and articulate[] a satisfactory explanation for its action including a rational connection between the facts found and the choice made").

III. The Court Should Compel EPA to Approve Texas's SIP Revision with an Effective Date Consistent with EPA's Statutory Duty to Act

For the reasons stated above, the Court should set aside and vacate EPA's disapproval of Texas's Standard Permit for PCPs. *See* 5 U.S.C. § 706(2) ("The reviewing court shall—. . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"). It is clear that EPA's decision is contrary to section 110, 42 U.S.C. § 7410, and not supported by the current record and rationale offered in the Final Rule.

Luminant also requests that the Court compel EPA to approve section 116.617 and related provisions. This statutory relief is authorized by the APA. 5 U.S.C. § 706(1) ("The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed[.]"). Compelling EPA to approve is warranted in this case because, as discussed above, when applying the correct statutory criteria, EPA has no basis to disapprove. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis added) (holding that 5 U.S.C. § 706(1) applies where "an agency failed to take a *discrete* agency action that it is *required to take*"). Here, because the statutory criteria for approval are met, EPA must

approve the revision. 42 U.S.C. § 7410(k); *see also BCCA Appeal Group*, 355 F.3d at 826; *Fla. Power & Light Co.*, 650 F.2d at 587; *Ohio Envtl. Council v. EPA*, 593 F.2d 24, 29 (6th Cir. 1979).

Further, Luminant requests that the Court order EPA to issue its approval of section 116.617 with an appropriate effective date. Under the statute, EPA has at most eighteen (18) months in which to approve or disapprove a State's SIP revision. *See* 42 U.S.C. § 7410(k). TCEQ adopted its first two Standard Permits for PCPs on April 22, 1994, and submitted them to EPA for review one week later on April 29, 1994. TCEQ adopted a revised Standard Permit for PCPs in 2006, *see* 31 Tex. Reg. 515 (Jan. 27, 2006), and submitted it to EPA on February 1, 2006. 75 Fed. Reg. at 56,444.

Thus, under the deadlines in the Clean Air Act, EPA was required to take action on the most recent version of section 116.617 by August 1, 2007, at the latest. EPA, however, failed to take action until 2010. While EPA sat on its hands, scores of pollution control projects were authorized and operated in the State in reliance on the Standard Permit for PCPs. The Court should not ignore EPA's substantial delay in acting.[42] EPA allowed the statutory deadline to come and go.

[42] In some cases, courts have excused agency delay where the record showed that meeting the statutory deadline was impossible. *See Ala. Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979). But the agency bears a "heavy burden" to demonstrate impossibility, and the court must "scrutinize such claims carefully since officials may seize on a remedy made available for extreme illness and

The Standard Permit for PCPs should have been approved years ago, and the Court may properly take that into account in fashioning a remedy. *See Fla. Power & Light Co.*, 650 F.2d at 590 (internal quotation omitted) ("In hearing a petition for review, a court of appeals may exercise equitable powers in its choice of a remedy, as long as the court remains within the bounds of statute and does not intrude into the administrative province."); *Ethyl Corp. v. Browner*, 67 F.3d 941, 945 (D.C. Cir. 1995) (using *nunc pro tunc* order to require retroactive effectiveness of Clean Air Act registration that was unlawfully denied by EPA—"a complete remedy for [Petitioner] requires that the registration be treated as taking effect on approximately the date it would have occurred if EPA had acted lawfully—November 30, 1993."); *see also* 65 Fed. Reg. 45,182, 45,196 (July 20, 2000) (emphasis added) (EPA final rule explaining that "[t]he CAA does not specifically provide for retroactive application of regulations under title I [however] *EPA might have authority to apply the reinstatement retroactively if a court determined that EPA's action in revoking the standard was illegal*[.]").

Here, providing for retroactive effectiveness of EPA's approval is consistent with the Clean Air Act's statutory deadlines in 42 U.S.C. § 7410(k) and the public

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promote it into the daily bread of convenience." *Id.* EPA has not met that heavy burden here.

notice provisions of the APA.[43] The APA allows EPA to issue final rules with retroactive effect. 5 U.S.C. § 553(d) (authorizing issuance of substantive rules prior to final publication in the *Federal Register* "which grant[] or recognize[] an exemption or relieve[] a restriction," or for "good cause"); *United States v. Dean*, 604 F.3d 1275, 1278–79 (11th Cir. 2010) (upholding retroactive application of final rule pursuant to 5 U.S.C. § 553(d)(3)); *cf. U.S. Steel Corp. v. EPA*, 595 F.2d 207, 213–14 (5th Cir. 1979) (stating that related provision in 5 U.S.C. § 553(b)(B) is "an important safety valve to be used where delay would do real harm" and although "the mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for a § 553(b)(B) exception[,] . . . *[t]he deadline is a factor to be considered*") (emphasis added). EPA frequently invokes the exceptions in 5 U.S.C. § 553(d) when reviewing and acting on State SIP revisions. *See, e.g.*, 76 Fed. Reg. 11,082, 11,083 (Mar. 1, 2011) (invoking "good cause" exception in 5 U.S.C. § 553(d) in action on SIP following vacatur and remand from court of appeals); 76 Fed. Reg. 12,587, 12,594 (Mar. 8, 2011) (applying "good cause" exception in 5 U.S.C. § 553(d) in action

[43] Moreover, the concerns ordinarily raised by the retroactive application of rules are not at issue here. The presumption against retroactivity is based on the potential infringement of existing due process rights. *See E. Enters. v. Apfel*, 524 U.S. 498, 533 (1998) (internal quotation omitted) ("[Retroactive legislation] presents problems of unfairness . . . because it can deprive [parties] of legitimate expectations and upset settled transactions."). Here, the due process interests of the regulated members of the public run in favor of retroactivity.

approving SIP revision). Here, to accommodate the "reasonable reliance" that scores of businesses placed on the Standard Permit for PCPs and EPA's prior approval of the Standard Permit Program regulations, the Court should instruct EPA to issue its approval with an effective date no later than August 1, 2007 (*i.e.*, eighteen months after TCEQ last submitted the Standard Permit for PCPs to EPA for approval). *Cf. Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P.*, 627 F.3d 134, 141–42 (5th Cir. 2010) (recognizing that businesses should not be considered in violation of Clean Air Act requirements when their actions were "undertaken in reasonable reliance on now-vacated rules").

CONCLUSION

For all these reasons, the Court should set aside and hold unlawful EPA's disapproval of Texas's Standard Permit for PCPs and further compel EPA to approve Texas's SIP revision with an effective date of no later than August 1, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 6th day of April, 2011. Any other counsel of record will be served by first class U.S. mail on this same day.

/s/ P. Stephen Gidiere III
Counsel for Luminant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,918 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

April 6, 2011

/s/ P. Stephen Gidiere III
Counsel for Luminant

ADDENDUM OF STATUTES, RULES, AND REGULATIONS

For the Court's ease of reference, this Addendum reproduces the following regulatory materials:

- Federal Register notices
  - 68 Fed. Reg. 64,543 (Nov. 14, 2003)
  - 74 Fed. Reg. 48,467 (Sept. 23, 2009)
  - 75 Fed. Reg. 56,424 (Sept. 15, 2010)
- Texas Register notices
  - 18 Tex. Reg. 8145 (Nov. 9, 1993)
  - 19 Tex. Reg. 3055 (Apr. 22, 1994)
  - 30 Tex. Reg. 6183 (Sept. 30, 2005)
  - 31 Tex. Reg. 515 (Jan. 27, 2006)
- Federal regulations
  - 40 C.F.R. §§ 51.160–51.164
- Texas Administrative Code Provisions (tit. 30, pt. 1, ch. 116, subch. F: selected sections)
  - 30 Tex. Admin. Code § 116.601
  - 30 Tex. Admin. Code § 116.602
  - 30 Tex. Admin. Code § 116.603
  - 30 Tex. Admin. Code § 116.604
  - 30 Tex. Admin. Code § 116.605
  - 30 Tex. Admin. Code § 116.610
  - 30 Tex. Admin. Code § 116.611
  - 30 Tex. Admin. Code § 116.614
  - 30 Tex. Admin. Code § 116.615
  - 30 Tex. Admin. Code § 116.617

EPA-APPROVED REGULATIONS IN THE DELAWARE SIP

State citation	Title/subject	State effective date	EPA approval date	Explanation
* * *	* * *	* * *	* * *	*
Regulation 24		Control of Volatile Organic Compound Emissions		
* * *	* * *	* * *	* * *	*
Section 2	Definitions	January 11, 2002	November 14, 2003, [Federal Register page citation].	
* * *	* * *	* * *	* * *	*
Section 26	Gasoline Dispensing Facility Stage I Vapor Recovery.	January 11, 2002	November 14, 2003, [Federal Register page citation].	
* * *	* * *	* * *	* * *	*
Section 36	Stage II Vapor Recovery	January 11, 2002	November 14, 2003, [Federal Register page citation].	
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–154–1–7590; FRL–7585–8]

Approval and Promulgation of Implementation Plans; Texas; Revisions to Regulations for Permits by Rule, Control of Air Pollution by Permits for New Construction or Modification, and Federal Operating Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is taking final action to approve revisions of the Texas State Implementation Plan (SIP). The plan revisions include changes that Texas adopted to address deficiencies that were identified on January 7, 2002, and other changes adopted by Texas to regulations that include provisions for Permits by Rule (PBR) and Standard Permits. This includes revisions that the Texas Commission on Environmental Quality (TCEQ) submitted to EPA on April 29, 1994; August 17, 1994; September 20, 1995; April 19, 1996; May 21, 1997; July 22, 1998; October 25, 1999; January 3, 2000; September 11, 2000; July 25, 2001; and December 9, 2002. This action is being taken under section 110 of the Federal Clean Air Act (the Act, or CAA).

EFFECTIVE DATE: This rule is effective on December 15, 2003.

ADDRESSES: Copies of documents relevant to this action are available for public inspection during normal business hours at the following locations. Anyone wanting to examine these documents should schedule an appointment with the appropriate office, if possible, two working days in advance of the visit.

Environmental Protection Agency, Region 6, Air Permits Section (6PD–R), 1445 Ross Avenue, Dallas, Texas 75202–2733.

Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Stanley M. Spruiell of the Air Permits Section at (214) 665–7212, or *spruiell.stanley@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' or ''our'' means EPA.

Table of Contents

I. What Is Being Addressed in This Document?

In today's action we are approving into the Texas SIP revisions to Chapter 106—Permits by Rule, Chapter 116—Control of Air Pollution by Permits for New Construction or Modification, and Chapter 122—Federal Operating Permits. Some of these revisions were made to correct certain deficiencies identified by EPA in a Notice of Deficiency (NOD) for Texas' Title V Operating Permit Program. The EPA issued the NOD on January 7, 2002 (67 FR 732), under its authority at 40 CFR 70.10(b). The NOD was based upon EPA's finding that several State requirements for the Title V operating permits program did not meet the minimum Federal requirements of 40 CFR part 70 and the Act. Texas adopted rule revisions to address the potential to emit (PTE) requirements identified in the January 7, 2002, NOD. Texas submitted parts of these and other rule changes as revisions to its SIP on December 9, 2002, including revisions to section 106.6—Registration of Emissions, section 116.115—General and Special Conditions, section 116.611—Registration to Use a Standard Permit, and section 122.122—Potential to Emit.

The December 9, 2002, submittal also includes revisions to Texas' Title V Operating Permits Program. We will address these and other regulations which revise Texas' Operating Permits Program, in a separate **Federal Register** action.

The December 9, 2002, SIP submittal includes revisions to Texas' regulations for PBR and Texas' regulations for Standard Permits. The EPA is also approving earlier SIP submittals which include the adoption of Texas' programs for PBR and Standard Permits under Chapter 106—Permits by Rule; Chapter 116, Subchapter F—Standard Permits,

section 116.14—Standard Permit Definitions in Chapter 116, Subchapter A—Definitions, and Sections 116.110 and 116.116 in Subchapter B—New Source Review Permits. Furthermore, the approval of the submitted provisions of Chapter 106 would replace the current SIP-approved section 116.6—Exemptions. Accordingly, we are removing section 116.6 from the SIP.

On July 9, 2003 (68 FR 40865), we proposed to approve into the Texas SIP the revisions to Chapter 106, Chapter 116, and Chapter 122, as described above. In response to our proposal, we received no comments.

In today's action, consistent with the following discussion, we are approving these revisions to Chapters 106, 116, and 122, as part of the Texas SIP.

II. Final Action Concerning the Notice of Deficiency Issues

A. What Was the PTE Registration Deficiency Which Required a SIP Revision?

Many stationary source requirements of the Act apply only to major sources, whose emissions of air pollutants exceed a threshold emissions level specified in the Act. However, such sources may legally avoid program requirements by taking Federally-enforceable permit conditions which limit their PTE to a level below the applicable major source threshold. Those permit conditions, if violated, are subject to enforcement by EPA, the State or local agency, or by citizens. Federal enforceability ensures that the conditions placed on emissions to limit a source's PTE are enforceable as both a legal and practical matter.

Texas has adopted regulations which enable a source to register and certify that its PTE is below the applicable major source threshold. These certified registrations contain a description of how the source will limit its PTE below the major source threshold and include appropriate operation and production limitations, appropriate monitoring and recordkeeping which demonstrate compliance with the operation and production limits which the source is certifying to meet.

In the NOD, we informed Texas that section 122.122 was not practicably enforceable because the regulation allowed a facility to keep all documentation of its PTE limitation on site without providing any notification to the State or EPA. Therefore, neither the public, TCEQ, nor EPA could determine the PTE limitation without going to the site. A facility could change its PTE limit several times without the public or TCEQ knowing about the change. Therefore, these limitations were not practically enforceable, and TCEQ has revised this regulation to make it practically enforceable. The NOD required that the revised regulation be approved into the SIP before it and the registrations are Federally enforceable. *See* 67 FR 735.

B. How Did Texas Address This Deficiency?

To address this deficiency, TCEQ amended section 122.122 to require certified registrations of emissions establishing a Federally-enforceable emission limit to be submitted to the Executive Director of TCEQ, the appropriate regional office, and all local air pollution control agencies having jurisdiction over the site. In addition, the Commission submitted the amended section 122.122 to EPA as a revision to the Texas SIP. Section 122.122 states that all representations with regard to emissions, production or operational limits, monitoring, and reporting shall become conditions upon which the stationary source shall operate and shall include documentation of the basis of emission rates (section 122.122(b)–(c)).

C. Do the Changes Correct the PTE Registration Deficiency?

The TCEQ has revised Chapter 122 to require registrations to be submitted to the Executive Director, to the appropriate Commission regional office, and all local air pollution control agencies, and a copy to be maintained on-site at the facility. The rule therefore satisfies the legal requirement for practical enforceability which was cited in the NOD. Accordingly, we are approving section 122.122 as a revision to the Texas SIP and to find that the revision to section 122.122 satisfies Texas' requirement to correct the PTE registration deficiency identified in the January 7, 2002, NOD.

III. Final Action Concerning Chapter 106—Permits by Rule

A. What Are We Approving?

We are approving provisions of Subchapter A (General Requirements) under Chapter 106 which Texas submitted July 25, 2002, and revisions submitted December 9, 2002. This includes the following Sections: section 106.1—Purpose, section 106.2—Applicability, section 106.4—Requirements for Permitting by Rule, section 106.5—Public Notice, section 106.6—Registration of Emissions, section 106.8—Recordkeeping, and section 106.13—References to Standard Exemptions and Exemptions from Permitting.

B. What Is the History of PBR and Chapter 106?

Prior to 1993, Standard Exemptions were addressed in section 116.6 which we approved August 13, 1982 (47 FR 35193). In a SIP submittal dated August 31, 1993, Texas recodified the provisions for Standard Exemptions into Subchapter C of Chapter 116. In 1996, Texas subsequently recodified its provisions for Standard Exemptions into Chapter 106. In 2000, Texas redesignated the Standard Exemptions to PBR.

On July 25, 2002, Texas submitted Subchapter A which includes Sections 106.1, 106.2, 106.4, 106.5, 106.6, 106.8, and 106.13. On December 9, 2002, Texas submitted revisions to section 106.6 which address procedures by which registrations of emissions effectively limit a source's PTE. Because these Sections replace Subchapter C of section 116, as submitted August 31, 1993, there is no need for EPA to act on Subchapter C of section 116.

C. What Is a PBR?

A PBR is a permit which is adopted under Chapter 106. Chapter 106 provides an alternative process for approving the construction of new and modified facilities or changes within facilities which TCEQ has determined will not make a significant contribution of air contaminants to the atmosphere. These provisions provide a streamlined mechanism for approving the construction of certain small sources which would otherwise be required to apply for and receive a permit before commencing construction or modification.

A PBR is available only to sources which belong in categories for which TCEQ has adopted a PBR in Chapter 106. A PBR is available only to a facility that is authorized to emit no more than 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_X); or 25 tpy of volatile organic compounds (VOC), sulfur dioxide (SO_2), or inhalable particulate matter (PM_{10}); or 25 tpy of any other air contaminant, except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen (section 106.4(a)(1)). A PBR is not available to a facility or group of facilities which undergo a change which constitutes a new major source or major modification under Title I of the Act, part C (Prevention of Significant Deterioration of Air Quality) or part D (Nonattainment Review) (section 106.(a)(2)–(3)). Such major source or major modification must comply with the applicable permitting requirements under Chapter 116, Subchapter B,

which meet the new source review requirements of Title I, part C or part D of the Act. A facility which qualifies for a PBR must also comply with all applicable provisions of section 111 of the Act (Standards of Performance for New Stationary Sources or New Source Performance Standards (NSPS)) and section 112 of the Act (National Emission Standards for Hazardous Air Pollutants (NESHAP)) (section 106.4(a)(6)). Furthermore, a facility which qualifies for a PBR must comply with all rules and regulations of TCEQ (section 106.4(c)).

D. Are Texas' PBR Approvable?

The PBR are approvable as meeting the requirements of 40 CFR part 51, subpart I—Review of New Sources and Modifications (subpart I).[1] Section 106.1 provides that only certain types of facilities or changes within facilities which do not make a significant contribution of air contaminants to the atmosphere are eligible for a PBR. This satisfies the requirements of 40 CFR 51.160(a) which provides that the SIP must include procedures that enable the permitting authority to determine whether the construction or modification will result in a violation of applicable portions of the control strategy or interfere with attainment or maintenance of a national ambient air quality standard.

Section 106.4 further provides additional requirements that a facility must meet to qualify for a PBR. Such requirements include:

- Limiting PBR only to facilities which are authorized to emit no more than 250 tpy of CO or NO_X; or 25 tpy of VOCs, SO_2, or inhalable PM_{10}; or 25 tpy of any other air contaminant, except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen. This meets 40 CFR 51.160(e), which provides that the SIP must identify the types and sizes of facilities which will be subject to review.
- Any facility or group of facilities which constitutes a new major source of major modification under part C or D of Title I of the Act must be permitted under regulations for Nonattainment Review or Prevention of Significant Deterioration of Air Quality. Such sources are not eligible for a PBR. This meets 40 CFR 51.165 (Permit requirements) and 51.166 (Prevention of significant deterioration of air quality).
- Sources qualifying for a PBR must meet all applicable requirements under section 111 of the Act (NSPS) and section 112 of the Act (NESHAP), and must comply with all rules of TCEQ. This satisfies the requirements of 40 CFR 51.160(d) which require that approval of any construction or modification must not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy.
- Subchapter A includes all the administrative requirements which support the issuance and enforcement of PBR. This includes registration of emissions which limit a source's PTE (section 106.6), and Recordkeeping, which requires each source subject to a PBR to maintain records sufficient to demonstrate compliance with all conditions of the applicable PBR (section 106.8). These provisions satisfy the requirements in 40 CFR 51.163, which require the plan to contain the administrative procedures that will be followed in making the determination under 40 CFR 51.160(a). It also meets the requirements of 40 CFR 51.211 which requires the owner or operator to maintain records and to periodically report to the State the nature and amounts of emissions and information necessary to determine whether a source is in compliance.
- All PBR must be adopted or revised through rulemaking to incorporate the PBR into the applicable Subchapters under Chapter 106. Such new or revised PBR must undergo public notice and a 30-day comment period, and TCEQ must address all comments received from the public before finalizing its action to issue or revise a PBR. This meets the requirements of 40 CFR 51.161, which requires the permitting authority to provide for opportunity for public comment on the State's analysis of the effect of construction or modification on ambient air quality.

The TSD contains further information on how Subchapter A of Chapter 106 meets the requirements of subpart I.

E. Why Are We Only Approving Subchapter A of Chapter 106?

Texas submitted Subchapter A because that subchapter contains the process by which TCEQ will issue or modify PBR. Subpart A contains the provisions which apply to all PBR and which ensure that individual PBR meet the requirements of subpart I. The individual PBR are adopted in Subchapters B through X, of Chapter 106.[2] In 1996, Texas codified its existing Standard Exemptions into Subchapters B through X and redesignated them to PBR in 2000. Because these existing Standard Exemptions were adopted under section 116.6, which is currently SIP-approved, they meet the requirements of subpart I. Furthermore, new and amended PBR are adopted in accordance with the general requirements in Subchapter A, which meet the applicable requirements of subpart I as discussed above. Accordingly, our approval of Subchapter A of Chapter 106 is sufficient to assure that the PBR meet the requirements in subpart I.

F. What Other Actions Are We Taking in Relation to PBR?

The provisions for PBR in Chapter 106 replace the former provisions for exemptions from permitting which we had approved in section 116.6—Exemptions. Because Chapter 106 replaced the exemptions previously authorized under section 116.6, we are removing section 116.6 from the SIP.

IV. Final Action Concerning Revisions to Chapter 116—Control of Air Pollution by Permits for New Construction or Modification

A. Subchapter A—Definitions

1. What Are We Approving?

We are approving section 116.14—Standard Permit Definitions. Section 116.14 includes definitions of the following terms as they are used in Chapter 116, Subchapter F—Standard Permits: Off-plant receptor, oil and gas facility, and sulfur recovery unit.

2. Are These Definitions Approvable?

These definitions are approvable based upon their being comparable to corresponding terms defined elsewhere in EPA regulations. Specifically, the definition of ''off-plant receptor'' is consistent with the definition of ''ambient air'' in 40 CFR 50.1(e). The definitions of ''oil and gas facility'' and ''sulfur recovery unit'' are consistent with the terms ''natural gas processing plant'' and ''sulfur recovery plant'' as defined in 40 CFR 60.630 and 60.641 respectively. The TSD contains further information on our basis for approving these definitions. These definitions support the provisions of Subchapter F (Standard Permits) which we are also approving.

B. Subchapter B—New Source Review Permits (for minor sources)

1. What Are We Approving?

We are approving revisions to the following: section 116.110—Applicability; section 116.115—General and Special Conditions, and section 116.116—Changes to Facilities.

[1] Subpart I contains the provisions that a SIP must include to address the construction of new sources and the modification of existing sources. Subpart I includes sections 51.160–51.166.

[2] Subchapters B through X of Chapter 106 were not submitted to EPA approval as SIP revisions.

2. What Is Our Basis for Approving These Changes?

a. Section 116.110—Applicability. We are approving revisions to section 116.110 [3], which Texas submitted April 29, 1994; July 22, 1998; and September 11, 2000. These changes revise section 116.110 to add or revise references to provisions which relate to PBR and Standard Permits, which we are approving elsewhere in this action. We are approving the following:

- Approval of paragraph (2) of section 116.110(a) which incorporates references to conditions of Standard Permits. This meets 40 CFR 51.160(e), which provides that the SIP must identify the types and sizes of facilities which will be subject to review.
- Approval of nonsubstantive revision to section 116.110(a)(4), to change the reference from ''exemptions from permitting'' to ''permits by rule.''
- Approve a nonsubstantive change to section 116.110(b) to remove a reference to flexible permits.

b. Section 116.115—General and Special Conditions. We are approving revisions to section 116.115 [4], which Texas submitted April 29, 1994; August 17, 1994; July 22, 1998; and December 9, 2002; as follows:

- Approval of Subsection (b) to section 116.115 [5], as submitted July 22, 1998; and December 9, 2002; which incorporates the General Provisions that holders of Permits, Special Permits, Standard Permits, and Special Exemptions must meet. Subsection (b) includes provisions relating to notification to the State concerning the progress of construction and start-up, requirements for sampling and recordkeeping, requirements to meet emissions limits specified in the permit, requirements concerning maintenance of emission control, and compliance with rules.
- Approval of paragraph (b)(2)(F)(vi) (submitted December 9, 2002) which requires that a person who certifies and registers a Federally enforceable emission limitation under section 116.611 must retain all records demonstrating compliance for at least five years.
- The above provisions meet the requirements of 40 CFR 51.163, 51.211, 51.212, and 51.230. See the TSD for more information concerning how these requirements are met.

c. Section 116.116—Changes to Facilities. We are approving revisions to section 116.116 [6], which Texas submitted October 25, 1999 [7]; and September 11, 2000; as follows:

- Approve nonsubstantive changes to section 116.116(d) and (d)(1)–(2) to change the existing reference from ''exemptions from permitting'' to ''permits by rule.''
- Approve nonsubstantive changes to section 116.116(c)(4)–(5) to correct a cross reference from section 116.111(3) to section 116.111(a)(2)(C).

C. Subchapter F—Standard Permits

1. What Are We Approving?

We are approving the following Sections in Subchapter F of Chapter 116: section 116.601—Types of Standard Permits, section 116.602—Issuance of Standard Permits, section 116.603—Public Participation in Issuance of Standard Permits, section 116.604—Duration and Renewal of Registrations to Use Standard Permits, section 116.605—Standard Permit Amendment and Revocation, section 116.606—Delegation, section 116.610—Applicability, section 116.611—Registration to Use a Standard Permit, section 116.614—Standard Permit Fees, and section 116.615—General Conditions.

2. What Is a Standard Permit?

A Standard Permit is a permit which is adopted under Chapter 116, Subchapter F. Subchapter F provides an alternative process for approving the construction of certain categories of new and modified sources for which TCEQ has adopted a Standard Permit. These provisions provide for a streamlined mechanism for approving the construction of certain sources within categories which contain numerous similar sources.

A Standard Permit is available to sources which belong in categories for which TCEQ has adopted a Standard Permit under Subchapter F of Chapter 116. A Standard Permit is not available to a facility or group of facilities which undergo a change which constitutes a new major source or major modification under Title I of the Act, part C (Prevention of Significant Deterioration of Air Quality) or part D (Nonattainment Review). Such major source or major modification must comply with the applicable permitting requirements under Chapter 116, Subchapter B, which meet the new source review requirements in Title I, part C or part D of the Act. A facility which qualifies for a Standard Permit must also comply with all applicable provisions of section 111 of the Act (NSPS) and section 112 of the Act (NESHAP). Furthermore, a facility which qualifies for a Standard Permit must comply with all rules and regulations of TCEQ.

3. Are Texas' Provisions for Standard Permits Approvable?

Texas' Standard Permits are approvable as meeting the requirements of subpart I. Subchapter F under Chapter 116 provides the requirements that a facility must meet to qualify for a Standard Permit. Such requirements include:

- Any facility or group of facilities which constitutes a new major source or major modification under part C or D of Title I of the Act must be permitted under regulations for Nonattainment Review or Prevention of Significant Deterioration of Air Quality. Such sources are not eligible for a Standard Permit. This meets 40 CFR 51.165 (Permit requirements) and 51.166 (Prevention of significant deterioration of air quality).
- Sources qualifying for a Standard Permit must meet all applicable requirements under section 111 of the Act (NSPS) and section 112 of the Act (NESHAP), and must comply with all rules of TCEQ. This satisfies the requirements of 40 CFR 51.160(d) which requires that approval of any construction or modification must not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy.
- Subchapter F includes all the administrative requirements which support the issuance and enforcement of a Standard Permit. This includes registration of emissions which limit a source's PTE and Recordkeeping, which requires each source subject to a Standard Permit to maintain records sufficient to demonstrate compliance with all conditions of the applicable Standard Permit. These provisions satisfy the requirements in 40 CFR 51.163 which requires the plan to contain the administrative procedures that will be followed in making the

[3] On September 18, 2002 (67 FR 58709), EPA approved section 116.110, as adopted June 17, 1998. We did not approve Sections 116.110(a)(2), (a)(3), and (c).

[4] On September 18, 2002 (67 FR 58709), EPA approved section 116.115, as adopted June 17, 1998. We did not approve Sections 116.115(b), (c)(2)(A)(i), and (c)(2)(A)(ii)(I).

[5] In this action, we are not approving section 116.115(b)(2)(C)(iii). This provision relates to Mass Emissions Cap and Trade Program and was not adopted in the submittals that we are approving in this action. We will address section 116.115(b)(2)(C)(iii) in a separate action.

[6] On September 18, 2002 (67 FR 58709), EPA approved section 116.116, as adopted June 17, 1998. We did not approve Sections 116.116(b)(3), (e), and (f).

[7] We are approving only the changes to section 116.116, submitted October 25, 1999, which relate to PBR. This includes changes to section 116.116(d) and (d)(1)–(2). We are taking no action on changes to section 116.116(b)(3)–(4), submitted October 25, 1999, because these provisions do not relate to PBR or to Standard Permits. We will address section 116.116(b)(3)–(4) in a separate action.

determination under 40 CFR 51.160(a). These provisions also meet the requirements of 40 CFR 51.211 which require the owner or operator to maintain records and to periodically report to the State the nature and amounts of emissions and information necessary to determine whether a source is in compliance.

• All Standard Permits are adopted or revised through the process described in Sections 116.601–116.605. Such new or revised Standard Permits must undergo public notice and a 30-day comment period, and TCEQ must address all comments received from the public before finalizing its action to issue or revise a Standard Permit. This meets the requirements of 40 CFR 51.161 which requires the permitting authority to provide for opportunity for public comment on the information submitted and the State's analysis of the effect on construction or modification on ambient air quality.

The TSD contains further information on how Subchapter F of Chapter 116 meets the requirements of subpart I.

4. What Sections in Subchapter F Are We Not Approving in This Action?

We are not approving the following Sections in Subchapter F: section 116.617—Standard Permits for Pollution Control Projects, section 116.620—Installation and/or Modification of Oil and Gas Facilities, and section 116.621—Municipal Solid Waste Landfills. Approval of these sections is not necessary for our approval of Texas' PBR and Standard Permits regulations submitted to EPA on December 9, 2002. Sections 116.617, 116.620, and 116.621 will be addressed in a separate action.

As stated previously, we are approving changes which Texas submitted December 9, 2002, some of which address the deficiencies that we identified in our January 7, 2002, NOD. In that submittal, Texas submitted revisions to section 116.611—Registration to Use a Standard Permit. Section 116.611 is part of Subchapter F—Standard Permits. To date, we have not approved the provisions relating to Standard Permits, including the earlier submittals of section 116.611. Section 116.611 is part of, and dependent upon, other provisions of Subchapter F, and consequently section 116.611 cannot stand alone. Therefore, we must approve other provisions of Subchapter F, including the earlier submittals of section 116.611, which contain the process by which Texas issues and modifies Standard Permits when we approve the revisions to section 116.611 which Texas submitted December 9, 2002.

In order to approve section 116.611, we are addressing the provisions of Subchapter F which include the process for issuing and modifying Standard Permits. We are approving the provisions for issuing and modifying Standard Permits which are found in Sections 116.601–116.606, 116.610–116.611, and 116.614–116.615.

Sections 116.617, 116.620, and 116.621 are specific permits that Texas has issued. These Sections do not include any provisions relating to the process by which they (or any Standard Permit) must be issued or modified. The Sections which address the process for issuing and modifying Standard Permits (as identified above) are not dependent on the provisions of Sections 116.617, 116.620, and 116.621, and can be implemented without the approval of Sections 116.617, 116.620, and 116.621. Thus, today's final action does not include action on Sections 116.617, 116.620, and 116.621. We are also taking no action today on section 116.601(a)(1) which contains cross-references to Sections 116.617, 116.620, and 116.621. We will review and take appropriate action on Sections 116.617, 116.620, and 116.621, as well as section 116.601(a)(1), separately.

In addition, we are taking no action on section 116.610(d). Subsection (d) of section 116.610 addresses projects subject to Subchapter C of Chapter 116 (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g)). We have not completed our review of the provisions of Subchapter C. We will address Subchapter C and other provisions referring to Subchapter C (including section 116.610(d)) in a separate action.

V. Final Action Concerning Chapter 122—Federal Operating Permits

A. What Are We Approving?

We are approving section 122.122—Potential to Emit, as submitted December 9, 2002.

B. Is Section 122.122 Approvable?

Section 122.122 contains provisions by which a source may register and certify limitations on its production and operation which would limit its PTE below the level of a ''major source'' as defined under 40 CFR 70.2. Texas revised the rule to address a deficiency identified in the NOD. The changes that were made and our evaluation of why the changes are approvable are discussed in section II of this preamble.

VI. Summary of Today's Final Action

We are approving revisions of the Texas SIP to address Texas' SIP submittal dated December 9, 2002. This includes Sections 106.6, revisions to section 116.115, and Sections 116.611 and 122.122. These SIP revisions relate to Texas' programs for PBR, Standard Permits, and Operating Permits.

The regulations allow a source to limit its PTE of a pollutant below the level of a major source defined in the Act. This includes regulations which Texas revised to allow an owner or operator of a source to register and certify restrictions and limitations that the owner or operator will meet to maintain its PTE below the major source threshold. The changes require the owner or operator to submit the certified registrations to the Executive Director of TCEQ, the appropriate TCEQ regional office, and to all local air pollution control agencies having jurisdiction over the site. The changes to section 122.122 satisfactorily address the NOD by making the PTE limits in the certified registrations practically and Federally enforceable.

We are also approving other provisions of Chapters 106 and 116 which incorporate Texas' regulations for PBR and Standard Permits that Texas submitted to EPA on April 29, 1994; August 17, 1994; September 20, 1995; April 19, 1996; May 21, 1997; July 22, 1998; October 25, 1999; January 3, 2000; September 11, 2000; July 25, 2001; and December 9, 2002.

VII. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 13, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate Matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 5, 2003.

Richard E. Greene,

Regional Administrator, Region 6.

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart SS—Texas

■ 2. The table in § 52.2270(c) entitled ''EPA Approved Regulations in the Texas SIP'' is amended as follows:

■ (a) Under Chapter 101, Subchapter H, immediately following section 101.363, by adding a new centered heading ''Chapter 106—Permits by Rule'' followed by a centered heading ''Subchapter A—General Requirements,'' followed by new entries for Sections 106.1, 106.2, 106.4, 106.5, 106.6, 106.8, and 106.13;

■ (b) Under Chapter 116 (Reg 6), by removing the existing entry for section 116.6, Exemptions;

■ (c) Under Chapter 116 (Reg 6), Subchapter A, immediately following section 116.12, by adding a new entry for section 116.14;

■ (d) Under Chapter 116 (Reg 6), Subchapter B, Division 1, by revising the existing entries for Sections 116.110, 116.115, and 116.116;

■ (e) Under Chapter 116 (Reg 6), Subchapter B, Division 7, immediately following section 116.170, by adding a new centered heading ''Subchapter F—Standard Permits'' followed by new entries for Sections 116.601, 116.602, 116.603, 116.604, 116.605, 116.606, 116.610, 116.611, 116.614, and 116.615; and

■ (f) Under Chapter 118 (Reg 8), immediately following section 118.6, by adding a new centered heading entitled ''Chapter 122—Federal Operating Permits Program'' followed by a new centered heading entitled ''Subchapter B—Permit Requirements'' followed by a new centered heading ''Division 2—Applicability,'' followed by a new entry for section 122.122.

The additions and revisions read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title / Subject	State approval / submittal date	EPA approval date	Explanation
*	*	*	*	*
Section 101.363	Program Audits and Reports ..	09/26/01	11/04/01, 66 FR 57260	
Chapter 106—Permits by Rule				
Subchapter A—General Requirements				
Section 106.1	Purpose	08/09/00	11/14/03 [and page number] ..	

EPA-APPROVED REGULATIONS IN THE TEXAS SIP—Continued

State citation	Title / Subject	State approval / submittal date	EPA approval date	Explanation
Section 106.2	Applicability	08/09/00	11/14/03 [and page number] ..	
Section 106.4	Requirements for Permitting by Rule.	03/07/01	11/14/03 [and page number] ..	
Section 106.5	Public Notice	09/02/99	11/14/03 [and page number] ..	
Section 106.6	Registration of Emissions	11/20/02	11/14/03 [and page number] ..	
Section 106.8	Recordkeeping	10/10/01	11/14/03 [and page number] ..	
Section 106.13	References to Standard Exemptions and Exemptions from Permitting.	08/09/00	11/14/03 [and page number] ..	
*	*	*	*	*
Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification				
Subchapter A—Definitions				
*	*	*	*	*
Section 116.12	Nonattainment Review Definitions.	02/24/99	07/17/00, 65 FR 43994	
Section 116.14	Standard Permit Definitions	06/17/98	11/14/03 [and page number] ..	
Subchapter B—New Source Review Permits				
Division 1—Permit Application				
Section 116.110	Applicability	08/09/00	11/14/03 [and page number] ..	The SIP does not include sections 116.110(a)(3), (a)(5), and (c).
*	*	*	*	*
Section 116.115	General and Special Conditions.	11/20/02	11/14/03 [and page number] ..	The SIP does not include sections 116.115(b)(2)(C)(iii) and (c)(2)(B)(ii)(I).
Section 116.116	Changes to Facilities	08/09/00	11/14/03 [and page number] ..	The SIP does not include sections 116.116(b)(3), (b)(4), (e), and (f).
*	*	*	*	*
Section 116.170	Applicability of Reduction Credits.	06/17/98	09/18/02, 67 FR 58709	The SIP does not include section 116.170(2).
Subchapter F—Standard Permits				
Section 116.601	Types of Standard Permits	12/16/99	11/14/03 [and page number] ..	The SIP does not include section 116.170(a)(1).
Section 116.602	Issuance of Standard Permits	12/16/99	11/14/03 [and page number] ..	
Section 116.603	Public Participation in Issuance of Standard Permits.	08/09/00	11/14/03 [and page number] ..	
Section 116.604	Duration and Renewal of Registrations to Use Standard Permits.	12/16/99	11/14/03 [and page number] ..	
Section 116.605	Standard Permit Amendment and Revocation.	12/16/99	11/14/03 [and page number] ..	
Section 116.606	Delegation	12/16/99	11/14/03 [and page number] ..	
Section 116.610	Applicability	12/16/99	11/14/03 [and page number] ..	The SIP does not include section 116.610(d).
Section 116.611	Registration to Use a Standard Permit.	11/20/02	11/14/03 [and page number] ..	
Section 116.614	Standard Permit Fees	12/16/99	11/14/03 [and page number] ..	
Section 116.615	General Conditions	06/17/98	11/14/03 [and page number] ..	
*	*	*	*	*
Section 118.6	Texas Air Pollution Episode Contingency Plan and Emergency Management Center.	03/05/00	07/26/00	
Chapter 122—Federal Operating Permits Program				
Subchapter B—Permit Requirements				
Division 2—Applicability				
Section 122.122	Potential to Emit	11/20/02	11/14/03 and page number	

[FR Doc. 03–28416 Filed 11–13–03; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–7586–9]

Colorado: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: Colorado has applied to EPA for Final authorization of the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA has determined that these changes satisfy all requirements needed to qualify for Final authorization and is authorizing the State's changes through this immediate final action. We are publishing this rule to authorize the changes without a prior proposal because we believe this action is not controversial. Unless we receive written comments which oppose this authorization during the comment period, the decision to authorize Colorado's changes to their hazardous waste program will take effect. If we receive comments that oppose this action, we will publish a document in the **Federal Register** withdrawing this rule before it takes effect, and a separate document in the proposed rules section of this **Federal Register** will serve as a proposal to authorize the changes.

DATES: This Final authorization will become effective on January 13, 2004 unless EPA receives adverse written comment by December 15, 2003. If EPA receives such comment, it will publish a timely withdrawal of this Immediate Final Rule in the **Federal Register** and inform the public that this authorization will not take effect.

ADDRESSES: Copies of the Colorado program revision applications and the materials which EPA used in evaluating the revisions are available for inspection and copying at the following locations: EPA Region 8, from 7 AM to 3 PM, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, contact: Kris Shurr, phone number: (303) 312–6139, e-mail: *shurr.kris@epa.gov* or CDPHE, from 8 AM to 4 PM, 4300 Cherry Creek Drive South, Denver, Colorado 80222–1530, contact: Randy Perila, phone number (303) 692–3364. Send written comments to Kris Shurr, 8P–HW, U.S. EPA, Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, phone number: (303) 312–6139 or electronically to *shurr.kris@epa.gov.*

FOR FURTHER INFORMATION CONTACT: Kris Shurr, 8P–HW, U.S. EPA, Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, phone number: (303) 312–6139 or *shurr.kris@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Why Are Revisions to State Programs Necessary?

States which have received Final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, States must change their programs and ask EPA to authorize the changes. Changes to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 266, 268, 270, 273 and 279.

B. What Decisions Have We Made in This Rule?

We conclude that Colorado's application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we grant Colorado Final authorization to operate its hazardous waste program with the changes described in the authorization applications. Colorado has responsibility for permitting Treatment, Storage, and Disposal Facilities (TSDFs) within its borders, except in Indian Country, and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, EPA will implement those requirements and prohibitions in Colorado, including issuing permits, until Colorado is authorized to do so.

C. What Is the Effect of Today's Authorization Decision?

This decision means that a facility in Colorado subject to RCRA will now have to comply with the authorized State requirements instead of the equivalent Federal requirements in order to comply with RCRA. Colorado has enforcement responsibilities under its State hazardous waste program for violations of such program, but EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to:

- Conduct inspections; require monitoring, tests, analyses, or reports;
- Enforce RCRA requirements; suspend or revoke permits; and,
- Take enforcement actions regardless of whether Colorado has taken its own actions.

This action does not impose additional requirements on the regulated community because the regulations for which Colorado is being authorized by today's action are already effective and are not changed by today's action.

D. Why Wasn't There a Proposed Rule Before Today's Rule?

EPA did not publish a proposal before today's rule because we view this as a routine program change. We are providing an opportunity for the public to comment now. In addition to this rule, in the proposed rules section of today's **Federal Register** we are publishing a separate document that proposes to authorize the State program changes.

E. What Happens if EPA Receives Comments That Oppose This Action?

If EPA receives comments that oppose this authorization, we will withdraw this rule by publishing a document in the **Federal Register** before the rule becomes effective. EPA will base any further decision on the authorization of the State program changes on the proposal mentioned in the previous paragraph. We will then address all public comments in a later final rule. You may not have another opportunity to comment, therefore, if you want to comment on this authorization, you must do so at this time.

If we receive comments that oppose only the authorization of a particular change to the Colorado hazardous waste program, we will withdraw that part of this rule but the authorization of the program changes that the comments do not oppose will become effective on the date specified above. The **Federal Register** withdrawal document will specify which part of the authorization will become effective and which part is being withdrawn.

F. What Has Colorado Previously Been Authorized for?

Colorado initially received Final authorization on October 19, 1984,

1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (*59 FR 22951,* November 9, 2000), because the SIP EPA is proposing to disapprove would not apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (*62 FR 19885,* April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (*62 FR 19885,* April 23, 1997). This proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211 (*66 FR 28355,* May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (*59 FR 7629* (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely proposes to disapprove certain State requirements for inclusion into the SIP under section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon Monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: September 8, 2009.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

[FR Doc. E9–22805 Filed 9–22–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2006–0133; FRL–8958–7]

Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD), Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: EPA is proposing disapproval of submittals from the State of Texas, through the Texas Commission on Environmental Quality (TCEQ), to revise the Texas Major and Minor NSR SIP. We are proposing to disapprove the submittals because they do not meet the 2002 revised Major NSR SIP requirements. We are proposing to disapprove the submittals as not meeting the Major Nonattainment NSR SIP requirements for implementation of the 1997 8-hour ozone national ambient air quality standard (NAAQS) and the 1-hour ozone NAAQS. Additionally, EPA is proposing to disapprove the submittals to revise the Texas Major PSD NSR SIP. Finally, EPA proposes disapproval of the submitted Standard Permit (SP) for Pollution Control Projects (PCP) because it does not meet the requirements for a minor NSR SIP revision.

EPA is taking comments on this proposal and intends to take final action. EPA is proposing these actions under section 110, part C, and part D,

of the Federal Clean Air Act (the Act or CAA).

DATES: Any comments must arrive by November 23, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R06–OAR–2006–0133, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *U.S. EPA Region 6 ''Contact Us'' Web site: http://epa.gov/region6/r6coment.htm* Please click on ''6PD'' (Multimedia) and select ''Air'' before submitting comments.
- *E-mail:* Mr. Stanley M. Spruiell at *spruiell.stanley@epa.gov.*
- *Fax:* Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), at fax number 214–665–7263.
- *Mail:* Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 am and 4 pm weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2006–0133. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 am and 4:30 pm weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittals are also available for public inspection at the State Air Agency during official business hours by appointment: Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–7212; fax number 214–665–7263; e-mail address *spruiell.stanley@epa.gov.*

SUPPLEMENTARY INFORMATION:

Throughout this document, the following terms have the meanings described below:

- ''We,'' ''us,'' and ''our'' refer to EPA.
- ''Act'' and ''CAA'' means Clean Air Act.
- ''40 CFR'' means Title 40 of the Code of Federal Regulations—Protection of the Environment.
- ''SIP'' means State Implementation Plan as established under section 110 of the Act.
- ''NSR'' means new source review, a phrase intended to encompass the statutory and regulatory programs that regulate the construction and modification of stationary sources as provided under CAA section 110(a)(2)(C), CAA Title I, parts C and D, and 40 CFR 51.160 through 51.166.
- ''Minor NSR'' means NSR established under section 110 of the Act and 40 CFR 51.160.
- ''NNSR'' means nonattainment NSR established under Title I, section 110 and part D of the Act and 40 CFR 51.165.
- ''PSD'' means prevention of significant deterioration of air quality established under Title I, section 110 and part C of the Act and 40 CFR 51.166.
- ''Major NSR'' means any new or modified source that is subject to NNSR and/or PSD.
- ''TSD'' means the Technical Support Document for this action.
- ''NAAQS'' means national ambient air quality standards promulgated under section 109 of that Act and 40 CFR part 50.
- ''PAL'' means ''plantwide applicability limitation.''
- ''PCP'' means ''pollution control project.''
- ''TCEQ'' means ''Texas Commission on Environmental Quality.''

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I. What Action is EPA Proposing?

We are proposing to disapprove the SIP revisions submitted by Texas on June 10, 2005, and February 1, 2006, as not meeting the 1997 8-hour ozone major nonattainment NSR SIP requirements, and as not meeting the Act and Major Nonattainment NSR SIP requirements for the 1-hour ozone NAAQS. We are proposing to disapprove the SIP revision submitted by Texas on February 1, 2006, as not meeting the Major NSR Reform SIP requirements for PAL provisions and the Major NSR Reform SIP requirements without the PAL provisions. We are proposing to disapprove the February 1, 2006, SIP revision submittal as not meeting the Act and the Major NSR PSD SIP requirements. Finally, we are proposing to disapprove the Standard Permit (SP) for PCP submitted February 1, 2006, as not meeting the Minor NSR SIP requirements. It is EPA's position that each of these six identified portions in the SIP revision submittals, 8-hour ozone, 1-hour ozone, PALs, non PALs, PSD, and PCP Standard Permit is severable from each other.

We are taking no action on the portions of the June 10, 2005, submittal concerning 30 TAC 101.1 Definitions, section 112(g) of the Act, and Emergency Orders.

We have evaluated the SIP submissions for whether they meet the Act and 40 CFR Part 51, and are consistent with EPA's interpretation of the relevant provisions. Based upon our evaluation, EPA has concluded that each of the six portions of the SIP revision submittals does not meet the requirements of the Act and 40 CFR part 51. Therefore, each portion of the State submittals is not approvable. As authorized in sections 110(k)(3) and 301(a) of the Act, where portions of the State submittal are severable, EPA may approve the portions of the submittal that meet the requirements of the Act, take no action on certain portions of the submittal,[1] and disapprove the portions of the submittal that do not meet the requirements of the Act. When the deficient provisions are not severable from the all of the submitted provisions, EPA must propose disapproval of the submittals, consistent with section 301(a) and 110(k)(3) of the Act. Each of the six portions of the State submittals is severable from each other. Therefore, EPA is proposing to disapprove each of the following severable provisions of the submittals: (1) The submitted 1997 8-hour ozone NAAQS Major Nonattainment NSR SIP revision, (2) the submitted 1-hour ozone NAAQS Major NNSR SIP revision, (3) the submitted Major NSR reform SIP revision with PAL provisions, (4) the submitted Major NSR reform SIP revision with no PAL provisions, (5) the submitted Major NSR PSD SIP revision, and (6) the submitted Minor NSR Standard Permit for PCP SIP revision.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a mandatory requirement of the Act starts a sanctions clock and a Federal Implementation Plan (FIP) clock. The provisions in these submittals were not submitted to meet a mandatory requirement of the Act. Therefore, if EPA takes final action to disapprove any provision of the submittals, no sanctions and FIP clocks will be triggered.

II. What are the Other Relevant Proposed Actions on the Texas Permitting SIP Revision Submittals?

This proposed action should be read in conjunction with two other proposed actions appearing elsewhere in today's **Federal Register**, (1) proposed action on the Texas NSR SIP, the Flexible Permits Program, and (2) proposed action on the Texas NSR SIP, the Qualified Facilities Program and the General Definitions.[2] Also, on November 26, 2008, EPA proposed limited approval/limited disapproval of the Texas submittals relating to public participation for air permits of new and modified facilities (73 FR 72001). EPA believes these actions should be read in conjunction with each other because the permits issued under these State programs are the vehicles for regulating a significant universe of the air emissions from sources in Texas and thus directly impact the ability of the State to achieve and maintain attainment of the NAAQS and protect the health of the communities where these sources are located. The basis for proposing these actions is outlined in each notice and accompanying technical support document (TSD). Those interested in any one of these actions are encouraged to review and comment on the other proposed actions as well.

EPA intends to take final action on the State's Public Participation SIP revision submittals in November 2009. EPA intends to take final action on the submitted Texas Qualified Facilities State Program by March 31, 2010, the submitted Texas Flexible Permits State Program by June 30, 2010, and the NSR SIP on August 31, 2010. These dates are expected to be mandated under a Consent Decree (*see,* Notice of Proposed Consent Decree and Proposed Settlement Agreement, 74 FR 38015, July 30, 2009).

III. What has the State Submitted?

This notice provides a summary of our evaluation of Texas' June 10, 2005, and February 1, 2006, SIP revision submittals. We provide our reasoning in general terms in this preamble, but provide a more detailed analysis in the TSD that has been prepared for this proposed rulemaking. Because we are proposing to disapprove the submittals based on the inconsistencies discussed herein, we have not attempted to review and discuss all of the issues that would need to be addressed for approval of these submittals as Major NSR SIP revisions.

On June 10, 2005, Texas submitted revisions to Title 30 of the Texas Administrative Code (30 TAC) Chapter 116—Control of Air Pollution by Permits for New Construction or Modification, revising 30 TAC 116.12—Nonattainment Definitions[3]—and 30 TAC 116.150—New Major Source or Major Modification in Ozone Nonattainment Areas, to meet the Major Nonattainment NSR requirements for Phase I of the 1997 8-hour NAAQS for ozone as promulgated April 30, 2004 (69 FR 23951). The June 10, 2005, submittal also includes revisions to the definitions in 30 TAC 101.1—Definitions.

On February 1, 2006, Texas submitted revisions to 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction or Modification, to implement the Major NSR Reform SIP requirements with the PAL provisions and without the PAL provisions. The submittal also included revisions for the Texas PSD SIP and a new Minor NSR Standard Permit for Pollution Control Projects. This submittal includes the following changes:

[1] In this action, we are taking no action on certain provisions that are either outside the scope of the SIP or which revise an earlier submittal of a base regulation that is currently undergoing review for appropriate action.

[2] In that proposed action, the submitted definition of BACT is not severable from the proposed action on the PSD SIP revision submittals. EPA may choose to take final action on the definition of BACT in the NSR SIP final action rather than in the Qualified Facilities and the General Definitions final actions. EPA is obligated to take final action on the submitted definitions in the General Definitions for those identified as part of the Texas Qualified Facilities State Program, the Texas Flexible Permits State Program, Public Participation, Permit Renewals (there will be a proposed action published at a later date), and this BACT definition as part of the NSR SIP.

[3] In the Texas SIP and in the June 10, 2005, SIP submittal, the title of 30 TAC 116.12 is ''Nonattainment Review Definitions.'' In the February 1, 2006, SIP submittal, 30 TAC 116.12 was renamed ''Nonattainment and Prevention of Significant Deterioration Review Definitions.''

• *Revisions to the following sections:* 30 TAC 116.12—Nonattainment and Prevention of Significant Deterioration Review Definitions, 30 TAC 116.150—New Major Source or Major Modification in Ozone Nonattainment Areas, 30 TAC 116.151—New Major Source or Major Modification in Nonattainment Areas Other Than Ozone, 30 TAC 116.160—Prevention of Significant Deterioration Requirements, and 30 TAC 116.610(a), (b), and (d) —Applicability;

• *Addition of the following new sections:* 30 TAC 116.121—Actual to Projected Actual Test for Emissions Increases, 30 TAC 116.180—Applicability, 30 TAC 116.182—Plant-Wide Applicability Limit Application, 30 TAC 116.184—Application Review Schedule, 30 TAC 116.186—General and Special Conditions, 30 TAC 116.188—Plantwide Applicability Limit, 30 TAC 116.190—Federal Nonattainment and Prevention of Significant Deterioration Review, 30 TAC 116.192—Permit Amendments and Alterations, 30 TAC 116.194—Public Notice and Comment, 30 TAC 116.196—Renewal of Plant-Wide Applicability Limit Permit, and 30 TAC 116.198—Expiration or Voidance.

• *Removal of 30 TAC 116.617*—Standard Permit for Pollution Control Projects and replacement with new 30 TAC 116.617—State Pollution Control Project Standard Permit.

The table below summarizes the changes that are in the two SIP revisions submitted June 10, 2005, and February 1, 2006. A summary of EPA's evaluation of each section and the basis for this proposal is discussed in sections IV, V, VI, and VII of this preamble. The TSD includes a detailed evaluation of the submittals.

TABLE—SUMMARY OF EACH SIP SUBMITTAL THAT IS AFFECTED BY THIS ACTION

Section	Title	Submittal dates	Description of change	Proposed action
Chapter 116—Control of Air Pollution by Permits for New Construction or Modification Subchapter A—Definitions				
30 TAC 116.12	Nonattainment Review Definitions.	6/10/2005	Changed several definitions to implement Federal phase I rule implementing 8-hour ozone standard.	Disapproval.
	Nonattainment Review and Prevention of Significant Deterioration Definitions.	2/1/2006	Renamed section and added and revised definitions to implement Federal NSR Reform regulations.	Disapproval.
Subchapter B—New Source Review Permits Division 1—Permit Application				
30 TAC 116.121	Actual to Projected Actual Test for Emissions Increase.	2/1/2006	New Section	Disapproval.
Division 5—Nonattainment Review				
30 TAC 116.150	New Major Source or Major Modification in Ozone Nonattainment Area.	6/10/2005	Revised section to implement Federal phase I rule implementing 8-hour ozone standard.	Disapproval.
		2/1/2006	Revised section to implement Federal NSR Reform regulations.	Disapproval.
30 TAC 116.151	New Major Source or Major Modification in Nonattainment Areas Other Than Ozone.	2/1/2006	Revised section to implement Federal NSR Reform regulations.	Disapproval.
Division 6—Prevention of Significant Deterioration Review				
30 TAC 116.160	Prevention of Significant Deterioration Requirements.	2/1/2006	Revised section to implement Federal NSR Reform regulations.	Disapproval.
Subchapter C—Plant-Wide Applicability Limits Division 1—Plant-Wide Applicability Limits				
30 TAC 116.180	Applicability	2/1/2006	New Section	Disapproval.
30 TAC 116.182	Plant-Wide Applicability Limit Permit Application.	2/1/2006	New Section	Disapproval.
30 TAC 116.184	Application Review Schedule	2/1/2006	New Section	Disapproval.
30 TAC 116.186	General and Special Conditions.	2/1/2006	New Section	Disapproval.
30 TAC 116.188	Plant-Wide Applicability Limit	2/1/2006	New Section	Disapproval.
30 TAC 116.190	Federal Nonattainment and Prevention of Significant Deterioration Review.	2/1/2006	New Section	Disapproval.
30 TAC 116.192	Amendments and Alterations	2/1/2006	New Section	Disapproval.
30 TAC 116.194	Public Notice and Comment ..	2/1/2006	New Section	Disapproval.

TABLE—SUMMARY OF EACH SIP SUBMITTAL THAT IS AFFECTED BY THIS ACTION—Continued

Section	Title	Submittal dates	Description of change	Proposed action
30 TAC 116.196	Renewal of a Plant-Wide Applicability Limit Permit.	2/1/2006	New Section	Disapproval.
30 TAC 116.198	Expiration and Voidance	2/1/2006	New Section	Disapproval.
Subchapter E—Hazardous Air Pollutants: Regulations Governing Constructed and Reconstructed Sources (FCAA, § 112(g), 40 CFR Part 63)[a]				
30 TAC 116.400	Applicability	2/1/2006	Recodification from section 116.180.	No action.
30 TAC 116.402	Exclusions	2/1/2006	Recodification from section 116.181.	No action.
30 TAC 116.404	Application	2/1/2006	Recodification from section 116.182.	No action.
30 TAC 116.406	Public Notice Requirements	2/1/2006	Recodification from section 116.183.	No action.
Subchapter F—Standard Permits				
30 TAC 116.610	Applicability	2/1/2006	Revised paragraphs (a), (a)(1) through (a)(5), (b), and (d).[b]	Disapproval, No action on paragraph (d).
30 TAC 116.617	State Pollution Control Project Standard Permit.	2/1/2006	Replaced former 30 TAC 116.617—Standard Permit for Pollution Control Projects.[c]	Disapproval.
Subchapter K—Emergency Orders[d]				
30 TAC 116.1200	Applicability		Recodification from 30 TAC 116.410.	No action.

[a] Recodification of former Subchapter C. These provisions are not SIP-approved.
[b] 30 TAC 116.610(d) is not SIP-approved.
[c] 30 TAC 116.617 is not SIP-approved.
[d] Recodification of former Subchapter E. These provisions are not SIP-approved.

IV. Do the Submitted SIP Revisions Meet the Major NSR PSD SIP Requirements?

A. What are the Requirements for EPA's Review of a Submitted Major NSR SIP Revision?

Before EPA's 1980 revised major NSR SIP regulations, 45 FR 52676 (August 7, 1980), States were required to adopt and submit a major NSR SIP revision where the State's provisions and definitions were identical to or individually more stringent than the Federal rules. Under EPA's 1980 revised major NSR SIP regulations, States could submit provisions in a major NSR SIP revision different from those in EPA's major NSR rules, as long as the State provision was equivalent to a rule identified by EPA as appropriate for a ''different but equivalent'' State rule. If a State chose to submit *definitions* that were not verbatim, the State was required to *demonstrate any different definition* has the effect *of being as least as stringent.* (Emphasis added.) *See* 45 FR 52676, at 52687. The demonstration requirement was *explicitly* expanded to include not just different definitions *but also different programs* in the EPA's revised major NSR regulations, as promulgated on December 31, 2002 (67 FR 80186) and reconsidered with minor changes on November 7, 2003 (68 FR 63021). Therefore, to be approved as meeting the 2002 revised major NSR SIP requirements, a State submitting a customized major NSR SIP revision *must demonstrate why its program and definitions* are in fact at least as stringent as the major NSR revised base program. (Emphasis added). *See* 67 FR 80186, at 80241.

Moreover, because there is an existing Texas Major NSR SIP, the submitted Program must meet the anti-backsliding provisions of the Act in section 193 and meet the requirements in section 110(l) which provides that EPA may not approve a SIP revision if it will interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the Act. Furthermore, any submitted SIP revision must meet the applicable SIP regulatory requirements and the requirements for SIP elements in section 110 of the Act, and be consistent with applicable statutory and regulatory requirements. These can include, among other things, enforceability, compliance assurance, replicability of an element in the program, accountability, test methods, and whether the submitted rules are vague. There are four fundamental principles for the relationship between the SIP and any implementing instruments, *e.g.,* Major NSR permits. These four principles as applied to the review of a major or minor NSR SIP revision include: (1) The baseline emissions from a permitted source be quantifiable; (2) the NSR program be enforceable by specifying clear, unambiguous, and measurable requirements, including a legal means for ensuring the sources are in compliance with the NSR program, and providing means to determine compliance; (3) the NSR program's measures be replicable by including sufficiently specific and objective provisions so that two independent entities applying the permit program's procedures would obtain the same result; and (4) the major NSR permit program be accountable, including means to track emissions at sources resulting from the issuance of permits and permit amendments. *See* EPA's April 16, 1992, ''General Preamble for

the Implementation of Title I of the Clean Air Act Amendments of 1990'' (57 FR 13498) (General Preamble). A discussion illustrating the principles and elements of SIPs that apply to sources in implementing a SIP's control strategies begins on page 13567 of the General Preamble.

B. Do the Submitted SIP Revisions Meet the Act and the PSD SIP requirements?

Texas submitted a revision to 30 TAC 116.160(a) and a new section 116.160(c)(1) and (2) on February 1, 2006, as a SIP revision to the Texas PSD SIP. This SIP revision submittal removed from the State rules the incorporation by reference of the Federal PSD definition of ''best available control technology (BACT)'' as defined in 40 CFR 51.166(b)(12) [4]. The currently approved PSD SIP requires that a State include the Federal definition of BACT. *See* 30 TAC 116.160(a).

The 2006 submittal also removed from the State rules, the PSD SIP requirement at 40 CFR 52.21(r)(4) that the State previously had incorporated by reference. The currently approved PSD SIP mandates this requirement. *See* 30 TAC 116.160(a). This provision specifies that if a project becomes a major stationary source or major modification solely because of a relaxation of an enforceable limitation on the source or modification's capacity to emit a pollutant, then the source or modification is subject to PSD applies as if construction had not yet commenced. The State's action in eliminating that requirement means the State's rules will not regulate these types of major stationary sources or modifications as stringently as the Federal program.

Section 165 of the Act provides that ''No major emitting facility * * * may be constructed [or modified] in any area to which this part applies unless— (1) a permit has been issued for such proposed facility in accordance with this part setting forth *emission limitations* for such facility *which conform to the requirements of this part*'' * * * (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter * * *.'' *Id.* 7475(a). Accordingly, under the plain language of Section 165 a facility may not be constructed unless it will comply with BACT limits, which conform to the requirements of the Act. As BACT is a defined term in the Act, see CAA 169(3), we interpret this to mean that a facility may not be constructed unless the permit it has been issued conforms to the Act's definition of BACT.

The removal of these two provisions is not approvable as a SIP revision. The BACT requirement is a basic tenet of a permitting program. Our conclusion that the BACT and emission limitation requirements are a statutory minimum flows from the Act itself. *See* CAA section 165. These two provisions are required for a SIP revision to meet the PSD SIP requirements.

Not only is BACT a defined statutory and regulatory term, but it also constitutes a central requirement of the Act. Accordingly, a state's submission of a revision that would remove the requirement that all new major stationary sources or major modifications meet, at a minimum, BACT as defined by the Act creates a situation where the submitted SIP revision would be a relaxation of the requirements of the previous SIP.

Our evaluation considers whether a submitted SIP revision that removes a statutory requirement can still meet the Act. It is EPA's position that the removal of a statutory requirement from a State's program cannot be approved as a SIP revision because the removal does not meet the requirements of the Act. Additionally, as a SIP relaxation, we would look to the requirements of section 110(l). Section 110(l) of the Act prohibits EPA from approving any revision of a SIP if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act. The State did not provide any demonstration showing how the submitted SIP revision would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act.

As the mechanism in Texas for ensuring that permits contain such a requirement, the State PSD SIP must both require BACT and apply the federal definition of BACT (or one that is more stringent) to be approved pursuant to part C and Section 110*(l)* of the Act.

Since Texas' approach fails to ensure that all of the statutory relevant criteria contained in the statutory BACT definition are contained in the Texas SIP revision submittal, and the State failed to submit a demonstration showing how the relaxation would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other CAA requirement, we are proposing to disapprove this removal pursuant to part C and Section 110*(l)* of the Act, as well as failing to meet the Major NSR SIP requirements.

V. Do the Submitted SIP Revisions Meet the Major Non-attainment NSR Requirements for the 1-Hour and the 1997 8-Hour Ozone NAAQS?

A. What are the Anti-Backsliding Major Nonattainment NSR SIP Requirements for the 1-hour Ozone NAAQS?

On July 18, 1997, EPA promulgated a new NAAQS for ozone based upon 8-hour average concentrations. The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38865).[5] On April 30, 2004 (69 FR 23951), we published a final rule that addressed key elements related to implementation of the 1997 8-hour ozone NAAQS including, but not limited to: revocation of the 1-hour NAAQS and how anti-backsliding principles will ensure continued progress toward attainment of the 1997 8-hour ozone NAAQS. We codified the anti-backsliding provisions governing the transition from the revoked 1-hour ozone NAAQS to the 1997 8-hour ozone NAAQS in 40 CFR 51.905(a). The 1-hour ozone major nonattainment NSR SIP requirements indicated that certain 1-hour ozone standard requirements were not part of the list of anti-backsliding requirements provided in 40 CFR 51.905(f).

On December 22, 2006, the DC Circuit vacated the Phase 1 Implementation Rule in its entirety. *South Coast Air*

[4] The January 1972 Texas NSR rules, as revised in July 1972, require a proposed new facility or modification to utilize the best available control technology, with consideration to the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility. The Federal definition for PSD BACT is part of the Texas SIP as codified in the SIP at 30 TAC 116.160(a). (This current SIP rule citation was adopted by the State on October 10, 2001, and EPA approved this recodified SIP rule citation on July 22, 2004 (69 FR 43752).) EPA approved the Texas PSD program SIP revision submittals, including the State's incorporation by reference of the Federal definition of BACT, in 1992. See proposal and final approval of the Texas PSD SIP at 54 FR 52823 (December 22, 1989) and 57 FR 28093 (June 24, 1992). EPA specifically found that the SIP BACT requirement (now codified in the Texas SIP at 30 TAC 116.111(a)(2)(C)) did not meet the Federal PSD BACT definition. To meet the PSD SIP Federal requirements, Texas chose to incorporate by reference, the Federal PSD BACT definition, and submit it for approval by EPA as part of the Texas PSD SIP. Upon EPA's approval of the Texas PSD SIP submittals, both EPA and Texas interpreted the SIP BACT provision now codified in the SIP at 30 TAC 116.111(a)(2)(C) as being a minor NSR SIP requirement for minor NSR permits.

[5] On March 12, 2008, EPA significantly strengthened the 1997 8-hour ozone standard, to a level of 0.075 ppm. EPA is developing rules needed for implementing the 2008 revised 8-hour ozone standard and has received the States' submittals identifying areas with their boundaries they identify to be designated nonattainment. EPA is reviewing the States' submitted data.

Quality Management District, et al., v. *EPA,* 472 F.3d 882 (DC Cir. 2006), *reh'g denied* 489 F.3d 1245 (2007) (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review). The EPA requested rehearing and clarification of the ruling and on June 8, 2007, the Court clarified that it was vacating the rule only to the extent that it had upheld petitioners' challenges. Thus, the provisions in 40 CFR 51.905(e) that waived obligations under the revoked 1-hour standard for NSR were vacated. The effect of this portion of the court's ruling is to restore major nonattainment NSR applicability thresholds and emission offsets pursuant to classifications previously in effect for areas designated nonattainment for the 1-hour ozone NAAQS.

On June 10, 2005 and February 1, 2006, Texas submitted SIP revisions to 30 TAC 116.12 and 30 TAC 116.150 which relate to the transition from the major nonattainment NSR requirements applicable for the 1-hour ozone NAAQS to implementation of the major nonattainment NSR requirements applicable to the 1997 8-hour ozone NAAQS. Texas' revisions at 30 TAC 116.12(18) (Footnote 6 under Table I under the definition of ''major modification'') and 30 TAC 116.150(d) introductory paragraph, effective as state law on June 15, 2005, provide that for ''the Houston-Galveston-Brazoria, Dallas-Fort Worth, and Beaumont-Port Arthur eight hour ozone nonattainment areas, if the United States Environmental Protection Agency promulgates rules requiring new source review permit applications in these areas to be evaluated for nonattainment new source review according to the area's one-hour standard classification,'' then ''each application will be evaluated according to that area's one-hour standard classification'' and ''* * * the de minimis threshold test (netting) is required for all modifications to existing major sources of VOC or NO_x in that area * * *.'' The footnote 6 and the introductory paragraph add a new requirement for an affirmative regulatory action by the EPA on the reinstatement of the 1-hour ozone NAAQS major nonattainment NSR requirements before the major nonattainment NSR requirements under the 1-hour standard will be implemented in the Texas 1-hour ozone nonattainment areas.

The currently approved Texas major nonattainment NSR SIP does not require such an affirmative regulatory action by the EPA before the 1-hour ozone major nonattainment NSR requirements come into effect in the Texas 1-hour ozone nonattainment areas. Our evaluation of a SIP revision generally considers whether a revision would be at least as stringent as the provision in the existing applicable implementation plan that it would supersede. If we cannot conclude that a SIP revision is at least as stringent as the corresponding provision in the existing SIP, we may approve the revision only if the revision would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act. The Texas revision would relax the requirements of the approved SIP.

Texas submitted no section 110(l) analysis demonstrating that this relaxation would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act. Therefore, we are proposing to disapprove the revisions as not meeting section 110(l) of the Act for the Major NNSR SIP requirements for the 1-hour ozone NAAQS.

B. What Are the Major Nonattainment NSR SIP Requirements for the 1997 8-hour Ozone NAAQS?

The Act and EPA's NSR SIP rules require that an applicability determination regarding whether Major NSR applies for a pollutant should be based upon the attainment or nonattainment designation of the area in which the source is located on the *date of issuance* of the Major NSR permit. *See* the following: sections 172(c)(5) and 173 of the Act; 40 CFR 51.165(a)(2)(i); and ''New Source Review (NSR) Program Transitional Guidance,'' issued March 11, 1991, by John S. Seitz, Director, Office of Air Quality Planning and Standard. An applicability determination for a Major NSR permit based upon the date of administrative completeness, rather than date of issuance, would allow more sources to avoid the Major NSR requirements where there is a nonattainment designation between the date of administrative completeness and the date of issuance, and thus this submitted revision will reduce the number of sources subject to Major NSR requirements.

Revised 30 TAC 116.150(a), as submitted June 10, 2005 and February 1, 2006, now reads as follows under state law:

(a) This section applies to all new source review authorizations for new construction or modification of facilities as follows:

(1) For all applications for facilities that will be located in any area designated as nonattainment for ozone under 42 United States Code (U.S.C.), §§ 7407 *et seq.* on the effective date of this section, the issuance date of the authorization; and

(2) For all applications for facilities that will be located in counties for which nonattainment designation for ozone under 42 U.S.C. 7407 *et seq.* becomes effective after the effective date of this section, the date the application is administratively complete.[6]

The submitted rule raises two concerns. First, the revised language in 30 TAC 116.150(a) is not clear as to when and where the applicability date will be set by the date the application is administratively complete and when and where the applicability date will be set by the issuance date of the authorization. The rule, adopted and submitted in 2005, applies the date of administrative completeness of a permit application, not the date of permit issuance, where setting the date for determination of NSR applicability after June 15, 2004 (the effective date of ozone nonattainment designations). The submitted 2006 rule adds the date of permit issuance. Unfortunately, the submitted 2006 rule by introducing a bifurcated structure creates vagueness rather than clarity. The effective date of this new bifurcated structure is February 1, 2006. It is unclear whether this means under subsection (1) that the permit issuance date is used in existing nonattainment areas designated nonattainment for ozone before and up through February 1, 2006. Thus, the proposed revision lacks clarity on its face and is therefore not enforceable.

Second, to the extent that the date of application completeness is used in certain instances to establish the applicability date, such use is contrary to the Act and EPA's interpretation thereof, as discussed above.

The State did not provide any information, which demonstrates that this revision is at least as stringent as the requirements of the Act and applicable Federal rules.

Thus, based upon the above and in the absence of any explanation by the State, EPA is proposing to disapprove the SIP revision submittals for not

[6] It is our understanding of State law, that a ''facility'' can be an ''emissions unit,'' *i.e.,* any part of a stationary source that emits or may have the potential to emit any air contaminant. A ''facility'' also can be a piece of equipment, which is smaller than an ''emissions unit.'' A ''facility'' can be a ''major stationary source'' as defined by Federal law. A ''facility'' under State law can be more than one ''major stationary source.'' It can include every emissions point on a company site, without limiting these emissions points to only those belonging to the same industrial grouping (SIP code). To comment on our understanding of the State definition of facility, see our proposed action regarding Modification of Existing Qualified Facilities Program and General Definitions, published elsewhere in today's **Federal Register**.

meeting the Major NNSR SIP requirements for the 1997 8-hour ozone standard.

VI. Do the Submitted SIP Revisions Meet the Major NSR SIP Requirements?

A. Do the SIP Revision Submittals Meet the Major NSR SIP Requirements With a PALs Provision?

We are proposing to disapprove the following non-severable revisions that address the revised Major NSR SIP requirements with a PALs provision: 30 TAC Chapter 116 submitted February 1, 2006: 30 TAC 116.12—Definitions; 30 TAC 116.180—Applicability; 30 TAC 116.182—Plant-Wide Applicability Limit Permit Application; 30 TAC 116.184—Application Review Schedule; 30 TAC 116.186—General and Special Conditions; 30 TAC 116.188—Plant-Wide Applicability Limit; 30 TAC 116.190—Federal Nonattainment and Prevention of Significant Deterioration Review; 30 TAC 116.192—Amendments and Alterations; 30 TAC 116.194—Public Notice and Comment; 30 TAC 116.196—Renewal of a Plant-Wide Applicability Limit Permit; 30 TAC 116.198—Expiration or Voidance.

Below is a summary of our evaluation. *Please see* the TSD for additional information.

The submittal lacks a provision which limits applicability of a PAL only to an *existing* major stationary source, and which precludes applicability of a PAL to a new major stationary source, as required under 40 CFR 51.165(f)(1)(i) and 40 CFR 51.166(w)(1)(i), which limits applicability of a PAL to an existing major stationary source. In the absence of such limitation, this submission would allow a PAL to be authorized for the construction of a new major stationary source. In EPA's November 2002 TSD for the revised Major NSR Regulations, we respond on pages I–7–27 and 28 that actual PALs are available only for existing major stationary sources, because actual PALs are based on a source's actual emissions. Without at least 2 years of operating history, a source has not established actual emissions upon which to base an actual PAL. However, for individual emissions units with less than two years of operation, allowable emissions would be considered as actual emissions. Therefore, an actual PAL can be obtained only for an existing major stationary source even if not all emissions units have at least 2 years of emissions data. Moreover, the development of an alternative to provide new major stationary sources with the option of obtaining a PAL based on allowable emissions was foreclosed by the Court in *New York* v. *EPA,* 413 F.3d 3 at 38–40 (DC Cir. 2005) (''New York I'') (holding that the Act since 1977 requires a comparison of existing actual emissions before the change and projected actual (or potential emissions) after the change in question is required).

The absence of the applicability limitation creates a provision less stringent than the Act as interpreted by the Court and the revised Major NSR SIP PAL requirements. Therefore, we are proposing to disapprove this submittal as not meeting the revised Major NSR SIP requirements.

The submittal has no provisions that relate to PAL re-openings, as required by 40 CFR 51.165(f)(8)(ii), (ii)(A) through (C), and 51.166(w)(8)(ii) and (ii)(a). Nor is there a mandate that failure to use a monitoring system that meets the requirements of this section renders the PAL invalid, as required by 40 CFR 51.165(f)(12)(i)(D) and 51.166(w)(12)(i)(d). The absence of these provisions renders the accountability of this Program inadequate and less stringent than the Federal requirements of Major NSR. Therefore, EPA is proposing to disapprove the submittal as not meeting the revised Major NSR SIP requirements.

The Texas submittal at 30 TAC 116.186 provides for an emissions cap that may not account for all of the emissions of a pollutant at the major stationary source. Texas requires the owner or operator to submit a list of *all facilities to be included in the PAL* see 30 TAC 116.182(1), such that not all of the facilities at the entire major stationary source may be specifically required to be included in the PAL. However, the Federal rules require the owner or operator to submit a list of *all emissions units at the source* see 40 CFR 51.166(f)(3)(i) and 40 CFR 51.166(w)(3)(i). The corresponding Federal rules provide that a PAL applies to all of the emission units at the *entire* major stationary source. Inclusion of all the emissions units subject to the enforceable PAL limit is an essential feature of the Plantwide Applicability Limit. The Texas submittal is unclear as to whether the PAL would apply to all of the emission units at the *entire* major stationary source and therefore appears to be less stringent than the Federal rules. In the absence of any demonstration from the State, EPA is proposing to disapprove 30 TAC 116.186 and 30 TAC 116.182(1) as not meeting the revised Major NSR SIP requirements.

Submitted 30 TAC 116.194 requires that an applicant for a PAL permit must provide for public notice on the draft PAL permit in accordance with 30 TAC Chapter 39—Public Notice—for all initial applications, amendments, and renewals or a PAL Permit.[7] *See* 73 FR 72001 (November 26, 2008) for more information on Texas' public participation rules and their relationship to PALs. The November 2008 proposal addressed the public participation provisions in 30 TAC Chapter 39, but did not specifically propose action on 30 TAC 116.194. Today, we propose to address 30 TAC 116.194. Because this section relates to the public participation requirements of the PAL program, this section is not severable from the PAL program. Because we are proposing to disapprove the PAL program, we propose to likewise disapprove 30 TAC 116.194.

The Federal definition of the ''baseline actual emissions'' provides that these emissions must be calculated in terms of ''the *average* rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period.'' *See* 40 CFR 51.165(a)(1)(xxxv)(A), (B), (D) and (E) and 51.166(b)(47)(i), (ii), (iv), and (v). Emphasis added. The submitted definition of the term ''baseline actual emissions'' found at 30 TAC 116.12(3)(A), (B), (D), and (E) differs from the Federal definition by providing that the baseline shall be calculated as ''the rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period.'' The submitted definition omits reference to the ''average rate.'' The definition differs from the Federal SIP definition but the State failed to provide a demonstration showing how the different definition is at least as stringent as the Federal definition. Therefore, EPA proposes to disapprove the different definition of ''baseline actual emissions'' found at 30 TAC 116.12(3) as not meeting the revised Major NSR SIP requirements. On the same grounds for lacking a demonstration, EPA proposes to

[7] ''The submittals do not meet the following public participation provisions for PALs: (1) For PALs for existing major stationary sources, there is no provision that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). (2) For PALs for existing major stationary sources, there is no requirement that the State address all material comments before taking final action on the permit, consistent with 40 CFR 51.165(f)(5) and 51.166(w)(5). (3) The applicability provision in section 39.403 does not include PALs, despite the cross-reference to Chapter 39 in Section 116.194.''

disapprove 30 TAC 116.182(2) that refers to calculations of the baseline actual emissions for a PAL, as not meeting the revised Major NSR SIP requirements.

The State also failed to include the following specific monitoring definitions: ''Continuous emissions monitoring system (CEMS)'' as defined in 40 CFR 51.165(a)(1)(xxxi) and 51.166(b)(43); ''Continuous emissions rate monitoring system (CERMS)'' as defined in 40 CFR 51.165(a)(1)(xxxiv) and 51.166(b)(46); ''Continuous parameter monitoring system (CPMS)'' as defined in 40 CFR 51.165(a)(1)(xxxiii) and 51.166(b)(45); and ''Predictive emissions monitoring system (PEMS)'' as defined in 40 CFR 51.165(a)(1)(xxxii) and 51.166(b)(44). All of these definitions concerning the monitoring systems in the revised Major NSR SIP requirements are essential for the enforceability of and providing the means for determining compliance with a PALs program. Therefore, we are proposing to disapprove the State's lack of these four monitoring definitions as not meeting the revised Major NSR SIP requirements.

Additionally, where, as here, a State has made a SIP revision that does not contain definitions that are required in the revised Major NSR SIP program, EPA may approve such a revision only if the State specifically demonstrates that, despite the absence of the required definitions, the submitted revision is more stringent, or at least as stringent, in all respects as the Federal program. *See* 40 CFR 51.165(a)(1) (non-attainment SIP approval criteria); 51.166 (b) (PSD SIP definition approval criteria). Texas did not provide such a demonstration. Therefore, EPA proposes to disapprove the lack of these definitions as not meeting the revised Major NSR SIP requirements.

None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for PALs is severable from each other. Therefore, we are proposing to disapprove the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations.

B. Do the Submitted SIP Revisions Meet the Non-PAL Aspects of the Major NSR SIP Requirements?

The submitted NNSR non-PAL rules do not explicitly limit the definition of ''facility'' [8] to an ''emissions unit'' as do the submitted PSD non-PAL rules. It is our understanding of State law that a ''facility'' can be an ''emissions unit,'' *i.e.*, any part of a stationary source that emits or may have the potential to emit any air contaminant, as the State explicitly provides in the revised PSD rule at 30 TAC 116.160(c)(3). A ''facility'' also can be a piece of equipment, which is smaller than an ''emissions unit.'' A ''facility'' can include more than one ''major stationary source.'' It can include every emissions point on a company site, without limiting these emissions points to only those belonging to the same industrial grouping (SIP code). In our proposed action on the Texas Qualified Facilities State Program, EPA specifically solicits comment on the definition for ''facility'' under State law. We encourage anyone interested in this issue to review and comment on the other proposed action on the submitted Qualified Facilities State Program, as well.

Regardless, the State clearly thought the prudent legal course was to limit ''facility'' explicitly to ''emissions unit'' in its PSD SIP non-PALs revision. TCEQ did not submit a demonstration showing how the lack of this explicit limitation in the NNSR SIP non-PALs revision is at least as stringent as the revised Major NSR SIP requirements. Therefore, EPA is proposing to disapprove the submitted definition and its use as not meeting the revised Major NNSR non-PALs SIP requirements.

Under the Major NSR SIP requirements, for any physical or operational change at a major stationary source, a source must include emissions resulting from startups, shutdowns, and malfunctions in its determination of the baseline actual emissions (see 40 CFR 51.165(a)(1)(xxxv)(A)(1) and (B)(1) and 40 CFR 51.166(b)(47)(i)(*a*) and (ii)(a)) and the projected actual emissions (see 40 CFR 51.165(a)(1)(xxviii)(B) and 40 CFR 51.166(b)(40)(ii)(*b*)). The definition of the term ''baseline actual emissions,'' as submitted in 30 TAC 116.12(3)(E), does not require the inclusion of emissions resulting from startups, shutdowns, and malfunctions.[9] Our understanding of State law is that the use of the term ''may'' ''creates discretionary authority or grants permission or a power. See Section 311.016 of the Texas Code Construction Act. Similarly, the submitted definition of ''projected actual emissions'' at 30 TAC 116.12(29) does not require that emissions resulting from startups, shutdowns, and malfunctions be included. The submitted definitions differ from the Federal SIP definitions and the State has not provided information demonstrating that these definitions are at least as stringent as the Federal SIP definitions. Therefore, based upon the lack of a demonstration from the State, EPA proposes to disapprove the definitions of ''baseline actual emissions'' at 30 TAC 116.12(3) and ''projected actual emissions'' at 30 TAC 116.12(29) as not meeting the revised Major NSR SIP requirements.

The Federal definition of the ''baseline actual emissions'' provides that these emissions must be calculated in terms of ''the average rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period.'' The submitted definition of the term ''baseline actual emissions'' found at 30 TAC 116.12 (3)(A), (B), (D), and (E) differs from the Federal definition by providing that the baseline shall be calculated as ''the rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period.''

Texas has not provided any demonstration showing how this different definition is at least as stringent as the Federal SIP definition. Therefore, EPA proposes to disapprove the submitted definition of ''baseline actual emissions'' found at 30 TAC 116.12(3) as not meeting the revised major NSR SIP requirements.

None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for non-PALs is severable from each other. Therefore, we are proposing to disapprove the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR non-PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations.

VII. Does the Submitted PCP Standard Permit Meet the Minor NSR SIP Requirements?

EPA approved Texas' general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116 on November 14, 2003 (68 FR 64548) as meeting the minor NSR SIP requirements. The November 14, 2003

[8] ''Facility'' is defined in the SIP approved 30 TAC 116.10(6) as ''a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment.''

[9] The submitted definition of ''baseline actual emissions,'' is as follows: Until March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under Chapter 101 of this title * * * *may* be included to the extent they have been authorized, or are being authorized, in a permit action under Chapter 116. 30 TAC 116.12(3)(E) (emphasis added).

action describes how these rules meet EPA's requirements for new minor sources and minor modifications. A Standard Permit provides a streamlined mechanism with all permitting requirements for construction and operation of certain sources in categories that contain numerous similar sources. It is not a case-by-case minor NSR SIP permit. Therefore, each minor NSR SIP Standard Permit must contain all terms and conditions on the face of it (combined with the SIP general requirements) and it cannot be used to address site-specific determinations. This particular type of minor NSR permit is required to be applicable to narrowly defined categories of emission sources [10] rather than a category of *emission types*. A Standard Permit is a minor NSR permit limited to a particular narrowly defined source category for which the permit is designed to cover and cannot be used to make site-specific determinations that are outside the scope of this type of permit.[11]

EPA did not approve the Standard Permit for PCPs (30 TAC 116.617) in the November 14, 2003 action as part of the Texas minor NSR SIP. *See* 68 FR 64547. On February 1, 2006, Texas submitted a repeal of the previously submitted PCP Standard Permit and submitted the adoption of a new PCP Standard Permit at 30 TAC 116.617—State Pollution Control Project Standard Permit.[12] One of the main reasons Texas adopted a new PCP Standard Permit was to meet the new Federal requirements to explicitly limit this PCP Standard Permit only to Minor NSR. In *State of New York, et al.* v. *EPA,* 413 F.3d 3 (DC Cir. June 24, 2005), the Court vacated the federal pollution control project provisions for NNSR and PSD. The new PCP Standard Permit explicitly prohibits the use of the PCP Standard Permit for new major sources and major modifications. Still the new PCP Standard Permit is a generic permit that applies to numerous types of pollution control projects, which can be used at *any* source that wants to use a PCP. The definition in this Standard Permit for what is a PCP is overly broad. For example, it does not delineate what type of pollution control equipment is authorized.

The PCP Standard Permit, as adopted and submitted by Texas to EPA for approval into the Texas Minor NSR SIP, is not limited in its applicability to a single category of industrial sources, but to a broad class of pollution control techniques at all source categories. An individual Standard Permit must be limited to a single source category, which consists of numerous similar sources that can meet standardized permit conditions. In addition to EPA's concerns that this submitted PCP Standard Permit is not limited in its applicability, another major concern is that this Standard Permit is designed for case-by-case additional authorization, source-specific review, and source-specific technical determinations. For case-by-case additional authorization, source-specific review, and source specific technical determinations, under the minor NSR SIP rules, if these types of determinations are necessary, the State must use its minor NSR SIP case-by-case permit process under 30 TAC 116.110(a)(1).

There are no replicable conditions in the PCP Standard Permit that specify how the Director's discretion is to be implemented for the individual determinations. Of particular concern is the provision that allows for the exercise of the Executive Director's discretion in making case-specific determinations in individual cases in lieu of generic enforceable requirements. Because EPA approval will not be required in each individual case, specific replicable criteria must be set forth in the Standard Permit establishing equivalent emissions rates and ambient impact. Similarly, the PCP Standard Permit is not the appropriate vehicle in the case-by-case establishing of recordkeeping, monitoring, and recordkeeping requirements because it requires the Executive Director to make case-by-case determinations and to establish case specific terms and conditions for the construction or modification of each individual PCP that are outside the terms and conditions in the PCP Standard Permit.

Because the PCP Standard Permit, in 30 TAC 116.617, does not meet the SIP requirements for Minor NSR, EPA proposes to disapprove the PCP Standard Permit, as submitted February 1, 2006.

VIII. What Is Our Evaluation of Other SIP Revision Submittals?

We are proposing to take no action upon the June 10, 2005 SIP revision submittal addressing definitions at 30 TAC Chapter 101, Subchapter A, section 101.1, because previous revisions to that section are still pending review by EPA. We will take appropriate action on the submittals concerning 30 TAC 101.1 in a separate action. As noted previously, these definitions are severable from the other portions of the two SIP revision submittals.

Second, Texas originally submitted a new Subchapter C—Hazardous Air Pollutants: Regulations Governing Constructed and Reconstructed Sources (FCAA, § 112(g), 40 CFR Part 63) on July 22, 1998. EPA has not taken action upon the 1998 submittal. In the February 1, 2006, SIP revision submittal, this Subchapter C is recodified to Subchapter E and sections are renumbered. This 2006 submittal also includes an amendment to 30 TAC 116.610(d) to change the cross-reference from Subchapter C to Subchapter E. These SIP revision submittals apply to the review and permitting of constructed and reconstructed major sources of hazardous air pollutants (HAP) under section 112 of the Act and 40 CFR part 63, subpart B. The process for these provisions is carried out separately from the SIP activities. SIPs cover criteria pollutants and their precursors, as regulated by NAAQS. Section 112(g) of the Act regulates HAPs, this program is not under the auspices of a section 110 SIP, and this program should not be approved into the SIP. These portions of the 1998 and

[10] Examples of narrowly defined categories of emission sources include oil and gas facilities, asphalt concrete plants, and concrete batch plants.

[11] *See Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and section 112 rules and General permits*, Memorandum from Kathie A Stein, Office of Enforcement and Compliance Assurance, January 25, 1995, *Options for Limiting the Potential to Emit (PTE) of a Stationary Source under Section 112 and Title V of the Clean Air Act*, Memorandum from John S. Seitz, Office of Air Quality Planning and Standards (OAQPS), January 25, 1995, *Approaches to Creating Federally-Enforceable Emissions Limits*, Memorandum from John S. Seitz, OAQPS, November 3, 1993, *Potential to Emit (PTE) Guidance for Specific Source Categories*, Memorandum from John S. Seitz, OAQPS and Eric Schaeffer, OECA, April 14, 1998, *EPA Region 7 Permit by Rule Guidance for Minor Source Preconstruction Permits*. See also, rulemakings related to general permits: 61 FR 53633, final approval of Tennessee SIP Revision, October 15, 1996; 62 FR 2587, final approval of Florida SIP revision, January 17, 1997; 71 FR 5979, final approval of Wisconsin SIP revision, February 6, 2006; 71 FR 14439, proposed conditional approval of Missouri SIP revision, March 22, 2006. EPA guidance documents set out specific guidelines: (1) General permits apply to a specific and narrow category of sources, (2) For sources electing coverage under general permits where coverage is not mandatory, provide notice or reporting to the permitting authority, reporting or notice to permitting authority, (3) General permits provide specific and technically accurate (verifiable) limits that restrict potential to emit, (4) General permits contain specific compliance requirements, (5) Limits in general permits are established based on practicably enforceable averaging times, and (6) Violations of the permit are considered violations of state and federal requirements and may result in the source being subject to major source requirements.

[12] The 2006 submittal also included a revision to 30 TAC 116.610(d), that is a rule in Subchapter F, Standard Permits, to change an internal cross reference from Subchapter C to Subchapter E, consistent with the re-designation of this Subchapter by TCEQ. See section IX for further information on this portion of the 2006 submittal.

2006 submittals are severable. For these reasons we propose to take no action on this portion relating to section 112(g) of the Act.

Third, the February 1, 2006, SIP revision submittal includes a new 30 TAC Chapter 116, Subchapter K (as recodified from Subchapter E), that relates to the issuance of Emergency Orders, and is severable from all the other portions of the 2006 submittal. EPA is currently reviewing the SIP revision submittals that relate to Emergency Orders, including this submittal and will take appropriate action on the Emergency Order requirements in a separate action, according to the Consent Decree schedule.

IX. Proposed Action

Under section 110(k)(3) of the Act and for the reasons stated above, EPA is proposing disapproval of revisions to the Texas Major NSR SIP that relate to implementation of Major NSR in areas designated nonattainment for the 1997 8-hour ozone NAAQS, implementation of Major NSR in areas designated nonattainment for the 1-hour ozone NAAQS, and implementation of Major NSR SIP requirements in all of Texas. We are proposing to disapprove the SIP revision submittals for the Texas Major NSR SIP. Finally, we are proposing to disapprove the submittals for a Minor Standard Permit for PCP. EPA is also proposing to take no action on certain severable revisions submitted June 10, 2005, and February 1, 2006.

Specifically, we are proposing:

- Disapproval of revisions to 30 TAC 30 TAC 116.12 and 116.150 as submitted June 10, 2005;
- Disapproval of revisions 30 TAC 116.12, 116.150, 116.151, 116.160; and disapproval of new sections at 30 TAC 116.121, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, and 116.617, as submitted February 1, 2006.

We are also proposing to take no action on the provisions identified below:

- The revisions to 30 TAC 101.1—Definitions, submitted June 10, 2005;
- The recodification of the existing Subchapter C under 30 TAC Chapter 116 to a new Subchapter E under 30 TAC Chapter 116; and
- The recodification of the existing Subchapter E under 30 TAC Chapter 116 to a new Subchapter K under 30 TAC Chapter 116.

We will accept comments on this proposal for the next 60 days. After review of public comments, we will take final action on the SIP revisions that are identified herein.

EPA intends to take final action on the State's Public Participation SIP revision submittal in November 2009. EPA intends to take final action on the submitted Texas Qualified Facilities State Program by March 31, 2010, the submitted Texas Flexible Permits State Program by June 30, 2010, and the NSR SIP by August 31, 2010. These dates are expected to be mandated under a Consent Decree (*see* Notice of Proposed Consent Decree and Proposed Settlement Agreement, 74 FR 38015, July 30, 2009). Sources are reminded that they remain subject to the requirements of the federally approved Texas Major NSR SIP and subject to potential enforcement for violations of the SIP (*See* EPA's Revised Guidance on Enforcement During Pending SIP Revisions, dated March 1, 1991).

X. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (*58 FR 51735*, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq,* because this proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in and of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in and of itself create any new requirements but simply disapproves certain State requirements for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the Clean Air Act prescribes that various consequences (*e.g.,* higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities.

We continue to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 ''for State, local, or tribal governments or the private sector.'' EPA has determined that the proposed disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This action proposes to disapprove pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (*64 FR 43255*, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have

federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (*59 FR 22951*, November 9, 2000), because the SIP EPA is proposing to disapprove would not apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (*62 FR 19885*, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (*62 FR 19885*, April 23, 1997). This proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211 (*66 FR 28355*, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (*59 FR 7629* (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely proposes to disapprove certain State requirements for inclusion into the SIP under section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon Monoxide, Hydrocarbons, Intergovernmental relations, Lead, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: September 8, 2009.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

[FR Doc. E9–22806 Filed 9–22–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2007–0359; FRL–8960–8]

Approval and Promulgation of Implementation Plans, Alabama: Clean Air Interstate Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a portion of the State Implementation Plan (SIP) revision submitted by the State of Alabama, through the Alabama Department of Environmental Management (ADEM), on March 7, 2007. This action proposes to approve the portion of the March 7, 2007, submittal that addresses State reporting requirements under the Nitrogen Oxide (NO_X) SIP Call and the Clean Air Interstate Rule (CAIR) found in 40 CFR 51.122 and 51.125 as amended by the CAIR rulemakings. Specifically, in this action EPA is proposing to approve revisions to Chapter 335–3–1 ''General Provisions.'' In previous rulemakings, EPA took action on the other portions of the March 7, 2007, SIP submittal, which included revisions to Chapters 335–3–5, and 335–3–8 (October 1, 2007, 72 FR 55659) and Chapter 335–3–17 (March 26, 2009, 74 FR 13118). Although the DC Circuit Court found CAIR to be flawed, the rule was remanded without vacatur and thus remains in place. Thus, EPA is continuing to approve CAIR provisions into SIPs as appropriate. CAIR, as promulgated, requires States to reduce emissions of sulfur dioxide (SO_2) and NO_X that significantly contribute to, or interfere with maintenance of, the national ambient air quality standards (NAAQS) for fine particulates and/or ozone in any downwind state. CAIR establishes budgets for SO_2 and NO_X for States that contribute significantly to

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2006–0133 and EPA–R06–OAR–2005–TX–0025; FRL—9199–6]

Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Nonattainment NSR (NNSR) for the 1-Hour and the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: EPA is taking final action to disapprove submittals from the State of Texas, through the Texas Commission on Environmental Quality (TCEQ), to revise the Texas Major and Minor NSR SIP. We are disapproving the submittals because they do not meet the 2002 revised Major NSR SIP requirements. We are also disapproving the submittals as not meeting the Major Nonattainment NSR SIP requirements for implementation of the 1997 8-hour ozone national ambient air quality standard (NAAQS) and the 1-hour ozone NAAQS. EPA is disapproving the submitted Standard Permit (SP) for Pollution Control Projects (PCP) because it does not meet the requirements of the CAA for a minor NSR Standard Permit program. Finally, EPA is also disapproving a submitted severable definition of best available control technology (BACT) that is used by TCEQ in its Minor NSR SIP permitting program.

EPA is not addressing the submitted revisions concerning the Texas Major PSD NSR SIP, which will be addressed in a separate action. EPA is taking no action on severable provisions that implement section 112(g) of the Act and is restoring a clarification to an earlier action that removed an explanation that a particular provision is not in the SIP because it implements section 112(g) of the Act. EPA is not addressing severable revisions to definitions submitted June 10, 2005, submittal, which will be addressed in a separate action. We are taking no action on a severable provision relating to Emergency and Temporary Orders, which we will address in a separate action.

EPA is taking these actions under section 110, part C, and part D, of the Federal Clean Air Act (the Act or CAA).

DATES: This rule is effective on October 15, 2010.

ADDRESSES: EPA has established a docket for this action on New Source Review (NSR) Nonattainment NSR (NNSR) Program for the 1-Hour Ozone Standard and the 1997 8-Hour Ozone Standard, NSR Reform, and a specific Standard Permit under Docket ID No. EPA–R06–OAR–2006–0133. The docket for the action on the definition of BACT is in Docket ID No. EPA–R06–OAR–2005–TX–0025. All documents in these dockets are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal, which is part of the EPA record, is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–7212; fax number 214–665–7263; e-mail address *spruiell.stanley@epa.gov*.

SUPPLEMENTARY INFORMATION:

Throughout this document, the following terms have the meanings described below:

- "We," "us," and "our" refer to EPA.
- "Act" and "CAA" means Clean Air Act.
- "40 CFR" means Title 40 of the Code of Federal Regulations–Protection of the Environment.
- "SIP" means State Implementation Plan as established under section 110 of the Act.
- "NSR" means new source review, a phrase intended to encompass the statutory and regulatory programs that regulate the construction and modification of stationary sources as provided under CAA section 110(a)(2)(C), CAA Title I, parts C and D, and 40 CFR 51.160 through 51.166.
- "Minor NSR" means NSR established under section 110 of the Act and 40 CFR 51.160.
- "NNSR" means nonattainment NSR established under Title I, section 110 and part D of the Act and 40 CFR 51.165.
- "PSD" means prevention of significant deterioration of air quality established under Title I, section 110 and part C of the Act and 40 CFR 51.166.
- "Major NSR" means any new or modified source that is subject to NNSR and/or PSD.
- "TSD" means the Technical Support Document for this action.
- "NAAQS" means national ambient air quality standards promulgated under section 109 of that Act and 40 CFR part 50.
- "PAL" means "plantwide applicability limitation."
- "PCP" means "pollution control project."
- "TCEQ" means "Texas Commission on Environmental Quality."

Table of Contents

I. What action is EPA taking?

A. What regulations is EPA disapproving?

We are disapproving the SIP revisions submitted by Texas on June 10, 2005, and February 1, 2006, as not meeting the Act and the 1997 8-hour ozone Major Nonattainment NSR SIP requirements, and as not meeting the Act and Major Nonattainment NSR SIP requirements for the 1-hour ozone NAAQS. We are disapproving the SIP revision submitted by Texas on February 1, 2006, as not meeting the Major NSR Reform SIP requirements for PAL provisions and the Major NSR Reform SIP requirements without the PAL provisions. We are disapproving the Standard Permit for PCP submitted February 1, 2006, as not meeting the Act and Minor NSR SIP requirements. We proposed to disapprove the above SIP revision submittals on September 23, 2009 (74 FR 48467). We are disapproving the State's regulatory definition for its Texas Clean Air Act's statutory definition for "BACT" that was submitted in 30 TAC 116.10(3) on March 13, 1996, and July 22, 1998, because it is not clearly limited to minor sources and minor modifications. We proposed to disapprove this severable definition of BACT under our action on Qualified Facilities. *See* 74 FR 48450, at 48463 (September 23, 2009). It is EPA's position that each of these six identified portions in the SIP revision submittals, 8-hour ozone, 1-hour ozone, PALs, non-PALs, PCP Standard Permit, and Minor NSR definition of BACT, is severable from each other and from the remaining portions of the SIP revision submittals.

We have evaluated the SIP submissions to determine whether they meet the Act and 40 CFR Part 51, and are consistent with EPA's interpretation of the relevant provisions. Based upon our evaluation, EPA has concluded that each of the six portions of the SIP revision submittals, identified below, does not meet the requirements of the Act and 40 CFR part 51. Therefore, each portion of the State submittals is not approvable. As authorized in sections 110(k)(3) and 301(a) of the Act, where portions of the State submittal are severable, EPA may approve the portions of the submittal that meet the requirements of the Act, take no action on certain portions of the submittal,[1] and disapprove the portions of the submittal that do not meet the requirements of the Act. When the deficient provisions are not severable from the all of the submitted provisions, EPA must disapprove the submittals, consistent with section 301(a) and 110(k)(3) of the Act. Each of the six portions of the State submittals is severable from each other. Therefore, EPA is disapproving each of the following severable provisions of the submittals:

- The submitted 1997 8-hour ozone NAAQS Major Nonattainment NSR SIP revision,
- The submitted 1-hour ozone NAAQS Major NNSR SIP revision,
- The submitted Major NSR reform SIP revision with PAL provisions,
- The submitted Major NSR reform SIP revision with no PAL provisions,
- The submitted Minor NSR Standard Permit for PCP SIP revision, and
- The submitted definition of "BACT" under 30 TAC 116.10(3) for Minor NSR.

The provisions in these submittals for each of the six portions of the SIP revision submittals were not submitted to meet a mandatory requirement of the Act. Therefore, this final action to disapprove the submitted six portions of the State submittals does not trigger a sanctions or Federal Implementation Plan clock. *See* CAA section 179(a).

B. What other actions is EPA taking?

EPA is taking action in a separate rulemaking action published in today's **Federal Register** on the severable revisions that relate to Prevention of Significant Deterioration. The affected provision that is being acted upon separately in today's **Federal Register** is 30 TAC 116.160.

We are taking no action on 30 TAC 116.400, 116.402, 116.404, and 116.406, submitted February 1, 2006. These provisions implement section 112(g) of the Act, which is outside the scope of the SIP. We are also making an administrative correction relating to 30 TAC 116.115(c)(2)(B)(ii)(I). In our 2002 approval of 30 TAC 116.115 we included an explanation in 40 CFR 52.2270(c) that 30 TAC 116.115(c)(2)(B)(ii)(I) is not in the SIP because it implements section 112(g) of the Act, which is outside the scope of the SIP. In a separate action published April 2, 2010 (75 FR 16671), we inadvertently removed the explanation that states that this provision is not part of the SIP.

We are taking no action on severable portions of the June 10, 2005, submittal concerning 30 TAC 101.1 Definitions. We will take action on these portions of the submittal in a later rulemaking.

Finally, we are taking no action on severable portions of the February 1, 2006, submittal which relate to

[1] In this action, we are taking no action on certain provisions that are either outside the scope of the SIP or which revise an earlier submittal of a base regulation that is currently undergoing review for appropriate action.

Emergency and Temporary Orders. We will take action on these portions of the submittal in a later rulemaking.

II. What is the background?

A. Summary of Our Proposed Action

On September 23, 2009, under Docket No. EPA–R06–OAR–0133, EPA proposed to disapprove revisions to the SIP submitted by the State of Texas that relate to revisions to the New Source Review (NSR) State Implementation Plan (SIP); (1) Prevention of Significant Deterioration (PSD), (2) Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, (3) NNSR for the 1-Hour Ozone Standard, (4) Major NSR Reform for PAL provisions, (5) The Major NSR Reform SIP requirements without the PAL provisions and (6) The Standard Permit for PCP. *See* 74 FR 48467. These affected provisions that we proposed to disapprove were 30 TAC 116.12, 116.121, 116.150, 116.151, 116.160, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, 116.610(a), and 116.617 under Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. EPA also proposed on September 23, 2009, under Docket No. EPA–R06–OAR–2005–TX–0025 (*see* 74 FR 48450, at 48463–48464), to disapprove a revision to the SIP submitted by the State that relates to the State's Minor NSR definition of BACT. The affected definition that we proposed to disapprove was 30 TAC 116.10(3). *See* 74 FR 48450, at 48463–48464. EPA finds that each of these six submitted provisions is severable from each other. EPA also finds that the submitted definition is severable from the other submittals.

EPA is taking action in a separate rulemaking action published in today's **Federal Register** on the severable revisions that relate to Prevention of Significant Deterioration. The affected provision that is being acted upon separately in today's **Federal Register** is 30 TAC 116.160.

EPA proposed on September 23, 2009, under Docket No. EPA–R06–OAR–0133, no action on the following regulations:

- 30 TAC 116.400, 116.402, 116.404, 116.406, 116.610(d). These regulations implement section 112(g) of the CAA and are outside the scope of the SIP;
- 30 TAC 116.1200. This regulation relates to Emergency and Temporary Orders and will be addressed in a separate action under the Settlement Agreement in BCCA Appeal Group v. EPA, Case No. 3:08–cv–01491–N (N.D. Tex).

B. Summary of the Submittals Addressed in This Final Action

Tables 1 and 2 below summarize the changes that are in the SIP revision submittals. A summary of EPA's evaluation of each section and the basis for this final action is discussed in sections III through V of this preamble. The TSD (which is in the docket) includes a detailed evaluation of the submittals.

TABLE 1—SUMMARY OF EACH SIP SUBMITTAL THAT IS AFFECTED BY THIS ACTION

Title of SIP submittal	Date submitted to EPA	Date of state adoption	Regulations affected in this action
Qualified Facilities and Modification to Existing Facilities	3/13/1996	2/14/1996	30 TAC 116.10—definition of "BACT".
NSR Rule Revisions; section 112(g) Rule Review for Chapter 116.	7/22/1998	6/17/1998	30 TAC 116.10(3)—definition of "BACT".
New Source Review for Eight-Hour Ozone Standard	6/10/2005	5/25/2005	30 TAC 116.12 and 115.150.
Federal New Source Review Permit Rules Reform	2/1/2006	1/11/2006	30 TAC 116.12, 116.121, 116.150, 116.151, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, 116.400, 116.402, 116.404, 116.406, 116.610, 116.617, and 116.1200.

TABLE 2—SUMMARY OF EACH REGULATION THAT IS AFFECTED BY THIS ACTION

Section	Title	Submittal dates	Description of change	Final action
Chapter 116—Control of Air Pollution by Permits for New Construction or Modification				
Subchapter A—Definitions				
30 TAC 116.10(3)	Definition of "BACT"	3/13/1996	Added new definition	Disapproval.
		7/22/1998	Repealed and a new definition submitted as paragraph (3).	
30 TAC 116.12	Nonattainment Review Definitions	6/10/2005	Changed several definitions to implement Federal phase I rule implementing 8-hour ozone standard.	Disapproval.
	Nonattainment Review and Prevention of Significant Deterioration Definitions.	2/1/2006	Renamed section and added and revised definitions to implement Federal NSR Reform regulations.	Disapproval.
Subchapter B—New Source Review Permits				
Division 1—Permit Application				
30 TAC 116.121	Actual to Projected Actual Test for Emissions Increase.	2/1/2006	New Section	Disapproval.

TABLE 2—SUMMARY OF EACH REGULATION THAT IS AFFECTED BY THIS ACTION—Continued

Section	Title	Submittal dates	Description of change	Final action
Division 5—Nonattainment Review				
30 TAC 116.150	New Major Source or Major Modification in Ozone Nonattainment Area.	6/10/2005	Revised section to implement Federal phase I rule implementing 8-hour ozone standard.	Disapproval.
		2/1/2006	Revised section to implement Federal NSR Reform regulations.	Disapproval.
30 TAC 116.151	New Major Source or Major Modification in Nonattainment Areas Other Than Ozone.	2/1/2006	Revised section to implement Federal NSR Reform regulations.	Disapproval.
Subchapter C—Plant-Wide Applicability Limits				
Division 1—Plant-Wide Applicability Limits				
30 TAC 116.180	Applicability	2/1/2006	New Section	Disapproval.
30 TAC 116.182	Plant-Wide Applicability Limit Permit Application.	2/1/2006	New Section	Disapproval.
30 TAC 116.184	Application Review Schedule	2/1/2006	New Section	Disapproval.
30 TAC 116.186	General and Special Conditions	2/1/2006	New Section	Disapproval.
30 TAC 116.188	Plant-Wide Applicability Limit	2/1/2006	New Section	Disapproval.
30 TAC 116.190	Federal Nonattainment and Prevention of Significant Deterioration Review.	2/1/2006	New Section	Disapproval.
30 TAC 116.192	Amendments and Alterations	2/1/2006	New Section	Disapproval.
30 TAC 116.194	Public Notice and Comment	2/1/2006	New Section	Disapproval.
30 TAC 116.196	Renewal of a Plant-Wide Applicability Limit Permit.	2/1/2006	New Section	Disapproval.
30 TAC 116.198	Expiration and Voidance	2/1/2006	New Section	Disapproval.
Subchapter E—Hazardous Air Pollutants: Regulations Governing Constructed and Reconstructed Sources (FCAA, § 112(g), 40 CFR Part 63) [a]				
30 TAC 116.400	Applicability	2/1/2006	Recodification from section 116.180.	No action.
30 TAC 116.402	Exclusions	2/1/2006	Recodification from section 116.181.	No action.
30 TAC 116.404	Application	2/1/2006	Recodification from section 116.182.	No action.
30 TAC 116.406	Public Notice Requirements	2/1/2006	Recodification from section 116.183.	No action.
Subchapter F—Standard Permits				
30 TAC 116.610	Applicability	2/1/2006	Revised paragraphs (a), (a)(1) through (a)(5), (b), and (d) [b].	- Disapproval of paragraph (a) - No action on paragraph (d)
30 TAC 116.617	State Pollution Control Project Standard Permit.	2/1/2006	Replaced former 30 TAC 116.617—Standard Permit for Pollution Control Projects [c].	Disapproval.
Subchapter K—Emergency Orders [d]				
30 TAC 116.1200	Applicability	2/1/2006	Recodification from 30 TAC 116.410.	No action.

[a] Recodification of former Subchapter C. These provisions are not SIP-approved.
[b] 30 TAC 116.610(d) is not SIP-approved.
[c] 30 TAC 116.617 is not SIP-approved.
[d] Recodification of former Subchapter E. These provisions are not SIP-approved.

C. Other Relevant Actions on the Texas Permitting SIP Revision Submittals

Final action on the submitted Major NSR SIP elements and the Standard Permit is required by August 31, 2010, as provided in the Consent Decree entered on January 21, 2010 in *BCCA Appeal Group* v. *EPA,* Case No. 3:08–cv–01491–N (N.D. Tex). As required by the Consent Decree, EPA published its final actions for the following SIP revisions: (1) Texas Qualified Facilities

Program and its associated General Definitions on April 14, 2010 (*See* 75 FR 19467); and (2) Texas Flexible Permits Program on July 15, 2010 (*See* 75 FR 41311).

TCEQ submitted on July 16, 2010, a proposed SIP revision addressing the PSD SIP requirements. We are acting upon the previous PSD SIP revision submittal of February 1, 2006, and the newly submitted PSD SIP revision in a separate rulemaking. Additionally, EPA acknowledges that TCEQ is developing a proposed rulemaking package to address EPA's concerns with revisions to the New Source Review (NSR) State Implementation Plan (SIP); Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard and the 1-Hour Ozone Standard, NSR Reform, and the PCP Standard Permit. We will, of course, consider any rule changes if and when they are submitted to EPA for review. However, the rules before us today are those of Texas's current 1997 8-Hour Ozone Standard NNSR Program, 1-Hour Ozone Standard NNSR Program, NSR Reform Program, PCP Standard Permit, and we have concluded that these current Programs are not approvable for the reasons set out in this notice.

III. Did we receive public comments on the proposed rulemaking?

In response to our September 23, 2009, proposal, we received comments from the following: Association of Electric Companies of Texas (AECT); Austin Physicians for Social Responsibility (PSR); Baker Botts, L.L.P., on behalf of BCCA Appeal Group (BCCA); Baker Botts, L.L.P., on behalf of Texas Industrial Project (TIP); Bracewell & Guiliani, L.L.P., on behalf of the Electric Reliability Coordinating Council (ERCC); Citizens of Grayson County; Gulf Coast Lignite Coalition (GCLC); Office of the Mayor—City of Houston, Texas (City of Houston); Harris County Public Health and Environmental Services (HCPHES); Sierra Club—Houston Regional Group (Sierra Club); Sierra Club Membership Services (including 2,062 individual comment letters) (SCMS); Texas Chemical Council (TCC); Texas Commission on Environmental Quality (TCEQ); Texas Association Business; Members of the Texas House of Representatives; Texas Association of Business (TAB); Texas Oil and Gas Association (TxOGA); and University of Texas at Austin School of Law—Environmental Clinic (the Clinic) on behalf of Environmental Integrity Project, Environmental Defense Fund, Galveston-Houston Association for Smog Prevention, Public Citizen, Citizens for Environmental Justice, Sierra Club Lone Star Chapter, Community-In-Power and Development Association, KIDS for Clean Air, Clean Air Institute of Texas, Sustainable Energy and Economic Development Coalition, Robertson County: Our Land, Our Lives, Texas Protecting Our Land, Water and Environment, Citizens for a Clean Environment, Multi-County Coalition, and Citizens Opposing Power Plants for Clean Air.

We respond to these comments in our evaluation and review under this final action in section IV below.

IV. What are the grounds for these actions?

This section includes EPA's evaluation of each part of the submitted rules. The evaluation is organized as follows: (1) A discussion of the background of the submitted rules; (2) a summary and response to each comment received on the submitted rule; and (3) the grounds for final action on each rule.

A. The Submitted Minor NSR State BACT Definition SIP Revision

EPA proposed to disapprove this severable definition of BACT in 30 TAC 116.10(3), submitted March 13, 1996, and July 22, 1998, when EPA proposed to disapprove the Texas Qualified Facilities Program (under Docket No. EPA–R06–OAR–2005–TX–0025). *See* 74 FR 48450, at 48463–48464. The submittals on March 13, 1996, and July 22, 1998, include a new regulatory definition for the Texas Clean Air Act's definition of "BACT," defining it as BACT with consideration given to the technical practicability and economical reasonableness of reducing or eliminating emissions.

1. What is the background for the submitted definition of BACT under 30 TAC 116.10(3) as proposed under Docket No. EPA–R06–OAR–2005–TX–0025?

On July 27, 1972, the State of Texas revised its January 1972 permitting rules, then Regulation VI at rule 603.16, to add the Texas Clean Air Act statutory requirement that a proposed new facility and proposed modification utilize BACT, with consideration to the technical practicability and economical reasonableness of reducing or eliminating the emissions from the facility. EPA approved the revised 603.16 into the Texas SIP [2] and that provision is presently codified in the Texas SIP at 30 TAC 116.111(a)(2)(C).

The Texas NSR SIP includes not only the PSD BACT definition [3] but also a requirement for a source to perform a BACT analysis. *See* 30 TAC 116.111(a)(2)(C). EPA relied upon this SIP provision in its 1992 original approval of the Texas PSD SIP as meeting the PSD requirement of 40 CFR 52.21(j). *See* 54 FR 52823, at 52824–52825, and 57 FR 28093, at 28096–28096. Both Texas and EPA interpreted this SIP provision to require either a Minor NSR BACT determination or a Major PSD BACT determination. Since EPA's approval of the Texas PSD SIP in 1992, there has been some confusion about the distinction between a State Minor NSR BACT definition and a PSD Major NSR BACT definition and the requirement that a source must perform the relevant BACT analysis.

TCEQ in 1996 submitted a regulatory definition of the TCAA BACT statutory provision but failed to distinguish the submitted regulatory BACT definition as the Minor NSR BACT definition. *See* the proposed disapproval of the BACT definition in 30 TAC 116.10(3) at 74 FR 48450, at 40453 (footnote 2), 48463–48464, TCEQ's proposed revisions to its Qualified Facilities Program rulemaking, and EPA's June 7, 2010, comment letter on TCEQ's Qualified Facilities Program, for further information.

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[2] The January 1972 Texas NSR rules, as revised in July 1972, require a proposed new facility or modification to utilize "best available control technology, with consideration to the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility." This definition of BACT is from the Texas Clean Air Act. EPA approved this into the Texas NSR SIP possibly in the 1970's and definitely on August 13, 1982 (47 FR 35193). When EPA approved the Texas PSD program SIP revision submittals, including the State's incorporation by reference of the Federal definition of PSD BACT, in 1992, both EPA and Texas interpreted the use of the TCAA BACT definition to be for Minor NSR SIP permitting purposes only. EPA specifically found that the State's TCAA BACT definition did not meet the Federal PSD BACT definition. We required the use of the Federal PSD BACT definition for PSD SIP permitting purposes. *See* the proposal and final approval of the Texas PSD SIP at 54 FR 52823 (December 22, 1989) and 57 FR 28093 (June 24, 1992).

[3] Texas's current PSD SIP incorporates by reference the Federal PSD definition of BACT in 40 CFR 52.21(b)(12). *See* current SIP at 30 TAC 116.160(a). On February 1, 2006, TCEQ submitted a revision that reorganized 30 TAC 116.160 and removed the reference to the BACT definition. On September 23, 2009, EPA proposed to disapprove the 2006 revision to section 116, because of the removal of the reference to the Federal PSD BACT definition. On July 16, 2010, Texas submitted a revision to section 116.160 that reinstated the reference to the PSD BACT definition in 40 CFR 52.21(b)(12). *See* 30 TAC 116.160(c)(1)(A), submitted July 16, 2010. EPA is addressing the 2006 and 2010 revisions to 30 TAC 116.160 in a separate action published in today's **Federal Register.**

2. What is EPA's response to comments on the submitted Minor NSR definition of BACT SIP revision?

Comment 1: TCEQ commented (under Docket No. EPA–R06–OAR–2005–TX–0025) on the proposed disapproval of BACT in the Qualified Facilities proposal that it will consider EPA's comments in connection with its disapproval of the definition of BACT and plans to revise its definition of BACT to correct the deficiencies identified in the proposal.

Response: EPA acknowledges TCEQ's consideration of our comments regarding our disapproval of the definition of BACT as well as TCEQ's plans to revise its definition of BACT to correct the deficiencies identified in our proposal. TCEQ proposed to revise this definition on March 30, 2010. On June 7, 2010, we forwarded comments to TCEQ on this proposed rule. In our comments, we stated that the definition of the TCAA BACT must be revised to indicate more clearly that the definition is for any air contaminant or facility that is not subject to the Federal permitting requirements for PSD. The proposed substantive revisions to the regulatory definition are acceptable. Nonetheless, as we explained in our comment letter, we believe that the TCAA BACT regulatory definition should be given a distinguishable name, *e.g.,* State, Texas, Minor NSR Best Available Control Technology. We recognize that the State must continue to use the term BACT since it is in the TCAA; we believe that TCEQ could add before "BACT" however, Texas, State, or Minor NSR, to clearly distinguish this BACT definition from the Federal PSD BACT definition.

Comment 2: The Clinic commented (under Docket No. EPA–R06–OAR–2005–TX–0025) on the proposed disapproval and agrees that this definition cannot be substituted for the Federal definition of BACT for purposes of PSD. The Clinic further comments that rather than limiting the applicability of the definition of "Texas BACT" to minor sources and modifications, Texas should use a different acronym for its minor NSR technology requirement. The use of dual definitions of BACT within the same program is too confusing, as evidenced by the ongoing application of Texas BACT in the Texas PSD permitting proceedings.

Response: EPA agrees with the Clinic that the TCAA BACT regulatory definition cannot be substituted for the Federal definition of PSD BACT. EPA takes note of the Clinic's comment regarding the dual use of the definition of "Texas BACT" within the same program and ensuing confusion. *See* Response to Comment 1 above for further information.

3. What are the grounds for disapproval of the submitted Minor NSR definition of BACT SIP revision?

EPA is disapproving the submitted definition of BACT under 30 TAC 116.10(3) as proposed under Docket No. EPA–R06–OAR–2005–TX–0025. EPA proposed to disapprove this severable definition of BACT in 30 TAC 116.10(3), submitted March 13, 1996, and July 22, 1998, when EPA proposed to disapprove the submitted Texas SIP revisions for Modification of Existing Qualified Facilities Program and General Definitions (under Docket No. EPA–R06–OAR–2005–TX–0025). *See* 74 FR 48450, at 48463–48464.

EPA received comments from TCEQ and the Clinic regarding the proposed disapproval of this submitted definition as a revision to the Texas NSR SIP. *See* our response to these comments in section IV.A.2 above. The submitted regulatory BACT definition of the TCAA provision at 30 TAC 116.10(3) fails to apply clearly only for minor sources and minor modifications at major stationary sources. *See* the proposed disapproval of the BACT definition in 30 TAC 116.10(3) at 74 FR 48450, at 40453 (footnote 2), 48463–48464, TCEQ Qualified Facilities proposal, and EPA's Qualified Facilities comment letter, for further information. Moreover, we strongly recommend, as suggested in comments from the Clinic, that Texas adopt a prefatory term before its TCAA BACT definition, *e.g.,* State, Texas, or Minor NSR, to avoid any confusion with the term BACT as used by the CAA and the major source PSD program.

B. The Submitted Anti-Backsliding Major NSR SIP Requirements for the 1-Hour Ozone NAAQS

1. What is the background for the submitted anti-backsliding Major NSR SIP requirements for the 1-hour ozone NAAQS?

On July 18, 1997, EPA promulgated a new NAAQS for ozone based upon 8-hour average concentrations. The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38865).[4] On April 30, 2004 (69 FR 23951), we published a final rule that addressed key elements related to implementation of the 1997 8-hour ozone NAAQS including, but not limited to: revocation of the 1-hour NAAQS and how anti-backsliding principles will ensure continued progress toward attainment of the 1997 8-hour ozone NAAQS. We codified the anti-backsliding provisions governing the transition from the revoked 1-hour ozone NAAQS to the 1997 8-hour ozone NAAQS in 40 CFR 51.905(a). The 1-hour ozone major nonattainment NSR SIP requirements indicated that certain 1-hour ozone standard requirements were not part of the list of anti-backsliding requirements provided in 40 CFR 51.905(f).

On December 22, 2006, the DC Circuit vacated the Phase 1 Implementation Rule in its entirety. *South Coast Air Quality Management District, et al.,* v. *EPA,* 472 F.3d 882 (DC Cir. 2006), reh'g denied 489 F.3d 1245 (2007) (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review). EPA requested rehearing and clarification of the ruling and on June 8, 2007, the Court clarified that it was vacating the rule only to the extent that it had upheld petitioners' challenges. Thus, the Court vacated the provisions in 40 CFR 51.905(e) that waived obligations under the revoked 1-hour standard for NSR. The court's ruling, therefore, maintains major nonattainment NSR applicability thresholds and emission offsets pursuant to classifications previously in effect for areas designated nonattainment for the 1-hour ozone NAAQS.

On June 10, 2005 and February 1, 2006, Texas submitted SIP revisions to 30 TAC 116.12 and 30 TAC 116.150 which relate to the transition from the major nonattainment NSR requirements applicable for the 1-hour ozone NAAQS to implementation of the major nonattainment NSR requirements applicable to the 1997 8-hour ozone NAAQS. Texas's revisions at 30 TAC 116.12(18) (Footnote 6 under Table I under the definition of "major modification") and 30 TAC 116.150(d) introductory paragraph, effective as State law on June 15, 2005, provide that for "the Houston-Galveston-Brazoria, Dallas-Fort Worth, and Beaumont-Port Arthur eight hour ozone nonattainment areas, if the United States Environmental Protection Agency promulgates rules requiring new source review permit applications in these areas to be evaluated for nonattainment new source review according to the area's one-hour standard classification," then "each application will be evaluated

[4] On March 12, 2008, EPA significantly strengthened the 1997 8-hour ozone standard, to a level of 0.075 ppm. EPA is developing rules needed for implementing the 2008 revised 8-hour ozone standard and has received the States' submittals identifying areas with their boundaries they identify to be designated nonattainment. EPA is reviewing the States' submitted data.

according to that area's one-hour standard classification" and "* * * the de minimis threshold test (netting) is required for all modifications to existing major sources of VOC or NO_X in that area * * *." The footnote 6 and the introductory paragraph add a new requirement for an affirmative regulatory action by EPA on the reinstatement of the 1-hour ozone NAAQS major nonattainment NSR requirements before the legally applicable major nonattainment NSR requirements under the 1-hour ozone standard will be implemented in the Texas 1-hour ozone nonattainment areas.

The currently approved Texas major nonattainment NSR SIP does not require such an affirmative regulatory action by EPA before the 1-hour ozone major nonattainment NSR requirements come into effect in the Texas 1-hour ozone nonattainment areas. The current SIP states at 30 TAC 116.12(18) (Footnote 1 under Table I) that "Texas nonattainment area designations are specified in 40 Code of Federal Regulations § 81.344." That section includes designations for the one-hour standard as well as the eight-hour standard. Moreover, the submitted revisions to 30 TAC 116.12(18) and 116.150(d) do not comport with the *South Coast* decision as discussed above.

The court opinion maintains the lower applicability thresholds and more stringent offset ratios for a 1-hour ozone nonattainment area whose classification under that standard was higher than its nonattainment classification under the 8-hour standard. In the submitted rule revision, the lower applicability thresholds and more stringent offset ratios for a classified 1-hour ozone nonattainment area would not be required in a Texas 1-hour ozone nonattainment area unless and until EPA promulgated a rulemaking implementing the South Coast decision. Although EPA proposed that the Texas revision relaxes the requirements of the approved SIP and we stated that EPA lacks sufficient information to determine whether this relaxation would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act (*see* 74 FR 48467, at 48473) we have now determined that it is unnecessary to reach this issue because the revision nonetheless fails to comply with the CAA, whereas, the existing approved SIP meets CAA requirements.

2. What is EPA's response to comments on the submitted anti-backsliding Major NSR SIP requirements for the 1-Hour Ozone NAAQS?

Comment 1: TCEQ commented that the anti-backsliding issue associated with the status of the requirements for compliance with the 1-hour ozone NAAQS with the implementation of the 8-hour ozone NAAQS was delayed by litigation that took several years to become final. TCEQ adopted changes to 30 TAC 116.12(18) in June, 2005, prior to the resolution of the litigation. After the *South Coast* decision, EPA subsequently stated it would conduct rulemaking to address the 1-hour ozone NAAQS requirements.[5] TCEQ commits to work with EPA to ensure that the rule is revised to comply with current law.

Response: EPA acknowledges TCEQ's commitment to revise its State rules to implement the Major NSR anti-backsliding requirement. However, the 2007 Meyers Memorandum cited in the comment did not indicate that States should await EPA rulemaking before taking any necessary steps to comply with the *South Coast* decision. Rather, the memorandum encouraged the Regions to "have States comply with the court decision as quickly as possible." The memorandum's reference to "rulemaking to conform our NSR regulations to the court's decision" was not intended to suggest that States could simply ignore the court's decision until EPA had updated its regulations to reflect the vacatur.

Comment 2: The Clinic commented that Texas rules limit enforcement of the 1-hour ozone NAAQS in violation of *South Coast Air Quality Management District* v. *EPA.* As a result of this decision, States must immediately comply with the formerly revoked 1-hour ozone requirements, including NNSR applicability thresholds and emission offset requirements. Texas rules include two provisions that require EPA to conduct rulemaking before TCEQ can begin enforcing the one-hour standard classification requirements for NAAQS. *See* 30 TAC 116.12(18), Table I, and 116.150(d).

Response: See response to Comment 1.

[5] *See* New Source Review (NSR) Aspects of the Decision of the U.S. Court of Appeals for the District of Columbia Circuit on the Phase I Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standards (NAAQS), from Robert J. Meyers, Principal Deputy Assistant Administrator, to EPA Regional Administrators, dated October 3, 2007. This memorandum is in the docket for this action numbered EPA–R06–OAR–2006–0133–0007 and is available at: *http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064801987ff.*

Comment 3: BCCA, TIP, TCC, commented that the Texas rules regarding the 1-hour/8-hour transition are neither inconsistent with the CAA, nor the court's decision in *South Coast.* With its remand to EPA following vacatur of parts of the Phase 1 transition rule, the *South Coast* court did not offer specific direction concerning implementation of the backsliding requirements as they apply to NSR. However, the court in its Opinion on Petitions for Rehearing "urged" EPA "to act promptly in promulgating a revised rule that effectuates the statutory mandate by implementing the eight-hour standard * * *." *South Coast Air Quality Mgmt. Dist.* v. *EPA,* 489 F.3d 1245, 1248–49 (DC Cir. 2007).

The commenters note that consistent with the court's direction in *South Coast,* the language of CAA § 172(e) suggests that EPA must take definite action to implement anti-backsliding requirements:

> If the Administrator relaxes a national primary ambient air quality standard * * * the Administrator *shall, within 12 months after the relaxation, promulgate requirements* applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

42 U.S.C. 7502(e) (emphasis added). Commenters claim that an October 2007 memorandum from EPA Deputy Administrator Robert Meyers stated that EPA intends to undertake rulemaking to conform the Agency's NSR regulations to the *South Coast* decision and yet EPA has not yet proposed such a rule. The footnote 6 and introductory paragraph cited in EPA's proposed disapproval are consistent with CAA § 172(e) and not a basis for disapproval of the proposed SIP revision. TCC stated that it is reasonable for TCEQ to understand that some EPA action is necessary before it proceeds with appropriate rule changes to reinstate the major NNSR applicability thresholds and emission offset requirements, and this is not a rational basis to justify disapproving the State's rules.

Response: EPA disagrees with the claim that States are under no obligation to take steps to comply with the *South Coast* decision until EPA updates its regulations. Neither the court's vacatur of the provision that waived States' obligation to include in their SIPs NSR provisions meeting the requirements for the 1-hour standard nor section 172(e) mandate that EPA promulgate a rule before such a requirement applies.

As EPA provided in the preamble to the Phase 1 Implementation Rule and as

recognized by the Court in *South Coast,* CAA § 172(e) does not apply because the 1997 8-hour NAAQS was a strengthening, rather than a relaxation, of the 1-hour NAAQS. *See* 69 FR 23951, at 23972 (April 30, 2004); 489 F.3d at 1248. However, in the preamble to the Phase I Implementation Rule, we cited to section 172(e) of the CAA and stated that "if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent." *See* 69 FR 23951, at 23972 (April 30, 2004). Thus, even if, as suggested upon revocation of a standard in the absence of an EPA rule retaining them pursuant to section 172(e), that would hold true only where section 172(e) directly applied, *i.e.,* where EPA had promulgated a less stringent NAAQS. Regardless, EPA disagrees with that interpretation of section 172(e). Rather, EPA interprets the CAA as retaining requirements applicable to any area, but allowing EPA through rulemaking to develop alternatives approaches or processes that would apply, so long as such alternatives ensure that the requirements are no less stringent than what applies under the Act. Thus, in the case, once the Court vacated EPA determination under the principles of section 172(e) that NSR as it applied for the 1-hour NAAQS should no longer apply, that requirement, as established under the CAA, once again applied. We do not believe that the interpretation suggested by the commenters is a reasonable interpretation as it would allow areas to discontinue implementing measures mandated by Congress with respect to a revoked standard in the absence of EPA rulemaking specifically retaining such obligations. Such a result would be counter to the health-protective goals of the CAA and inconsistent with the *South Coast* decision, which upheld EPA's authority to revoke standards but only where adequate anti-backsliding requirements were in place.

Nor do we believe that the language cited by the commenter from the *South Coast* decision supports their claim that rulemaking is necessary before the statutory 1-hour NSR requirement applies. The quoted language from the court's opinion immediately follows a sentence that pertains to the classification issue that was decided by the Court. Specifically, the Court notes that some parties objected to a partial vacatur of the rule because it would "inequitably exempt Subpart 1 areas from regulation while the remand is pending." *See* 489 F.3d at 1248. In other words, certain States with areas subject to subpart 2 claimed it would be inequitable for such areas to remain subject to planning obligations while subpart 1 areas would be "exempt." The Court responded by saying that a complete vacatur "would only serve to stall progress where it is most needed" and then urges EPA "to act promptly in promulgating a revised rule." *See* 489 F.3d at 1248. Thus, this portion of the opinion expressly addressed the need for EPA to promulgate a rule quickly so that areas that had been classified as subpart 1 would no longer be "exempt" from planning requirements for the 1997 ozone NAAQS, which requirements are linked to whether an area is subject only to subpart 1 or also subpart 2 and to an area's classification under subpart 2.

For these reasons, the effect of the portion of the court's ruling that vacated the waiver of the 1-hour NSR obligation is to restore the statutory obligation for areas that were nonattainment for the 1-hour standard at the time of designation for the 1997 8-hour standard to include in their SIPs major nonattainment NSR applicability thresholds and emission offsets pursuant to the area's classifications for the 1-hour ozone NAAQS at the time of designation for the 1997 ozone NAAQS.

In addition, the Court specifically concluded that withdrawing 1-hour NSR from a SIP "would constitute impermissible backsliding." *See* 472 F.3d at 900. Thus, it would be inconsistent with the *South Coast* decision for Texas to withdraw the 1-hour NSR applicability thresholds and emission offsets from its SIP. Texas's proposed addition of SIP language conditioning implementation of the 1-hour NSR thresholds and offsets on an affirmative regulatory action by EPA would be equivalent, in terms of human health impact, to a temporary withdrawal of those requirements from the SIP, and therefore would be inconsistent with the Court's decision.

Finally, we note that the 2007 Meyers Memorandum cited in the comment did not indicate that States should await EPA rulemaking before taking any necessary steps to comply with the *South Coast* decision. Rather, the memorandum encouraged the Regions to "have States comply with the court decision as quickly as possible." The memorandum's reference to "rulemaking to conform our NSR regulations to the court's decision" was not intended to suggest that States could simply ignore the court's decision until EPA had updated its regulations to reflect the vacatur. EPA proposed to remove the vacated provisions from its regulations on January 16, 2009 (74 FR 2936).

3. What are the grounds for disapproval of the submitted anti-backsliding Major NSR SIP requirements for the 1–hour ozone NAAQS?

EPA is disapproving the submitted Anti-Backsliding Major NSR SIP revisions for the 1-hour ozone NAAQS. This includes the SIP revisions submitted June 10, 2005, and February 1, 2006, with changes to 30 TAC 116.12 and 30 TAC 116.150 which relate to the transition from the major nonattainment NSR requirements applicable for the 1-hour ozone NAAQS to implementation of the major nonattainment NSR requirements applicable to the 1997 8-hour ozone NAAQS. *See* section B.1, first three paragraphs, for the information regarding EPA's promulgation of the new 1997 8-hour ozone NAAQS, EPA's Phase 1 Implementation Rule, the court history, and the description of the submitted SIP revisions.

The currently approved Texas major nonattainment NSR SIP does not require such an affirmative regulatory action by EPA before the 1-hour ozone major nonattainment NSR requirements can be implemented in the Texas 1-hour ozone nonattainment areas. However, the submitted revisions to 30 TAC 116.12(18) and 116.150(d) do not comply with the CAA as interpreted by the Court in the *South Coast* decision because the opinion does not require further action by EPA with respect to NSR, as discussed above.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.B.2 above. We are disapproving the revisions as not meeting part D of the Act as interpreted by the Court in *South Coast* for the Major NNSR SIP requirements for the 1-hour ozone NAAQS. *See* the proposal at 74 FR 48467, at 48472–48473, our background for these submitted SIP revisions in section IV.B.1 above, and our response to comments on these submitted SIP revisions in section IV.B.2 above for additional information.

C. The Submitted Major Nonattainment NSR SIP Requirements for the 1997 8–Hour Ozone NAAQS

1. What is the background for the submitted Major Nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS?

EPA interprets its Major NSR SIP rules to require that an applicability

determination regarding whether Major NSR applies for a pollutant should be based upon the designation of the area in which the source is located on the *date of issuance* of the Major NSR permit. EPA also interprets the Act and its rules that if an area is designated nonattainment on the date of issuance of a Major NSR permit, then the Major NSR permit must be a NNSR permit, not a PSD permit. If the area is designated attainment/unclassifiable, then under EPA's interpretation of the Act and its rules, the Major NSR permit must be a PSD permit on the date of issuance. *See* the following: sections 160, 165, 172(c)(5) and 173 of the Act; 40 CFR 51.165(a)(2)(i) and 51.166(a)(7)(i). EPA's interpretation of these statutory and regulatory requirements is guided by the memorandum issued March 11, 1991, and titled "New Source Review (NSR) Program Transitional Guidance," issued March 11, 1991, by John S. Seitz, Director, Office of Air Quality Planning and Standard.[6]

Revised 30 TAC 116.150(a), as submitted June 10, 2005 and February 1, 2006, now reads as follows under State law:

(a) This section applies to all new source review authorizations for new construction or modification of facilities as follows:

(1) For all applications for facilities that will be located in any area designated as nonattainment for ozone under 42 United States Code (U.S.C.), 7407 *et seq.* on the effective date of this section, the issuance date of the authorization; and

(2) For all applications for facilities that will be located in counties for which nonattainment designation for ozone under 42 U.S.C. 7407 *et seq.* becomes effective after the effective date of this section, the date the application is administratively complete.[7]

The submitted rule raises two concerns. First, the revised language in the submitted 30 TAC 116.150(a) is not clear as to when and where the applicability date will be set by the date the application is administratively complete and when and where the applicability date will be set by the issuance date of the authorization. The rule, adopted and submitted in 2005, applies the date of administrative completeness of a permit application, not the date of permit issuance, where setting the date for determination of NSR applicability after June 15, 2004 (the effective date of ozone nonattainment designations). The submitted 2006 rule adds the date of permit issuance. Unfortunately, the submitted 2006 rule by introducing a bifurcated structure creates vagueness rather than clarity. The effective date of this new bifurcated structure is February 1, 2006. It is unclear whether this means under subsection (1) that the permit issuance date is used in existing nonattainment areas designated nonattainment for ozone before and up through February 1, 2006. Thus, the proposed revision lacks clarity on its face and is therefore not enforceable.

Second, to the extent that the date of application completeness is used in certain instances to establish the applicability date for Nonattainment NSR requirements, such use is contrary to EPA's interpretation of the governing EPA regulations, as discussed above.

Thus, based upon the above and in the absence of any explanation by the State, EPA proposed to disapprove the SIP revision submittals for not meeting the Major NNSR SIP requirements for the 1997 8-hour ozone standard. *See* the proposal at 74 FR 48467, at 48473–48474, for additional information.

2. What is EPA's response to comments on the submitted Major Nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS?

Comment 1: TCEQ commented that in 2006 it had revised the rule to clarify and implement EPA interpretation that the applicability date is the date of permit issuance, as well as provide for the possibility of new nonattainment areas. The 2006 submittal also added a new bifurcated structure to the rule for when applicability is based upon date of submittal of a complete application and when applicability is based upon the date of permit issuance. TCEQ further agrees that this new bifurcated structure is unclear. TCEQ commits to work with EPA to comply with current rule and practice.

Response: EPA acknowledges TCEQ's commitment to revise the rule to clarify and implement EPA's interpretation of the Act that the applicability date is the date of permit issuance for all nonattainment areas, including applicability in newly designated nonattainment areas.

Comment 2: TCEQ, the Clinic, BCC, TIP, and TCC commented on the definition of "facility" as used in its submitted Major Nonattainment NSR SIP Requirements for the 1997 8-hour ozone NAAQS. They also commented on this definition under the evaluation of the Submitted Non-PAL Aspects of the Major NSR SIP Requirements in section IV.

Response: See section IV.E.2, Comments 1 through 3, for the comments and EPA's response on the definition of facility.

Comment 3: The Clinic commented that TCEQ's rules fail to require all NSR applicability determinations to be based on the applicable attainment status of an area on the date of permit issuance, as required under the CAA. Texas rule authorize certain sources to construct or modify in a nonattainment area to comply with PSD requirements rather than NNSR requirements if the facility's permit application is administratively complete prior to the area's designation to nonattainment. *See* 30 TAC 116.150(a). While the rules are vague as to what constitutes the "effective date of this section," 30 TAC 116.150(a)(2) clearly is not approvable because it authorizes facilities to base applicability determination on the area's attainment status as of the date their applications are administratively complete.

Response: EPA agrees with this comment.

Comment 4: BCCA, TIP, TCC, commented that the applicability cutoff established in TCEQ rules is not inconsistent with the CAA or EPA rules. While it may be inconsistent with EPA's interpretation of that rule language, the use of application completeness as an applicability date is not inconsistent with Part 51 itself. As a result, the applicability cutoff dates, established in 30 TAC 116.150(a), are not appropriate grounds for disapproval of the proposed SIP revision. EPA concerns regarding applicability dates are properly addressed through comments on individual permits, and not through a disapproval of the SIP revision. TCC further commented that TCEQ rules state that for facilities located in areas that are designated nonattainment areas after the effective date of TCEQ rules, the NNSR requirements apply the day the application is administratively complete. The day the application is determined to be administratively complete occurs prior to the issuance date of the permit; therefore, the State's rules are more stringent than the Federal rules in this regard.

Response: EPA disagrees with this comment. The applicability cutoff established in the submitted revision is inconsistent with the CAA and EPA rules. EPA interprets EPA's NSR SIP

[6] You can access this document at: *http://www.epa.gov/ttn/nsr/gen/nstrans.pdf.*

[7] It is our understanding of State law, that a "facility" can be an "emissions unit," *i.e.,* any part of a stationary source that emits or may have the potential to emit any air contaminant. A "facility" also can be a piece of equipment, which is smaller than an "emissions unit." A "facility" can be a "major stationary source" as defined by Federal law. A "facility" under State law can be more than one "major stationary source." It can include every emissions point on a company site, without limiting these emissions points to only those belonging to the same industrial grouping (SIC code).

rules to require that an applicability determination regarding whether Major NSR applies for a pollutant should be based upon the attainment or nonattainment designation of the area in which the source is located on the *date of issuance* of the Major NSR permit. EPA also interprets its rules that if an area is designated nonattainment on the date of issuance of a Major NSR permit, then the Major NSR permit must be a NNSR permit, not a PSD permit. If the area is designated attainment/unclassifiable, then under EPA's interpretation of the Act and its rules, the Major NSR permit must be a PSD permit on the date of issuance. *See* the following: sections 160, 165, 172(c)(5) and 173 of the Act; 40 CFR 51.165(a)(2)(i) and 51.166(a)(7)(i). EPA's interpretation of these statutory and regulatory requirements is guided by the memorandum issued March 11, 1991, and titled "New Source Review (NSR) Program Transitional Guidance," issued March 11, 1991, by John S. Seitz, Director, Office of Air Quality Planning and Standard. *See* section IV.C.1 above for further information. The submitted revision provides the regulatory framework for administering individual permits, thus it is necessary to ensure it is consistent with the equivalent Federal requirements. The submitted revision applies the date of administrative completeness of a permit application, not the date of permit issuance, where setting the date for determination of NSR applicability after June 15, 2004 (the effective date of ozone nonattainment designations). The submitted revision also appears to apply the date of permit issuance in existing nonattainment areas designated nonattainment for ozone before and up through February 1, 2006. This regulatory structure creates ambiguity and lacks clarity. Thus, the proposed revision lacks clarity on its face and is therefore not enforceable.

3. What are the grounds for disapproval of the submitted Major Nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS?

EPA is disapproving the submitted Major Nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS. An applicability determination for a Major Nonattainment NSR (NNSR) permit based upon the date of administrative completeness, rather than date of issuance, would allow more sources to avoid the Major NSR requirements where there is a nonattainment designation between the date of administrative completeness and the date of issuance, and thus this submitted revision will reduce the number of sources subject to Major NNSR requirements. The submitted revised rule does not apply the date of permit issuance in all cases and therefore violates the Act, as discussed previously.

The submitted revised 2006 rule by introducing a bifurcated structure creates vagueness rather than clarity. The effective date of this new bifurcated structure is February 1, 2006. Thus, the proposed revision lacks clarity on its face and is therefore not enforceable.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.C.2 above. *See* the proposal at 74 FR 48467, at 48473–48474, our background for these submitted SIP revisions in section IV.C.1 above, and our response to comments on these submitted SIP revisions in section IV.C.2 above for additional information.

D. The Submitted Major NSR Reform SIP Revision for Major NSR With PAL Provisions

1. What is the background for the submitted Major NSR reform SIP revision for Major NSR with PAL provisions?

We proposed to disapprove the following non-severable revisions that address the revised Major NSR SIP requirements with Plant-Wide Applicability Limitation (PAL) provisions: 30 TAC Chapter 116 submitted February 1, 2006: 30 TAC 116.12—Definitions; 30 TAC 116.180—Applicability; 30 TAC 116.182—Plant-Wide Applicability Limit Permit Application; 30 TAC 116.184—Application Review Schedule; 30 TAC 116.186—General and Special Conditions; 30 TAC 116.188—Plant-Wide Applicability Limit; 30 TAC 116.190—Federal Nonattainment and Prevention of Significant Deterioration Review; 30 TAC 116.192—Amendments and Alterations; 30 TAC 116.194—Public Notice and Comment; 30 TAC 116.196—Renewal of a Plant-Wide Applicability Limit Permit; 30 TAC 116.198—Expiration or Voidance.

We proposed disapproval of the PAL Provisions because of the following:

- The submittal lacks a provision which limits applicability of a PAL only to an *existing* major stationary source, and which precludes applicability of a PAL to a new major stationary source, as required under 40 CFR 51.165(f)(1)(i) and 40 CFR 51.166(w)(1)(i), which limits applicability of a PAL to an existing major stationary source. In the absence of such limitation, this submission would allow a PAL to be authorized for the construction of a new major stationary source. In EPA's November 2002 TSD for the revised Major NSR Regulations, we respond on pages I–7–27 and 28 that actuals PALs are available only for existing major stationary sources, because actuals PALs are based on a source's actual emissions.[8] Without at least 2 years of operating history, a source has not established actual emissions upon which to base an actuals PAL. However, for individual emissions units with less than two years of operation, allowable emissions would be considered as actual emissions. Therefore, an actuals PAL can be obtained only for an existing major stationary source even if not all emissions units have at least 2 years of emissions data. Moreover, the development of an alternative to provide new major stationary sources with the option of obtaining a PAL based on allowable emissions was foreclosed by the Court in *New York* v. *EPA,* 413 F.3d 3 at 38–40 (DC Cir. 2005) ("New York I") (holding that the Act since 1977 requires a comparison of existing actual emissions before the change and projected actual (or potential emissions) after the change in question is required).
- The submittal has no provisions that relate to PAL re-openings, as required by 40 CFR 51.165(f)(8)(ii), (ii)(A) through (C), and 51.166(w)(8)(ii) and (ii)(a).
- There is no mandate that failure to use a monitoring system that meets the requirements of this section renders the PAL invalid, as required by 40 CFR 51.165(f)(12)(i)(D) and 51.166(w)(12)(i)(d).
- The Texas submittal at 30 TAC 116.186 provides for an emissions cap that may not account for all of the emissions of a pollutant at the major stationary source. Texas requires the owner or operator to submit a list of all facilities to be included in the PAL, such that not all of the facilities at the entire major stationary source may be specifically required to be included in the PAL. *See* 30 TAC 116.182(1). However, the Federal rules require the owner or operator to submit a list of all emissions units at the source. *See* 40 CFR 51.166(f)(3)(i) and 40 CFR 51.166(w)(3)(i). The Texas submittal is unclear as to whether the PAL would apply to all of the emission units at the *entire* major stationary source and

[8] The TSD for the 2002 NSR rule making is in the docket for this action as document no. EPA–R06–OAR–2006–0133–0010. You can access this document at: *http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a2b968.*

therefore appears to be less stringent than the Federal rules. In the absence of any demonstration from the State, EPA proposed to disapprove 30 TAC 116.186 and 30 TAC 116.182(1) as not meeting the revised Major NSR SIP requirements.

• Submitted 30 TAC 116.194 requires that an applicant for a PAL permit must provide for public notice on the draft PAL permit in accordance with 30 TAC Chapter 39—Public Notice—for all initial applications, amendments, and renewals or a PAL Permit.[9] Although this submitted rule relates to the public participation requirements of the PAL program, it is is not severable from the PAL program. Because we proposed to disapprove the PAL program, we likewise proposed to disapprove 30 TAC 116.194.

• The Federal definition of the "baseline actual emissions" provides that these emissions must be calculated in terms of "the *average* rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period." *See* 40 CFR 51.165(a)(1)(xxxv)(A), (B), (D) and (E) and 51.166(b)(47)(i), (ii), (iv), and (v). Emphasis added. Texas's submitted definition of the term "baseline actual emissions" found at 30 TAC 116.12(3)(A), (B), (D), and (E) differs from the Federal definition by providing that the baseline shall be calculated as "the rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period." The submitted definition omits reference to the "average rate." The definition differs from the Federal SIP definition but the State failed to provide a demonstration showing how the different definition is at least as stringent as the Federal definition. Therefore, EPA proposed to disapprove the different definition of "baseline actual emissions" found at 30 TAC 116.12(3) as not meeting the revised Major NSR SIP requirements. On the same grounds for lacking a demonstration, EPA proposed to disapprove 30 TAC 116.182(2) that refers to calculations of the baseline actual emissions for a PAL, as not meeting the revised Major NSR SIP requirements.

• The State also failed to include the following specific monitoring definitions: "Continuous emissions monitoring system (CEMS)" as defined in 40 CFR 51.165(a)(1)(xxxi) and 51.166(b)(43); "Continuous emissions rate monitoring system (CERMS)" as defined in 40 CFR 51.165(a)(1)(xxxiv) and 51.166(b)(46); "Continuous parameter monitoring system (CPMS)" as defined in 40 CFR 51.165(a)(1)(xxxiii) and 51.166(b)(45); and "Predictive emissions monitoring system (PEMS)" as defined in 40 CFR 51.165(a)(1)(xxxii) and 51.166(b)(44). All of these definitions concerning the monitoring systems in the revised Major NSR SIP requirements are essential for the enforceability of and providing the means for determining compliance with a PALs program. Therefore, we proposed to disapprove the State's lack of these four monitoring definitions as not meeting the revised Major NSR SIP requirements. Additionally, where, as here, a State has made a SIP revision that does not contain definitions that are required in the revised Major NSR SIP program, EPA may approve such a revision only if the State specifically demonstrates that, despite the absence of the required definitions, the submitted revision is more stringent, or at least as stringent, in all respects as the Federal program. *See* 40 CFR 51.165(a)(1) (non-attainment SIP approval criteria); 51.166(b) (PSD SIP definition approval criteria). Texas did not provide such a demonstration. Therefore, EPA proposed to disapprove the lack of these definitions as not meeting the revised Major NSR SIP requirements.

None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for PALs is severable from each other. Therefore, we proposed to disapprove the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations. *See* the proposal at 74 FR 48467, at 48474–48475, for additional information.

2. What is EPA's response to comments on the submitted Major NSR Reform SIP Revision for Major NSR With PAL provisions?

Comment 1: TCEQ commented that it does not use a rate that differs from the Federal NSR requirement relating to baseline actual emissions. TCEQ definition of "actual emissions" includes the modifier "average," and "actual emissions" are included in the definition of "baseline actual emissions" rate. In practice, TCEQ contends that a reading of the entire definition, including parts (a)–(d), results in an average emission rate being used to establish a baseline actual emission rate. This is because to determine an actual emission rate in tons per year from a consecutive 24-month period requires averaging the emissions over 24 months to obtain an annual emission rate (an average annual emission rate).

TCEQ is willing to work with EPA to address any changes necessary to clarify the definition, and specifically reference that a baseline actual emission rate is an average emission rate, in tons per year, of a Federally regulated new source review pollutant.

Response: We appreciate the State's willingness to work with EPA to address any changes necessary to clarify the definition, and specifically reference that a baseline actual emission rate is an average emission rate, in tons per year, of a NSR regulated pollutant, but disagree with TCEQ's comment. We acknowledge that the SIP-approved definition of "actual emissions" at 30 TAC 116.12(1) is based upon average emissions but the lack of a specific provision in the definition of "baseline actual emissions" to require such emissions to be calculated as average emissions can be interpreted to be less stringent than the Federal minimum requirements because readers can interpret "the" emissions rate to be the highest rate instead of an average rate. It does not necessarily follow that the reading of the entire definition and the requirement to determine an actual emission rate in tons per year from a consecutive 24-month period to obtain an annual emission rate would result in an average emission rate.

Comment 2: BCCA and TIP commented that the substance of EPA's concern appears to be that the Texas rules are missing the word "average." The missing term is not grounds for disapproval of the Texas definition of "baseline actual emissions." The omission of the term "average" from this phrase in the 30 TAC 116.12(3) definition does not render the definition invalid or inconsistent with the

[9] "The submittals do not meet the following public participation provisions for PALs: 1) For PALs for existing major stationary sources, there is no provision that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). 2) For PALs for existing major stationary sources, there is no requirement that the State address all material comments before taking final action on the permit, consistent with 40 CFR 51.165(f)(5) and 51.166(w)(5). 3) The applicability provision in section 39.403 does not include PALs, despite the cross-reference to Chapter 39 in Section 116.194." *See* 73 FR 72001 (November 26, 2008) for more information on Texas's public participation rules and their relationship to PALs. The November 2008 proposal addressed the public participation provisions in 30 TAC Chapter 39, but did not specifically propose action on 30 TAC 116.194.

equivalent provision in 40 CFR Part 51. EPA cites a distinction without a substantive difference, as application of the two definitions will reach the same conclusion with regard to the tons per year ("tpy") emission rate over the 24-month baseline period. The Texas definition of "baseline actual emissions" in the proposed SIP revision is equivalent to the Federal definition in this regard and should be approved.

Response: EPA disagrees with this comment. *See* the response to comment 1 above.

Comment 3: TCEQ commented on EPA's statements that TCEQ's rules do not include the following PAL requirements:

- Provisions for PAL re-openings;
- Requirements concerning the use of monitoring systems (and associated definitions);
- A provision which limits applicability of a PAL only to an existing major stationary source;
- A provision that requires all facilities at a major source, emitting a PAL pollutant be included in the PAL;
- A provision that a PAL include every emissions point at a site, without limiting these emissions points to only those belonging to the same industrial grouping (SIC) code; and
- Notwithstanding the "lack of explicit limitation," *i.e.,* defining facility to equal emissions unit; that is how TCEQ applies the rule.

TCEQ will address these items in a future rulemaking.

Response: We appreciate the State's willingness to work with EPA to address any changes necessary to clarify these concerns relating to PAL re-openings; requirements concerning the use of monitoring systems (and associated definitions); a provision which limits applicability of a PAL only to an existing major stationary source; the lack of regulatory provisions relating to emissions to be included in a proposed PAL, the lack of provisions to require that all facilities at a major source, emitting a pollutant for which a PAL is being requested, be included in the PAL; and the concern that PAL can include every emissions point at a site, without limiting these emissions points to only those belonging to the same industrial grouping (SIC) code. However, our evaluation is based on the submitted rule currently before us.

Comment 4: The Clinic comments that Texas illegally allows PALs for new sources based upon allowable emissions. Federal regulations allow an agency to approve a PAL for "any existing major stationary source." *See* 40 CFR 51.166(f)(1)(i). PALs are intended to serve as thresholds for determining when emission increases trigger NNSR and PSD permitting review. As the DC Circuit found in *New York* v. *EPA,* "Congress clearly intended to apply NSR to changes that increase actual emissions. *New York* v. *EPA,* 413 F.3d 3, 38–40 (DC Cir. 2005.) Because new sources do not have past actual emissions, they cannot be subject to a PAL. 67 FR 80186, 80285 (December 31, 2002). The submitted Texas PAL rules do not limit their applicability to existing major sources.

Response: EPA agrees with this comment. The Federal PAL regulations provide that "[t]he reviewing authority may approve the use of an actuals PAL *for any existing major stationary source* * * *." *See* 40 CFR 51.165(f)(1) and 51.166(w)(1). Emphasis added. *See* the discussion in the proposal at 74 FR 48467, at 48474, and section IV.D.1 above, for further information.

Comment 5: Regarding limiting issuance of PAL permits only to existing major stationary sources, BCCA, TIP, and TCC comment that the absence of a reference to "existing" facilities is not grounds for disapproval of the Texas PAL rules. Even absent a reference to existing facilities, the Texas PAL rules are substantively similar to and closely track the Federal PAL regulations, as TCEQ explained in adopting the Texas PAL program.[10] The Texas PAL rules' applicability provisions are consistent with the Federal PAL program in 40 CFR Part 51, and should be approved as part of the Texas SIP on that basis. Moreover, the Federal scheme contemplates that "new" units may be included when calculating the baseline actual emissions for a PAL.[11] The preamble goes on to provide, "For any emission unit * * * that is constructed after the 24-month period, emissions equal to its PTE must be added to the PAL level."[12] Additionally, EPA issued PALs before NSR reform and these PALs showed a degree of flexibility tailored to the specific sites. For example, in its flexible permit pilot study, EPA examined a hybrid PAL issued to the Saturn plant in Spring Hill, Tennessee. This permit consisted of PSD permit for a major expansion with permitted emissions based on projected future actual emissions in combination with a PSD permit for existing emissions units with allowable emissions based on current actual emissions at the existing emissions units. According to EPA, that plant's hybrid PAL permit enabled Saturn to add and modify new lines "in a timely manner, while ensuring that best available pollution control technologies are installed and that air emissions remain under approved limits." Texas's PAL provisions are consistent with the Federal PAL provisions, and so should be approved. EPA concerns regarding TCEQ's implementation of the Texas rules are properly addressed through comments on individual permits, and not through a disapproval of the SIP revision.

Response: EPA disagrees that Texas's rules are consistent with the Federal PAL provisions, and we find the absence to a reference to "existing" major stationary sources to be grounds for disapproval. The Federal regulations generally adhere to the basic tenet that the PAL level is based on actual, historical operations. Such information is absent for new major stationary sources, and thus, EPA chose not to allow PALs for new major stationary sources. The commenters' reference to a hybrid PAL issued to the Saturn plant in Spring Hill, Tennessee, is not relevant to the approvability of the Texas's rules. This facility was permitted under a flexible permit pilot study, not under the provisions under 40 CFR 51.165(f) and 51.166(w), which specify the minimum requirements for an approvable State PAL SIP Program. Moreover, TCEQ provided no demonstration that its submitted program is at least as stringent as the Federal minimum PAL SIP Program requirements despite its broader applicability. EPA's concerns with the submitted PAL Program revisions are a result of its evaluation of these revisions. EPA disapproval is due to programmatic deficiencies, not problems associated with individual permits. Moreover, implementation by the State of its State PAL program is outside the scope of this rulemaking action.

Comment 6: The Clinic comments that Texas's rules fail to include adequate reopening provisions. Federal rules allow a permitting authority to re-open a PAL permit to correct errors in calculating a PAL or to reduce the PAL based on new Federal or State requirements or changing NAAQS levels or a change in attainment status. *See* 40 CFR 51.165(f)(8). The Texas rules do not provide for such reopening and are less stringent than Federal regulations.

Response: EPA agrees with this comment. The Federal rules require PAL re-openings as provided under 40 CFR 51.165(f)(8)(ii)) and 51.166(w)(8)(ii). The State did not provide any demonstration, as required for a customized Major NSR SIP revision submittal, showing how its submitted program is at least as

[10] *See* 31 Tex. Reg. 516, 527 & 528 (Jan. 27, 2006).

[11] 67 FR 80,186, at 80,208 (Dec. 31, 2002).

[12] *Id.*

stringent as the Federal PAL SIP Program requirements.

Comment 7: Regarding PAL re-openings, BCCA, TIP, TCC, and TxOGA comment that the current provisions of 30 TAC 116.192 regarding amendments and alterations of PALs provide adequate safeguards to ensure that appropriate procedural requirements are followed, both to increase a PAL through an amendment and to decrease a PAL through a permit alteration. *See, e.g.,* 30 TAC 116.190(b), requiring the decrease of a PAL for any emissions reductions used as offsets. The absence of rule language using the specific term "reopening" does not prevent TCEQ from implementing and enforcing the program in a manner consistent with Part 51 and is not an appropriate basis for disapproval of the SIP revision. The Texas PAL rules should be approved as a revision to the Texas SIP.

Response: EPA disagrees with this comment. The provisions in 30 TAC 116.192 relate to amendments and alterations. The Federal rules provide for PAL re-openings for other causes which include the following: correction of typographical/calculation errors in setting the PAL; reduction of the PAL to create creditable emission reductions for use as offsets; reductions to reflect newly applicable Federal requirements (for example, NSPS) with compliance dates after the PAL; PAL reduction consistent with any other requirement, that is enforceable as a practical matter, and that the State may impose on the major stationary source under the SIP; and PAL reduction if the reviewing authority determines that a reduction is necessary to avoid causing or contributing to a NAAQS or PSD increment violation, or an adverse impact on an air quality related value that has been identified for a Federal Class I area by a Federal Land Manager for which information is available to the general public. *See* 40 CFR 51.165(f)(4)(i)(A) and (f)(6)(i), and 51.166(w)(4)(i)(*a*) and (w)(6)(i). Texas has submitted no demonstration, as required for a customized Major NSR SIP revision submittal, that the lack of provisions for PAL re-openings is at least as stringent as the Federal PAL Program SIP requirements.

Comment 8: The Clinic comments that Texas illegally allows for "partial PALs." Federal rules require that all units at a source be subject to the PAL cap. *See* 40 CFR 52.21(aa)(6)(i)–(ii). Texas rules do not require PALs to include all units at the source that emit the PAL pollutant. *See* 30 TAC 116.182(1). EPA stated in its proposal that inclusion of all units at the source that emit the PAL pollutant is an "essential feature of the Federal PAL." Texas failure to require such provision justifies disapproval of the Texas PAL rules.

Response: The 2002 final rules require States to include PALs as a minimum program element in the SIP-approved major NSR program. The minimum Federal requirement for an approvable PAL regulations must include all emissions units at a major stationary source that emit the PAL pollutant as provided under 40 CFR 51.165(f)(6)(i) and 51.166(w)(6)(i). We reviewed the approvability of the Texas submitted program against these criteria, and determined, *inter alia,* that the submitted program does not meet these minimum program elements.

EPA has not taken a position on whether a State could include a "partial PAL" program, separate and apart from a PAL program that meets the Federal minimum program requirements, as an element in its major or minor NSR program. Nonetheless, the State did not submit its PAL Program with a request to have it reviewed by EPA on a case-by-case basis for approvability as a program, separate and apart from the Federal source-wide PAL program. Nor did it submit it for approval as a Minor NSR SIP revision. TCEQ did not provide any demonstration, as required for a customized Major NSR SIP revision submittal, showing how the allowing of an emission cap that does not include all emissions units at the major stationary source that emit the PAL pollutant is at least as stringent as the Federal PAL Program SIP requirements, nor does the record show whether Texas's submission will interfere with any applicable requirement concerning attainment and reasonable further progress or any other CAA requirement.

Comment 9: Concerning the lack of provision that a PAL include all emissions units at the major stationary source that emit the PAL pollutant, BCCA, TIP, TCC, and TxOGA commented that EPA's interpretation of the Texas PAL rules, which are consistent with the Federal PAL, is not grounds for disapproval of the SIP revision. The Texas PAL rules are substantively similar to and closely track the Federal PAL regulations, as TCEQ explained in adopting the Texas PAL program. EPA concerns regarding TCEQ's implementation of the Texas rules are properly addressed through comments on individual permits and not through a disapproval of the SIP revision. The Texas rules require that applicants for a PAL specify the facilities and pollutants to be covered by the PAL. Specifically, an applicant must detail "[A] list of all facilities, including their registration or permit number to be included in the PAL * * *." *See* 30 TAC 116.182. This requirement closely tracks the Federal provisions. Moreover, logic dictates, and the Federal rules recognize, that not every facility emits every regulated pollutant. Under the Federal rules "[e]ach PAL shall regulate emissions of only one pollutant." *See* 40 CFR 52.21(aa)(4)(e). Additionally, EPA has recognized that States may implement PAL programs in a more limited manner. In its 1996 proposal for the PAL concept, EPA noted "States may choose * * * to adopt the PAL approach on a limited basis. For example, States may choose to adopt the PAL approach only in attainment/unclassifiable areas, or only in nonattainment areas, for *specified source categories,* or only for certain pollutants in these areas." *See* 61 FR 38250, at 38265 (July 23, 1996) (emphasis added). The Texas PAL provisions track the Federal regulations, and so should be approved.

Response: EPA disagrees with this comment. The Federal rules at 40 CFR 51.165(f)(4)(i)(A) and (f)(6)(i), and 51.166(w)(4)(i)(a) and (w)(6)(i) require a PAL to include each emissions unit at a major stationary source that emits the PAL pollutant. The Federal rules do not require a PAL to include an emissions unit that does not emit, or has the potential to emit, the relevant PAL pollutant. In 1996, EPA proposed to allow States to pick and choose from the menu of reform options. In 2002, we rejected this proposed approach in favor of making all the reform options minimum program elements. *See* 67 FR 80185, at 80241, December 31, 2002. Accordingly, our final rule requires States to adopt the Federal PAL provisions as a minimum program element, or to demonstrate that an alternative program is equivalent or more stringent in effect. Texas has submitted no demonstration, as required for a customized Major NSR SIP revision submittal, that the difference in its program is at least as stringent as the Federal PAL Program SIP requirements.

Comment 10: The Clinic comments that Texas fails to prohibit the use of PALs in ozone extreme areas. Federal rules prohibit the use of PALs in extreme ozone nonattainment areas. *See* 40 CFR 51.165(f)(1)(ii). The Texas rules contain no such prohibition, and are less stringent than the Federal rules and not protective of air quality.

Response: EPA agrees that 40 CFR 51.165(f)(1)(ii) requires the prohibition and the submittal lacks such a prohibition. Texas currently has no extreme ozone nonattainment areas so it is not clear how that requirement

applies. We do not need to reach the issue, however, because the scope of our disapproval, *i.e.,* the entire Texas PALs Program, is not changed even if we added this as a basis for disapproval.

Comment 11: TCEQ commented that it will address EPA's concerns regarding public participation for PALs in a separate rulemaking regarding public participation for the NSR permitting program.

Response: TCEQ adopted revised rules for public participation on June 2, 2010; these rules became effective on June 24, 2010. TCEQ submitted these revised rules to EPA on July 2, 2010. EPA is reviewing these submitted regulations and will address the submittal in a separate action. Because this 30 TAC 116.740 relates to the public participation requirements of the PAL program, this section is not severable from the PAL program. Because we are disapproving the PAL program, we are also disapproving the submitted 30 TAC 116.194.

Comment 12: The Clinic commented that the PAL rules lack adequate public participation. Texas's rules do not require PALs to be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161. In particular, the PAL rules are missing the requirements that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least 30 day period for submittal of public comment on the draft permit as required under 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). Further the rules lack provisions for public participation for PAL renewals or emission increases. There is no requirement that TCEQ address all material comments before taking final action on the permit. Accordingly, these rules are less stringent than the Federal rules.

Response: EPA agrees with these comments. The submitted rule does not meet the public participation requirements for PAL as required in 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). These rules require that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161; and which require the program to include provisions for public participation for PAL renewals or emission increases. The Federal rules further require that TCEQ address all material comments before taking final action on the permit. Because the submitted rule lacks these requirements it is not consistent with the Federal rules.

Comment 13: Concerning the lack of provisions in the Texas PAL that meet the public participation requirements in 40 CFR 51.160 and 51.161, BCCA and TIP commented that EPA appears to be concerned that there is not an explicit reference to PALs in the public participation provisions. The Texas rules make clear that PALs are subject to public notice and participation. The absence of a reference to PALs in the applicability section of 30 TAC 39.403 is not significant. Section 116.194 of the PAL rules provides the clear cross-references to the applicable provisions of Chapter 39. A reference back from Chapter 39 to the PAL rules is redundant and unnecessary, and not grounds for disapproval of the Texas PAL rules.

Response: EPA disagrees with this comment. Submitted 30 TAC 116.194 requires that an applicant for a PAL permit must provide for public notice on the draft PAL permit in accordance with 30 TAC Chapter 39—Public Notice—for all initial applications, amendments, and renewals of a PAL Permit.[13] *See* 73 FR 72001 (November 26, 2008) for more information on Texas's public participation rules and their relationship to PALs. The November 2008 proposal addressed the public participation provisions in 30 TAC Chapter 39, but did not specifically propose action on 30 TAC 116.194. In the September 23, 2009, proposal, we proposed to address 30 TAC 116.194. Because this section relates to the public participation requirements of the PAL program, this section is not severable from the PAL program. Because we are disapproving the PAL program, we are also disapproving the submitted 30 TAC 116.194.

Comment 14: The Clinic commented that Texas fails to include required monitoring definitions for PALs. While the Federal regulations define "continuous emission monitoring system (CEMS)," "continuous emission rate monitoring system (CERMS)," "continuous parameter monitoring system (CPMS)," and "predictive emissions monitoring system (PEMS)" (*see* 40 CFR 51.165(a)(1)(xxxi), (xxxiv), (xxxiii), and (xxxii)), the Texas rules omit definitions. Because these definitions are crucial to enforcing and monitoring PALs, the lack of these definitions in Texas's PAL rules make the PAL rules less stringent that the Federal rules.

Response: EPA agrees with this comment. *See* 74 FR 48467, at 48475, and section IV.D.I of this action.

Comment 15: BCCA and TIP commented that EPA appears to be concerned that the monitoring provisions are not separately and discretely defined. They comment that Texas PAL rules in 30 TAC 116.192(c) contain monitoring requirements that are equivalent to the Federal PAL rules. They also comment that the absence of definitions of CEMS, CERMS, CPMS and PEMS does not render the rules unenforceable. They maintain that the rules themselves identify and define each type of monitoring system, and identify Federal-equivalent requirements that each monitoring system must satisfy. They cite, as an example, 30 TAC 116.192(c)(2)(B) as providing that an owner or operator using a CEMS to monitor PAL pollutant emissions shall comply with applicable performance specifications found in 40 CFR Part 60, Appendix B and sample, analyze, and record data at least every 15 minutes while the emissions unit is operating. Similar requirements are included for mass balance calculations, CPMS, PEMS and emissions factors used to monitor PAL pollutant emissions. They claim that the absence of separate definitions does not impact the enforceability of Texas PALs. The Texas provisions adequately address monitoring requirements for PALs, and should therefore be approved.

Response: EPA disagrees with this comment. In the proposal we stated that "[a]ll definitions concerning the monitoring systems in the revised Major SIP requirements are essential for the enforceability of and providing the means for determining compliance with a PALs program." We acknowledge that 40 CFR 51.165(f)(12)(i)(C) and 51.166(w)(12)(i)(*c*) allow a State program to include alternative monitoring, but the alternative monitoring must be approved by EPA as meeting the requirements of 40 CFR 51.165(f)(12)(A) and 51.166(w)(12)(a). The State did not provide any request for approval for alternative monitoring. Furthermore, the State did not provide any demonstration, as required for a customized Major NSR SIP revision

[13] "The submittals do not meet the following public participation provisions for PALs: (1) For PALs for existing major stationary sources, there is no provision that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). (2) For PALs for existing major stationary sources, there is no requirement that the State address all material comments before taking final action on the permit, consistent with 40 CFR 51.165(f)(5) and 51.166(w)(5). (3) The applicability provision in section 39.403 does not include PALs, despite the cross-reference to Chapter 39 in Section 116.194."

submittal, showing how the absence of these PAL monitoring definitions, is at least as stringent as the Federal PAL Program SIP requirements.

Comment 16: BCCA, TIP, TCC, and TxOGA commented that the Texas PAL rules make clear that monitoring is mandatory for a PAL. They comment that the rules establish monitoring requirements in 30 TAC 116.186(c) that are consistent with the Federal PAL monitoring requirements. They also comment the monitoring requirements are, most importantly, cast in terms of requirements that "*shall*" *or* "*must*" be met. Examples include:

- 30 TAC 116.186(c)(1): "The PAL monitoring system *must* accurately determine all emissions of the PAL pollutant in terms of mass per unit of time."
- 30 TAC 116.186(c)(2) further specifies requirements that *shall* be met for any permit holder using mass balance equations, continuous emissions monitoring system ("CEMS"), continuous parameter monitoring system ("CPMS") predictive emissions monitoring system ("PEMS"), or emission factors.

The commenters claim that these provisions adequately address the monitoring requirements required under the Federal PAL provisions. They assert that any additional statement that the PAL is rendered invalid unless the permit holder complies with these requirements is unnecessary in light of the clearly mandatory monitoring requirements that are equivalent to Federal requirements.

Response: EPA disagrees with this comment. The rules referred to by the commenters only provide that the required monitoring be met, but has no provision that the PAL becomes invalid whenever a major stationary source with a PAL Permit or any emissions unit under such PAL is operated without complying with the required monitoring, as required under 40 CFR 51.165(f)(12)(i)(D) and 51.166(w)(i)(*d*). TCEQ did not provide any demonstration, as required for a customized Major NSR SIP revision submittal, showing how the lack of a requirement invalidating the PAL if there is no compliance with the required monitoring, is at least as stringent as the Federal PAL Program SIP requirements.

3. What are the grounds for disapproval of the submitted Major NSR Reform SIP revision for Major NSR with PAL provisions?

EPA is disapproving the submitted Major NSR Reform SIP Revision for Major NSR with PAL provisions. We are disapproving the following non-severable revisions that address the revised Major NSR SIP requirements with a PALs provision: 30 TAC Chapter 116 submitted February 1, 2006: 30 TAC 116.12—Definitions; 30 TAC 116.180—Applicability; 30 TAC 116.182—Plant-Wide Applicability Limit Permit Application; 30 TAC 116.184—Application Review Schedule; 30 TAC 116.186—General and Special Conditions; 30 TAC 116.188—Plant-Wide Applicability Limit; 30 TAC 116.190—Federal Nonattainment and Prevention of Significant Deterioration Review; 30 TAC 116.192—Amendments and Alterations; 30 TAC 116.194—Public Notice and Comment; 30 TAC 116.196—Renewal of a Plant-Wide Applicability Limit Permit; 30 TAC 116.198—Expiration or Voidance.

We are disapproving the submitted PAL revisions for the following reasons: (1) The submittal lacks a provision which limits applicability of a PAL only to an *existing* major stationary source; (2) the submittal has no provisions that relate to PAL re-openings; (3) there is no mandate that failure to use a monitoring system that meets the requirements of this section renders the PAL invalid; (4) the Texas submittal at 30 TAC 116.186 provides for an emissions cap that may not account for all of the emissions of a pollutant at the major stationary source; (5) the submitted 30 TAC 116.194 does not require that: (a) PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment; (b) that the State address all material comments before taking final action on the permit; and (c) include a cross-reference to 30 TAC Chapter 39—Public Notice; (6) the Federal definition of the "baseline actual emissions" provides that these emissions must be calculated in terms of the average rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period; [14] and (7) the State also failed to include the following specific monitoring definitions for CEMS, CERMS, CPMS, PEMS.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.D.2 above. None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for PALs is severable from each other. Therefore, we are disapproving the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations. *See* the proposal at 74 FR 48467, at 48474–48475, our background for these submitted SIP revisions in section IV.D.1 above, and our response to comments on these submitted SIP revisions in section IV.D.2 above for additional information.

E. The Submitted Non-PAL Aspects of the Major NSR SIP Requirements

1. What is the background for the submitted non-PAL aspects of the Major NSR SIP requirements?

The submitted NNSR non-PAL rules do not explicitly limit the definition of "facility" [15] to an "emissions unit" as do the submitted PSD non-PAL rules. It is our understanding of State law that a "facility" can be an "emissions unit," *i.e.,* any part of a stationary source that emits or may have the potential to emit any air contaminant, as the State explicitly provides in the revised PSD rule at 30 TAC 116.160(c)(3). A "facility" also can be a piece of equipment, which is smaller than an "emissions unit." A "facility" can include more than one "major stationary source." It can include every emissions point on a company site, without limiting these emissions points to only those belonging to the same industrial grouping (SIP code). In our proposed action on the Texas Qualified Facilities State Program, EPA specifically solicited comment on the definition for "facility" under State law. Regardless, the State clearly thought the prudent legal course was to limit "facility" explicitly to "emissions unit" in its PSD SIP non-PALs revision. TCEQ did not submit a demonstration showing how the lack of this explicit limitation in the NNSR SIP non-PALs revision is at least as stringent as the revised Major NSR SIP requirements. Therefore, EPA is disapproving the submitted definition and its use as not meeting the revised Major NNSR non-PALs SIP requirements.

Under the Major NSR SIP requirements, for any physical or

[14] *See* section IV.E.3 of this preamble for further information on the basis for disapproval of the submitted definitions "baseline actual emission" for not determining baseline emissions as average emissions.

[15] "Facility" is defined in the SIP approved 30 TAC 116.10(6) as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment."

operational change at a major stationary source, a source must include emissions resulting from startups, shutdowns, and malfunctions in its determination of the baseline actual emissions (*see* 40 CFR 51.165(a)(1)(xxxv)(A)(1) and (B)(1) and 40 CFR 51.166(b)(47)(i)(*a*) and (ii)(a)) and the projected actual emissions (*see* 40 CFR 51.165(a)(1)(xxviii)(B) and 40 CFR 51.166(b)(40)(ii)(*b*)). The definition of the term "baseline actual emissions," as submitted in 30 TAC 116.12(3)(E), does not require the inclusion of emissions resulting from startups, shutdowns, and malfunctions.[16] Our understanding of State law is that the use of the term "may" "creates discretionary authority or grants permission or a power. *See* Section 311.016 of the Texas Code Construction Act. Similarly, the submitted definition of "projected actual emissions" at 30 TAC 116.12(29) does not require that emissions resulting from startups, shutdowns, and malfunctions be included. The submitted definitions differ from the Federal SIP definitions and the State has not provided information demonstrating that these definitions are at least as stringent as the Federal SIP definitions. Therefore, based upon the lack of a demonstration from the State, EPA is disapproving the definitions of "baseline actual emissions" at 30 TAC 116.12(3) and "projected actual emissions" at 30 TAC 116.12(29) as not meeting the revised Major NSR SIP requirements.

The Federal definition of the "baseline actual emissions" provides that these emissions must be calculated in terms of "the average rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period." The submitted definition of the term "baseline actual emissions" found at 30 TAC 116.12 (3)(A), (B), (D), and (E) differs from the Federal definition by leaving out the word "average" and instead providing that the baseline shall be calculated as "the rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period."

None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for non-PALs is severable from each other. Therefore, we proposed to disapprove the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR non-PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations.

See the proposal at 74 FR 48467, at 48475, for additional information.

2. What is EPA's response to comments on the submitted non-PAL aspects of the Major NSR SIP requirements?

Comment 1: TCEQ responded to EPA's request concerning its interpretation of Texas law and the Texas SIP with respect to the term "facility." The definition of "facility" is the cornerstone of the Texas Permitting Program under the Texas Clean Air Act. In addition, to provide clarity and consistency, TCEQ also provides similar comments in regard to Docket ID No. EPA–R06–OAR–2005–TX–0025 and EPA–R06–OAR–2005–TX–0032. EPA believes that the State uses a "dual definition" for the term facility. Under the TCAA and TCEQ rule, "facility" is defined as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. Tex. Health & Safety Code 382.003(6); 30 TAC 116.10(6). A mine, quarry, well test, or road is not considered to be a facility." A facility may contain a stationary source—point of origin of a contaminant. Tex. Health & Safety Code 382.003(12). As a discrete point, TCEQ contends that, under Federal law, a facility can constitute but cannot contain a major stationary source as defined by Federal law. A facility is subject to Major and Minor NSR requirements, depending on the facts of the specific application. Under Major NSR, EPA uses the term "emissions unit" (generally) when referring to a part of a "stationary source," TCEQ translates "emissions unit" to mean "facility,"[17] which TCEQ contends is at least as stringent as Federal rule. TCEQ and its predecessor agencies have consistently interpreted facility to preclude inclusion of more than one stationary source, in contrast to EPA's stated understanding. Likewise, TCEQ does not interpret facility to include "every emissions point on a company site, even if limiting these emission points to only those belonging to the same industrial grouping (SIC Code)." The Federal definition of "major stationary source" is not equivalent to the state definition of "source." 40 CFR 51.166(b)(1)(a). A "major stationary source"[18] can include more than one "facility" as defined under Texas law—which is consistent with EPA's interpretation of a "major stationary source" including more than one emissions unit. The above interpretation of "facility" has been consistently applied by TCEQ and its predecessor agencies for more than 30 years. TCEQ's interpretation of Texas statutes enacted by the Texas Legislature is addressed by the Texas Code Construction Act. More specifically, words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. Tex. Gov't Code 311.011(b). While Texas law does not directly refer to the two steps allowing deference enunciated in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* Texas law and judicial interpretation recognize *Chevron*[19] and follow similar analysis as discussed below. The Texas Legislature intends an agency created to centralize expertise in a certain regulatory area "be given a large degree of latitude in the methods it uses to accomplish its regulatory function." *Phillips Petroleum Co.* v. *Comm'n on Envtl. Quality,* 121 S.W.3d 502, 508 (Tex.App.—Austin 2003, no pet.), which cites Chevron to support the following: "Our task is to determine whether an agency's decision is based upon a permissible interpretation of its statutory scheme." Further, Texas courts construe the test of an administrative rule under the same principles as if it were a statute. *Texas Gen. Indem. Co.* v. *Finance Comm'n,* 36 S.W.3d 635,641 (Tex.App.—Austin 2000, no pet.). Texas Administrative agencies have the power to interpret their own rules, and their interpretation is entitled to great weight and deference. *Id.* The agency's construction of its rule is controlling unless it is plainly erroneous or inconsistent. *Id.* "When the construction

[16] The submitted definition of "baseline actual emissions," is as follows: Until March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under Chapter 101 of this title * * * *may* be included to the extent they have been authorized, or are being authorized, in a permit action under Chapter 116. 30 TAC 116.12(3)(E) (emphasis added).

[17] The term "facility" shall replace the words "emissions unit" in the referenced sections of the CFR. 30 TAC 116.160(c)(3).

[18] Tex. Health & Safety Code § 382.003(12).

[19] *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 387, 842–43 (1984). "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously express intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

of an administrative regulation rather than a statute is at issue, deference is even more clearly in order." *Udall* v. *Tallman,* 380 U.S. 1, 17 (1965). This is particularly true when the rule involves complex subject matter. *See Equitable Trust Co.* v. *Finance Comm'n,* 99 S.W.3d 384, 387 (Tex.App.—Austin 2003, no pet.). Texas courts recognize that the legislature intends an agency created to centralize expertise in a certain regulatory area "be given a large degree of latitude in the methods it uses to accomplish its regulatory function." *Reliant Energy, Inc.* v. *Public Util. Comm'n,* 62 S.W.3d 833,838 (Tex.App.—Austin 2001, no pet.)(citing *State* v. *Public Util. Comm'n,* 883 S.W.2d 190, 197 (Tex. 1994). In summary, TCEQ translates "emissions unit" to mean "facility." Just as an "emissions unit" under Federal law is construed by EPA as part of a major stationary source, a "facility" under Texas law can be a part of a major stationary source. However, a facility cannot include more than one stationary source as defined under Texas law.

Response: EPA welcomes the clarification concerning TCEQ's interpretation of Texas law and the Texas SIP with respect to the term "facility." However, we have determined that Texas's use of the term "facility," as it applies to the NNSR non-PALs rules, is overly vague, and therefore, unenforceable. TCEQ comments that it translates "emissions unit" to mean "facility." Although Texas's PSD non-PAL rules explicitly limit the definition of "facility" to "emissions unit," the NNSR non-PALs rules fail to make such a limitation. *See* 74 FR 48467, at 48473, footnote 6, and 48475; *compare* 30 TAC 116.10(6) *to* 30 TAC 116.160(c)(3). The State clearly thought the prudent legal course was to limit "facility" explicitly to "emissions unit" in its PSD SIP non-PALs revision. Furthermore, TCEQ did not submit information sufficient to demonstrate that the lack of this explicit limitation in the submitted NNSR non-PALs is at least as stringent as the revised definition in the PSD non-PALs definition.

We recognize that TCEQ should be accorded a level of deference to interpret the State's statutes and regulations; however, such interpretations must meet the applicable requirements of the Act and implementing regulations under 40 CFR part 51 to be approvable into the SIP as Federally enforceable requirements. The State has failed to provide any case law or SIP citation that confirms TCEQ's interpretation for "facility" under the NNSR non-PALs that would ensure Federal program scope.

Comment 2: The Clinic comments that Texas's use of the term "facility" makes its rules unacceptably vague. Texas's use of this term is problematic because of its dual definitions and broad meanings. The commenter compares Texas's definition of "facility" in 30 TAC 116.10 with the definition of "stationary source" in 30 TAC 116.12 and the definition of "building, structure, facility, or installation" in 30 TAC 116.12 and concludes that these definitions are quite similar. The commenter acknowledges that this argument assumes that one can rely on the Nonattainment NSR rules to interpret the general definitions. If one cannot use the Nonattainment NSR definitions to interpret the general definition of "facility," then one must resort to the definition of "source" in 30 TAC 116.10(17), which is defined as "a point of origin of air contaminants, whether privately or publicly owned or operated." Pursuant to this reading, a facility is more like a Federal "emissions unit." 40 CFR 51.165(a)(1)(vii). " 'Emissions unit' means any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant * * *" At least in the Qualified Facility rules, it appears that TCEQ use of the definition of "facility" is more like a Federal "emissions unit." The circular nature of these definitions, and the existence of two different definitions of "facility" without clear description of their applicability, makes Texas's rules, including the Qualified Facility rules, vague. The commenter urges EPA to require Texas to clarify its definition of "facility" and to ensure that its use of the term throughout the rules is consistent with that definition.

Response: EPA agrees with this comment. *See* our response to comment 1 above for further information.

Comment 3: Concerning the definition of "facility," BCCA, TIP, and TCC commented that the term "facility" is defined in Chapter 116 and in the Texas Clean Air Act, and is used in a consistent manner throughout. The term has identical meaning in the NNSR non-PAL rules and the PSD non-PAL rules. Any failure to "explicitly limit the definition" in one part of Chapter 116 is not grounds for disapproval, given the well-established definition of "facility" in the context of Texas air permitting and that it is comparable to the Federal definition of "emissions unit." TCEQ regulations in 30 TAC 116.10(6) defines a facility as: "A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not a facility." *See* 30 TAC 116.10(6). Section 116.10 states that the definitions contained in the section apply to *all* uses throughout Chapter 116. 30 TAC 116.10 ("[T]he following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.") This definition is similar to the definition of "emission unit" in Texas's Title V rules. There, "emissions unit" is defined as: "A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. *See* 30 TAC 122.10(8). Under the express terms of 30 TAC 116.10, the definition of "facility" is clear, and is equivalent to the Federal definition of "emission unit" in the nonattainment NSR non-PAL rules, as it is throughout Chapter 116.

Response: EPA disagrees with these comments. *See* our response to comment 1 above for further information.

Comment 4: TCEQ comments that TCEQ rules includes maintenance, startup and shutdown emissions in the development of "baseline actual emissions" to the extent that the permit reviewer can verify that these emissions occurred, were properly quantified and reported as part of the baseline, and were creditable. Otherwise, startup and shutdown, as well as maintenance emissions, are treated as unauthorized and, as such, have a baseline actual emission rate of zero. Further, TCEQ rules do not authorize malfunction emissions. TCEQ has concerns about crediting a major source with an emission associated with malfunctioning of equipment when the source determines baseline actual emissions. TCEQ is concerned that including malfunction emissions would inflate the baseline and narrow the gap between baseline actual emissions and the planned emission rate. Therefore, the number of "major" sources or modifications would be reduced. It is unclear how emissions that are not authorized would be considered creditable within the concept of NSR applicability.

EPA has approved the exclusion of malfunction emissions from the baseline calculation in other States' rules. TCEQ considers the exclusion of malfunction emissions from baseline actual emissions to be at least as stringent as the Federal rule. TCEQ is willing to work with EPA to clarify the inclusion of startup and shutdown emissions when determining baseline actual emissions.

Response: EPA disagrees with this comment. We note two fundamental concerns with the Texas definitions, as discussed in this response. First, the Texas definition of "baseline actual emissions" provides discretion to include emissions from malfunctions, startups, and shutdowns, but does not contain specific, objective, and replicable criteria for determining whether TCEQ's choice of emissions events to be included in the baseline actual emissions will be effective in terms of enforceability, compliance assurance, and ambient impacts. Second, the Texas definition of "projected actual emissions" does not include emissions from startups, shutdowns and malfunctions in contrast to the Federal definition which includes such emissions.

The Federal definition of "baseline actual emissions" requires such emissions to include emissions associated with startups, shutdowns, and malfunctions. *See* 40 CFR 51.165(a)(1)(xxxv)(A)(*1*) and (B)(*1*) and 51.166(b)(47)(i)(*a*) and (ii)(*a*). In contrast, Texas's submitted definition of "baseline actual emissions" at 30 TAC 116.12(3)(E) differs from the Federal definition by providing that "[u]ntil March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under [30 TAC] Chapter 101 of this title * * * *may* be included the extent they have been authorized, or are being authorized, in a permit action under Chapter 116." Emphasis added. EPA's understanding of State law is that the use of the term "may" creates discretionary authority or grants permission or power. *See* section 311.016 of the Texas Code Construction Act.

TCEQ considers emission events as unauthorized emissions associated with the startup, shutdown, and malfunction related activities. *See* 30 TAC 101.1(28). Texas has adopted an affirmative defense approach to handle such emissions. *See* 30 TAC 101.222. For emissions associated with the planned maintenance, startup or shutdown activities, the State rule has adopted a phased-in approach to allow a source to file an application to permit its planned maintenance, startup or shutdown related emissions in a source's NSR permit. This approach is based on the source's SIC code. *See* 101.222(h) and (i). For EPA's proposed rulemaking action on the State's Emission Events rule, *see* May 13, 2010 (75 FR 26892). The State's submitted definition provides director discretion whether to include these types of emissions. Such director discretion provisions are not acceptable for inclusion in SIPs, unless each director decision is required under the plan to be submitted to EPA for approval as a single-source SIP revision. This Program does not contain specific, objective, and replicable criteria for determining whether the Executive Director's choice of emissions events to be included in the baseline actual emissions will be effective in terms of enforceability, compliance assurance, and ambient impacts. This would include a replicable procedure for use of any discretionary decision to determine which maintenance, startup, and shutdown emissions are properly quantified and reported as part of the baseline, and are creditable; and for determining that maintenance, startup, and shutdown emissions then do not meet such criteria and can be excluded because they are unauthorized.

The State did not provide any demonstration, as required for a customized Major NSR SIP revision submittal, that the submitted provision that may exclude any emissions from maintenance, startup, and shutdown from the definition of baseline actual emissions, is at least as stringent as the definition in the Federal non-PAL Program SIP requirements. Texas also includes authorized maintenance emissions in its baseline actual emissions. Because maintenance emissions are not specifically required in the Federal definition, the State must provide a demonstration, as required for a customized Major NSR SIP revision submittal, that including these emissions in the baseline actual emissions is at least as stringent as the definition in the Federal non-PAL Program SIP requirements.

With respect to "projected actual emission," the Federal definition of "projected actual emissions" requires the projected emissions to include emissions associated with startups, shutdowns, and malfunctions. *See* 40 CFR 51.165(a)(1)(xxviii)(B)(*2*) and 51.166(b)(40)(ii)(*b*). Texas's submitted definition of "projected actual emissions" at 30 TAC 116.12(29) differs from the Federal definitions by not including emissions associated with startups, shutdowns, and malfunctions. The exclusion of these emissions in the projected actual emissions while providing for the possible inclusion of these emissions from baseline actual emissions does not provide a comparable estimation of emissions increases associated with the project and could narrow the gap between baseline actual emissions and the projected actual emissions in a way that allows facilities to avoid NSR requirements. The State did not provide a demonstration, as required for a customized Major NSR SIP revision, that excluding these emissions from projected actual emissions, is at least as stringent as the Federal non-PALs SIP requirements. (EPA also wishes to note that the submitted definition of baseline actual emissions is unclear how TCEQ will include authorized emissions events as baseline actual emissions and projected actual emissions on and after March 1, 2016.)

With respect to one aspect specifically related to emissions associated with malfunctions, EPA appreciates Texas's concern that including malfunction emissions in the baseline and projected actual emissions would inflate the baseline and narrow the gap between baseline and planned emissions. EPA acknowledges that it has approved the exclusion of malfunction emissions from the baseline calculation in other States' rules. This includes the approval of such exclusions in Florida (proposed April 4, 2008 at 73 FR 18466 and final approval on June 27, 2008 at 73 FR 36435) and South Carolina (proposed September 12, 2007 at 72 FR 52031 and final approval on June 2, 2008 at 73 FR 31368) and the proposed exclusion in Georgia (proposed September 4, 2008 at 73 FR 51606). EPA's review of these actions indicates that in each State, malfunctions were excluded from *both* baseline actual emissions and projected actual emissions. This exclusion was based upon the difficulty of quantifying past malfunction emissions and estimating future malfunction emissions as part of the projected actual emissions. Georgia's rules specify that if malfunction emissions are omitted from projected actual emissions, they must also be omitted from baseline emissions, and vice versa, so as to provide a comparable estimation of emissions increases associated with the project. Florida is also concerned about the possibility that including malfunction emissions may result in the unintended rewarding of the source's poor operation and maintenance, by allowing malfunction to be included in the baseline emissions that will be used to calculate emissions changes and emissions credits.

After reviewing Texas's comments on exclusion of malfunctions from its baseline actual emissions and projected actual emissions, we note that TCEQ voices concerns similar to Florida, Georgia, and South Carolina. Accordingly, we agree with TCEQ's concern that including malfunction emissions would inflate the baseline and narrow the gap between baseline actual emissions and the planned emission rate. Therefore, the number of "major" sources or modifications would

be reduced. It is unclear how emissions that are not authorized would be considered creditable within the concept of NSR applicability. Nevertheless, we must review the submitted definitions pending before EPA for action. Both definitions do not exclude malfunctions emissions. Furthermore, the baseline actual emissions definition allows the discretionary inclusion of malfunction emissions. To be approvable, both definitions must mandate the exclusion of malfunction emissions.

Comment 5: BCCA, TIP, TCC, and TxOGA commented that the Texas rules' treatment of startups, shutdowns, and malfunctions is not a proper basis for disapproval of the proposed SIP revision. The Federal and Texas definitions both require that non-compliant emissions be excluded from the determination of baseline actual emissions.[20] Based on the Texas rules' integration of pending Chapter 101 revisions on startup, shutdown, and malfunction emissions (as requested by EPA), the proposed SIP revision's treatment of these types of emissions is a reasonable approach.

EPA has approved rules for baseline calculations that exclude some of the elements they assert should be included in Texas's definition. For example, Georgia's PSD regulations give applicants the option of excluding malfunction emissions from the calculation of baseline emissions.[21] In approving this approach, EPA noted "The intent behind this optional calculation methodology is that it may result in a more accurate estimate of emission increases. The Federal rules allow for some flexibility, and EPA supports EPD's analysis that the Georgia rule is at least as stringent as the Federal rule." [22] Similarly, Texas's approach to the baseline calculation attempts for a more accurate estimate of emissions.

Moreover, TCEQ is underway in permitting maintenance, startup and shutdown emissions through Chapter 116 preconstruction permits, and a SIP revision reflecting the maintenance, startup, and shutdown permitting initiative has been submitted to EPA for approval. TCEQ is distinguishing between planned and unplanned maintenance, startup, and shutdown emissions, and working to authorize those planned maintenance, startup, and shutdown emissions in Texas air permits. It is reasonable and appropriate that the maintenance, startup, and shutdown permitting initiative be properly integrated with the definition of "baseline actual emissions." The proposed SIP revision recognizes that such emissions may be added to the baseline in the future, based on TCEQ's ongoing process of authorizing maintenance, startup, and shutdown emissions. The proposed SIP revision and TCEQ's current approach is sound and reasonable based on historical treatment of maintenance, startup, and shutdown emissions in Texas air permits, and is not grounds for disapproval of the proposed SIP revision.

Response: EPA disagrees with this comment. *See* the response to Comment 4 above for more information.

Comment 6: The Clinic comments that Texas's definition of "baseline actual emissions" is less stringent than the Federal definition. The Federal regulations define "baseline actual emissions" as "the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period." *See* 40 CFR 51.165(a)(1)(xxxv)(A) and (B). This definition further provided that the average rate "shall include emissions associated with startups, shutdowns, and malfunctions." *See* 40 CFR 51.165(a)(1)(xxxv)(A)(1).

Texas rules define "baseline actual emissions" as "the rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period." *See* 30 TAC 116.12(3)(A). The Texas rules do not require baseline actual emissions to include emissions associated with maintenance, startups, and shutdowns. Instead, the rules state that maintenance, startup, and shutdown events "may be included to the extent they have been authorized, or are being authorized." *See* 30 TAC 116.12(3)(E). Texas's failure to incorporate the Federal definition and the express failure to require incorporation of maintenance, startup, and shutdown emissions in the average rate renders the definition as inconsistent with Federal regulations.

The commenter further notes that Texas's failure to include maintenance, startup, and shutdown emissions is related to a larger problem with Texas's program. Texas is allowing sources to authorize their maintenance, startup, and shutdown emissions separately from their routine emissions. For example, Texas allows sources that have individual major NSR or PSD permits to authorize their maintenance, startup, and shutdown emissions through a stand-alone permit-by-rule. *See* 30 TAC 106.263. This allows sources to avoid considering their maintenance, startup, and shutdown emissions in determining potential to emit, as well as in determining the magnitude of any emission increases. EPA has repeatedly informed Texas that its approach for permitting maintenance, startup, and shutdown emissions violates the Act.[23] EPA should take action to ensure that Texas follows the Act when permitting maintenance, startup, and shutdown emissions.

Response: EPA agrees with the comment relating to not calculating baseline actual emissions as average emission rates. *See* section IV.D.2, responses to comments 1 and 2 for further information.

EPA agrees with this comment related to the inclusion of emissions associated with authorized maintenance, startup, and shutdown in the baseline actual emissions. *See* the response to comment 4 above. The comments relating to authorizing maintenance, startup, and shutdown emissions separately from routine emissions are outside the scope of this action.

Comment 7: The Clinic comments that Texas's definition of "projected actual emissions" is less stringent than the Federal definition. The Federal regulations define "projected actual emissions" to include maintenance, startup, and shutdown emissions. *See* 40 CFR 51.165(a)(1)(xxviii)(b) and 51.166(b)(40)(ii)(b). Texas's definition of "projected actual emissions" fails to include maintenance, startup, and shutdown emissions. *See* 30 TAC 116.12(29). Even where such emissions are included in a source's baseline actual emissions, there is no provision to require such emission in the projected actual emissions. The commenter states that facilities in Texas often have extremely large maintenance, startup, and shutdown emissions. *See* Attachment 8 of the comments (Facility emission event information). Under Texas's definitions, a source which would trigger a major modification under Federal rules could avoid a major modification by failing to include maintenance, startup, and shutdown in their projected actual emissions. The commenter states that any company that includes maintenance, startup, and shutdown in its baseline actual emissions should be required to include a realistic estimate of maintenance,

[20] 30 TAC 116.12(3)(D) ("The actual rate shall be adjusted downward to exclude any non-compliant emissions that occurred during the consecutive 24-month period.")

[21] GA. COMP. R. & REGS. 391–3– 1–.02(7)(a)2.(ii)(II)II (2009).

[22] 73 FR 51,606, at 51,609 (Sept. 4, 2008).

[23] *See* "Letter to Richard Hyde, TCEQ, Director, Air Permits Division" from Jeff Robinson, EPA, Region 6, Chief, Air Permits Section (May 21, 2008) (Attachment 7 in the Clinic's comments).

startup, and shutdown emissions in its projected actual emissions.

Response: EPA agrees with this comment. *See* our response to Comment 4 above for further information.

3. What are the grounds for disapproval of the submitted non-PAL aspects of the major NSR SIP requirements?

EPA is disapproving the submitted NNSR non-PAL rules because they do not explicitly limit the definition of "facility" to an "emissions unit." It is our understanding of State law that a "facility" can be an "emissions unit," *i.e.,* any part of a stationary source that emits or may have the potential to emit any air contaminant, as the State explicitly provides in the revised PSD rule at 30 TAC 116.160(c)(3). A "facility" also can be a piece of equipment, which is smaller than an "emissions unit." A "facility" can include more than one "major stationary source." It can include every emissions point on a company site, without limiting these emissions points to only those belonging to the same industrial grouping (SIP code). Regardless, the State clearly thought the prudent legal course was to limit "facility" explicitly to "emissions unit" in its PSD SIP non-PALs revision. TCEQ did not submit a demonstration showing how the lack of this explicit limitation in the NNSR SIP non-PALs revision is at least as stringent as the revised Major NSR SIP requirements. Therefore, EPA is disapproving the use of the submitted definition as not meeting the revised Major NNSR non-PALs SIP requirements.

Under the Major NSR SIP requirements, for any physical or operational change at a major stationary source, a source must include emissions resulting from startups, shutdowns, and malfunctions in its determination of the baseline actual emissions. The definition of the term "baseline actual emissions," as submitted in 30 TAC 116.12(3)(E), does not require the inclusion of emissions resulting from startups, shutdowns, and malfunctions as required under Federal regulations. The submitted definition of baseline actual emissions provides that until March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under [30 TAC] Chapter 101 of this title may be included the extent they have been authorized, or are being authorized, in a permit action under Chapter 116. The submitted definition of "projected actual emissions" at 30 TAC 116.12(29) differs from the Federal definitions by not including emissions associated with startups, shutdowns, and malfunctions. The authorized emission events under the submitted definition include emissions associated with maintenance, startups, and shutdowns. Our understanding of State law is that the use of the term "may" creates discretionary authority or grants permission or a power. *See* Section 311.016 of the Texas Code Construction Act. Similarly, the submitted definition of "projected actual emissions" at 30 TAC 116.12(29) does not require that emissions resulting from startups, shutdowns, and malfunctions be included. The submitted definitions differ from the Federal SIP definitions and the State has not provided information demonstrating that these definitions meet the Federal SIP definitions. Specifically, the State has not provided: (1) A replicable procedure for determining the basis for which emissions associated with maintenance, startup, and shutdown will and will not be included in the baseline actual emissions, (2) the basis for including emissions associated with maintenance in baseline actual emissions, (3) the basis for not including maintenance, startup, and shutdown emissions in the projected actual emissions, and (4) provisions for how it will handle maintenance, startup, and shutdown emissions after March 1, 2016. Therefore, based upon the lack of a demonstration from the State, as is required for a customized Major NSR SIP revision submittal, EPA is disapproving the definitions of "baseline actual emissions" at 30 TAC 116.12(3) and "projected actual emissions" at 30 TAC 116.12(29) as not meeting the revised Major NSR SIP requirements.

Texas stated that it has excluded emissions associated with malfunctions from the calculation of baseline actual emissions and projected actual emissions because including such emissions would inflate the baseline and narrow the gap between baseline and project emissions. EPA agrees with the reasons Texas uses to exclude malfunction emissions from baseline actual emissions and projected actual emissions are comparable to the reasons EPA used for excluding malfunction emissions from other States in which EPA approved such exclusion. Notwithstanding Texas's exclusion of malfunctions from these definitions, Texas must address the other grounds for disapproval as discussed above. This includes mandating the exclusion of malfunction emissions in both definitions.

The Federal definition of the "baseline actual emissions" provides that these emissions must be calculated in terms of "the average rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period." The submitted definition of the term "baseline actual emissions" found at 30 TAC 116.12 (3)(A), (B), (D), and (E) differs from the Federal definition by providing that the baseline shall be calculated as "the rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period."

Texas has not provided any demonstration, as is required for a customized Major NSR SIP revision submittal, showing how this different definition is at least as stringent as the Federal SIP definition. Therefore, EPA is disapproving the submitted definition of "baseline actual emissions" found at 30 TAC 116.12(3) as not meeting the revised major NSR SIP requirements.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.E.2 above. None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for non-PALs is severable from each other. Therefore, we are disapproving the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR non-PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations. *See* the proposal at 74 FR 48467, at 48475, our background for these submitted SIP revisions in section IV.E.1 above, and our response to comments on these submitted SIP revisions in section IV.E.2 above for additional information.

F. The Submitted Minor NSR Standard Permit for Pollution Control Project SIP Revision

1. What is the background for the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision?

EPA approved Texas's general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116 on November 14, 2003 (68 FR 64548) as meeting the minor NSR SIP requirements. The Texas Clean Air Act provides that the TCEQ may issue a standard permit for "new or existing similar facilities" if it is enforceable and compliance can be adequately monitored. *See* section 382.05195 of the TCAA. EPA approved the State's Standard Permit program as part of the Texas Minor NSR SIP program on November 14, 2003 (68 FR 64548). In the final FRN, EPA noted that the submitted provisions provide for a

streamlined mechanism for approving the construction or modification of certain sources in categories that contain numerous similar sources. EPA approved the provisions for issuing and modifying standard permits because, among other things, the submitted rules required the following: (1) No major stationary source or major modification subject to part C or part D of the Act could be issued a standard permit; (2) sources qualifying for a standard permit are required to meet all applicable requirements under section 111 of the Act (NSPS), section 112 of the Act (NESHAPS and MACT), and the TCEQ rules (this includes the Texas SIP control strategies); (3) sources have to register their emissions with the TCEQ and this registration imposes an enforceable emissions limitation; (4) maintenance of records sufficient to demonstrate compliance with all the permit's conditions; and (5) periodic reporting of the nature and amounts of emissions necessary to determine whether a source is in compliance. TCEQ must conduct an air quality impacts analysis of the anticipated emissions from the similar facilities before issuing and modifying any standard permit. All new or revised standard permits are required to undergo public notice and a 30-day comment period, and TCEQ must address all comments received from the public before finalizing its action to issue or revise a standard permit. Based upon the above and as further described in the TSD for the approval action, EPA found that the submitted Texas Minor NSR Standard Permits Program was adequate to protect the NAAQS and reasonable further progress (RFP) and was enforceable.

One of the primary reasons why EPA found that the Standard Permits Program was enforceable is that these types of Minor NSR permits were to be issued for similar sources. The issuance of a Minor NSR permit for similar sources eliminates the need for a case-by-case review and evaluation to ensure that the NAAQS and RFP are protected and the permit is enforceable. The provisions of the Texas Standard Permits Program also ensured that the terms and conditions of an individual standard permit would be replicable. This is a key component for the EPA authorization of a generic preconstruction permit. Replicable methodologies eliminate any director discretion issues. Otherwise, if there are any director discretion issues, EPA requires that they be addressed in a case-by-case Minor NSR SIP permit.

When EPA approved the Texas Standard Permits Program as part of the Texas Minor NSR SIP, it explicitly did not approve the Pollution Control Project (PCP) Standard Permit (30 TAC 116.617). *See* 68 FR 64543, at 64547. On February 1, 2006, Texas submitted a repeal of the previously submitted PCP Standard Permit and submitted the adoption of a new PCP Standard Permit at 30 TAC 116.617—State Pollution Control Project Standard Permit.[24] One of the main reasons Texas adopted a new PCP Standard Permit was to meet the new Federal requirements to explicitly limit this PCP Standard Permit only to Minor NSR. In *State of New York, et al* v. *EPA,* 413 F.3d 3 (DC Cir. June 24, 2005), the Court vacated the Federal pollution control project provisions for NNSR and PSD. Although the new PCP Standard Permit explicitly prohibits the use of it for Major NSR purposes, TCEQ has failed to demonstrate how this particular Standard Permit meets the Texas Standard Permits NSR SIP since it applies to numerous types of pollution control projects, which can be used at *any* source that wants to use a PCP, and is not an authorization for similar sources.

Under the Texas Standard Permits Minor NSR SIP, an individual Standard Permit must be limited to new or existing similar sources, such that the affected sources can meet the Standard Permit's *standardized* permit conditions. This particular PCP Standard Permit does not lend itself to standardized, enforceable, replicable permit conditions. Because of the broad types of source categories covered by the PCP Standard Permit, this Standard Permit lacks replicable standardized permit conditions specifying how the Director's discretion is to be implemented for the individual determinations, *e.g.,* the air quality determination, the controls, and even the monitoring, recordkeeping, and reporting. Rather, the types of sources covered by a Pollution Control Project are better designed for case-by-case additional authorization, source-specific review, and source-specific technical determinations. For case-by-case additional authorization, source-specific review, and source specific technical determinations, under the minor NSR SIP rules, if these types of determinations are necessary, under the Texas Minor NSR SIP, the State is required to use its minor NSR SIP case-by-case permit process under 30 TAC 116.110(a)(1).

Because of the lack of replicable standardized permit conditions and the lack of enforceability, the PCP Standard Permit is not the appropriate vehicle for authorizing PCPs. EPA proposed to disapprove the PCP Standard Permit, as submitted February 1, 2006. *See* the proposal at 74 FR 48467, at 48475–48476, for additional information.

2. What is EPA's response to comments on the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision?

Comment 1: TCEQ commented that its PCP Standard Permit has been used to implement control technologies required by regulatory changes, statutory changes, and/or EPA consent decree provisions. As such, control devices may be applied to numerous different facility types and industry types, ranging from storage tanks to fired units. TCEQ understands EPA's comments and will work with EPA to develop an approvable authorization(s) that will achieve the same goals and emission reductions.

Response: EPA appreciates TCEQ's understanding of our comments and intention to work with us to develop an approvable rule revision. However, our evaluation is based on the submitted rule currently before us.

Comment 2: The Clinic comments that the Texas PCP Standard Permit does not meet Federal NNSR and PSD requirements. *See New York* v. *EPA,* 413 F.3d 4 (DC Cir. 2005). The PCP Standard Permit also fails to meet the minimum standards for minor authorizations as provided by the Act at 42 U.S.C. 7410(a)(2)(C) and (C) and at 40 CFR 51.160(a) and (b). Texas's PCP Standard Permit is not limited to a particular source-category and can apply to various pollution control projects at any source type. *See* 30 TAC 116.617(a). Further, the permit itself does not have emission limits or monitoring; instead, a facility is permitted to include site-specific limits and monitoring requirements in its application for coverage under a PCP Standard Permit. *See* 30 TAC 116.617(d)(2). The PCP Standard Permit includes a generic statement that the permit must not be used to authorize changes for which the Executive Director at TCEQ determines whether "there are health effects concerns or the potential to exceed a national ambient air quality standard criteria pollutant or contaminant that results from an increase in emissions of any air contaminant until those concerns are addressed by the

[24] The 2006 submittal also included a revision to 30 TAC 116.610(d), that is a rule in Subchapter F, Standard Permits, to change an internal cross reference from Subchapter C to Subchapter E, consistent with the re-designation of this Subchapter by TCEQ. *See* section IV.H, and 74 FR 48467, at 48476, for further information on this portion of the 2006 submittal.

registrant." *See* 30 TAC 116.617(a)(3)(B). This provision itself, without specific emission limits and monitoring requirements in the PCP Standard Permit, in inadequate to protect the NAAQS, and is an acknowledgement that provisions on the face of the PCP Standard Permit are not sufficient to assure protection of the NAAQS and PSD increments. The commenter supports EPA taking action to disapprove and to further require facilities that have emissions authorized under the PCP Standard Permit to seek a Federally valid authorization.

Response: EPA agrees with the comments that the submitted PCP Standard Permit does not meet the requirements of the Texas Minor NSR Standard Permits SIP.

Comment 3: BCCA, TIP, TCC, GCLC, TxOGA, and TAB commented that the PCP standard permit does contain on its face all requirements applicable to its use. *See* 30 TAC 116.617(d). The rule requires that a permittee make a submittal to TCEQ, but does not require the Executive Director to act to approve the submittal. Under the rules, if the Executive Director does not act, the authorization under the permit stands. Review by the Executive Director is not to make case-by-case determination, but rather to review for impacts on air quality and disallow use if air quality would be negatively impacted. *See* 30 TAC 116.617(a)(3)(B). This is an important distinction. The Texas PCP permit is more stringent than a program that lacks a discretionary denial provision.

Moreover, the PCP is a minor NSR authorization. The CAA does not establish requirements for a State's minor NSR programs. The Federal regulations that govern minor NSR programs at 40 CFR 51.160–.164 provide States great flexibility in establishing SIP approvable minor NSR programs. Indeed, EPA's Environmental Appeals Board ("EAB") has recognized the flexibility provided States in establishing a non-PSD, non-nonattainment NSR permitting program, noting that Federal requirements do not mandate a particular minor NSR applicability methodology or test.[25]

In light of this flexibility, the Texas PCP standard permit is an acceptable part of the State's minor NSR SIP. Notably, EPA cites no statutory authority or provision of Part 51 in suggesting a bar on approval of general or standard permits. The manner in which TCEQ implements the PCP standard permit is reasonable and practical, and a decision to reject the PCP standard permit is a decision to reject an important minor NSR tool used by Texas sources to authorize environmentally beneficial projects in an expedited fashion. Site-specific traditional NSR permitting for such projects is impractical, inefficient and detrimental to the environment.

Response: EPA disagrees with this comment. We are not disapproving the Texas PCP Standard Permit because under the Texas Minor NSR SIP, Texas cannot issue general or standard permits. In fact, EPA has approved the Texas Standard Permits Program as part of the Texas Minor NSR SIP. EPA's approval authorizes Texas to issue so-called general permits, *i.e.,* the Texas standard permits. Our approval of the Texas Standard Permit Program as part of the Texas Minor NSR SIP was based on the statutory and regulatory requirements, including section 110 of the Act, in particular section 110(a)(2)(C), and 40 CFR 51.160, which require EPA to determine that the State has adequate procedures in place in the submitted Program to ensure that construction or modification of sources will not interfere with attainment of a National Ambient Air Quality Standard (NAAQS) or Reasonable Further Progress (RFP).

This particular submitted individual Standard Permit does not meet the requirements of the Texas Standard Permits Minor NSR SIP. The submitted revision allows the Executive Director to selectively review for impacts on air quality and disallow use if air quality would be negatively impacted or even revise the emission limit to avoid negative air quality impacts. It grants the Executive Director too much discretion to act selectively and make site-specific determinations outside the scope of the PCP Standard Permit and fails to include replicable procedures for the exercise of such discretion. It fails to include replicable procedures for the exercise of such discretion. Under the Texas Minor NSR Standard Permits SIP, each Standard Permit promulgated by Texas is required to include replicable standardized permit terms and conditions. Each Standard Permit is required to stand on its own. No further action on the part of the Executive Director for holders of a Standard Permit is authorized under the SIP because each individual Standard Permit is required to contain upfront all the replicable standardized terms and conditions. The replicability of a Standard Permit issued pursuant to the SIP rules eliminates any director discretion. EPA approval will not be required in each individual case as the TCEQ evaluates (and perhaps revises) a source's PCP Standard Permit. If the Director retains the authority to exercise discretion in the evaluation of each PCP Standard Permit holder's impact on air quality, this undermines EPA's rationale for approving the Texas Standard Permits Program as part of the Texas Minor NSR SIP. Under the SIP, any case-by-case determination must be made through the vehicle of the case-by-case Minor NSR SIP permit, not using a Minor NSR SIP Standard Permit as the vehicle. While Minor NSR SIP permit programs are given great flexibility, they cannot interfere with attainment and must meet the requirements for minor NSR. The Executive Director's selective application of his discretion on a case-by-case basis, without specific replicable criteria, exceeds the scope of EPA's approval of the Standard Permits Program in 30 TAC Subchapter F of 30 TAC Chapter 116 as approved on November 14, 2003 (68 FR 64548).

The submitted PCP Standard Permit revision has no replicable conditions that specify how the Director's discretion is to be exercised and delineated. We are particularly concerned that the Executive Director may exercise such discretion in case-specific determinations in the absence of generic, replicable enforceable requirements. These replicable methodologies and enforceable requirements should be in the submitted individual Standard Permit itself, not in the Executive Director's after the fact case-specific determinations made in issuing a customized Standard Permit to a source. If an individual Standard Permit requires any customizations for a holder, then this particular Standard Permit no longer meets the requirements for the Texas Standard Permit Program SIP. This customized Standard Permit has morphed into a case-by-case Minor NSR SIP permit and must meet the Texas NSR SIP requirements for this type of permit.

Comment 4: BCCA, TIP, TCC, GCLC, and TAB commented that the manner in which TCEQ has defined pollution control projects is reasonable and practical, and a decision to reject the PCP Standard Permit is a decision to reject an important minor NSR tool used by Texas sources to authorize environmentally beneficial projects in an expedited fashion. TCC further comments that EPA does not, and cannot, question that the Standard Permit for PCPs provides for the regulation of stationary sources as necessary to assure that that NAAQS are achieved. TCC also comments that Parts C (PSD) and D (NNSR) are not implicated because PCP Standard

[25] *In re Tennessee Valley Authority,* 9 EAD 357, 461 (EAB Sept. 15, 2000).

Permits are expressly made unavailable to major sources and major modifications. All commenters indicated that narrowing the scope of projects that can qualify for the expedited standard permit approval (or requiring TCEQ to promulgate source category-specific PCP standard permits for every source category in Texas) is impractical, inefficient, and detrimental to the environment.

Response: EPA agrees that the submitted PCP Standard Permit does not apply to major stationary sources and major modifications subject to PSD or NNSR. While the manner in which TCEQ has defined pollution control projects may be reasonable and practical, using the Texas Standard Permits SIP to issue one individual Standard Permit for all types of PCPs does not meet the SIP's requirements.

The scope of a Standard Permit promulgated by TCEQ is governed by the TCAA and the SIP's general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116. These do not provide for the issuance of a Standard Permit for dissimilar sources. They provide for the issuance of a Standard Permit for similar sources so that its permit terms and conditions are determined upfront in the promulgation of the individual Standard Permit. There is no need for any director discretion or customization of the individual Standard Permit. This is not to say that TCEQ is precluded from issuing various individual Standard Permits for PCPs; TCEQ can issue various individual Standard Permits for PCPs that cover similar sources.

Comment 5: ERCC commented that PCP authorizations are not unique to Texas and EPA's concerns with Texas PCP Standard Permit is too broad, is misplaced, and fails to recognize the regulatory restrictions in place, and the benefits that allow efficient emission reduction projects to proceed in the State. The commenter refers to two States with pollution control exemptions from the definition of modification which allow PCPs to proceed with significantly fewer limitations than the Texas PCP Standard Permit: Ohio and Oregon. Neither of these States limits PCP by a category of pollution control techniques or industrial sources. These SIP-approved provisions fail to provide any guidance for an application, director review, recordkeeping, or monitoring requirements. The Texas PCP program is highlighted for disapproval because it placed too much emphasis on the requirements and limitations of the PCP program. The Texas program has more safeguards than Oregon and Ohio. The Texas PCP program is solely a Minor NSR Program. By proposing disapproval of the Texas PCP program, EPA is holding Texas to a vastly more stringent approach and is designed to judge Texas in a way that EPA has not proposed for any other State.

Response: See response to Comments 3 and 4. EPA also wishes to note that that the cited Oregon and Ohio PCP exemptions from Major NSR were approved by EPA before the court held that EPA lacked the authority to exempt PCPs from the Major NSR SIP requirements. *See State of New York* v. *EPA,* 413 F 3d. 3 (DC Cir. 2005). These exemptions of PCPs from Major NSR are not the same as a Minor NSR Standard Permit for PCPs. Moreover, they have no relationship to the Texas Minor NSR Standard Permits SIP.

Comment 6: TAB commented on the history of the PCP programs at EPA and in Texas and states that Texas has been issuing Standard Permits for PCP Projects since 1994. TAB comments that the standard permit program was administered for several years with no suggestion of programmatic abuses, and more importantly, no examples given by anyone of unintended consequences. TAB also asserts that 13 years after Texas adopted its pollution control project standard permit, EPA finally commented on it in the proposal. TAB asserts that EPA cannot question that TCEQ's Minor NSR program, including the PCP Standard Permit, meets this provision of the Act.

Response: EPA disagrees with the comment. EPA had no need to comment on the administration of the general Standard Permit Program in this action because EPA approved Texas' general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116 on November 14, 2003 (68 FR 64548) as meeting the minor NSR SIP requirements. That approval describes how the Standard Permit rules met EPA's requirements for new minor sources and minor modifications. The scope of EPA's disapproval in this action is limited to Texas's submission of a SIP revision, on February 1, 2006, adopting a Standard Permit for PCPs at 30 TAC 116.617—State Pollution Control Project Standard Permit. CAA section 110 sets out the process for EPA's review of State SIP submittals. Nothing in the Act suggests EPA is foreclosed from disapproving a submittal because it failed to comment on it during the State's rulemaking process. For further response to the remainder of the comment, *see* response to comments 3 and 4.

Comment 7: TAB discussed numerous guidance memoranda that EPA used to support its position that the PCP Standard Permit is unapprovable because it is not limited to a particular narrowly defined source category that the permit is designed to cover and can be used to make site-specific determinations that are outside the scope of this type permit. The commenter states that these memos are not law, and cannot conceivably be used as an independent basis to deny approval of a SIP revision. Any EPA pronouncement that purports to be binding must be adopted through notice and comment rulemaking. *See Appalachian Power Company* v. *EPA,* 208 F.3d 1015, 1023 (DC Cir. 2000). The commenter concludes that if EPA wants to disapprove a submitted SIP revision of a Standard Permit because it is not limited to a particular narrowly defined source category and that allow site specific determinations, then EPA must adopt a rule that says so. TAB comments that even if the memos could legally support EPA's position, that the PCP Standard Permit is unapprovable because it not limited to a particular narrowly defined source category that the permit is designed to cover and can be used to make site-specific determinations that are outside the scope of this type permit, neither of the cited memos actually says so. The commenter reviewed each cited memo and found nothing to suggest any intent to fill gaps or qualify any provision of 40 CFR 51.160. TAB further comments on EPA's cites to a series of **Federal Registers** on actions taken on other States' minor NSR programs. The commenter states that these actions offer no explanation of how these particular actions illuminate EPA's proposal to disapprove Texas' PCP Standard Permit. TAB further comments on EPA's cites to a series of **Federal Registers** on actions taken on other States' minor NSR programs. The commenter states that these actions offer no explanation of how these particular actions illuminate EPA's proposal to disapprove Texas' PCP Standard Permit.

Response: EPA disagrees with this comment. Section 110 of the Act, in particular section 110(a)(2)(C), and 40 CFR 51.160, require the EPA to determine that the State has adequate procedures to ensure that construction or modification of sources will not interfere with attainment of a National Ambient Air Quality Standard (NAAQS). The CAA grants EPA the authority to ensure that the construction or modification of sources will not interfere with attainment of a National

Ambient Air Quality Standard (NAAQS). The memoranda cited in the proposal were cited for the purpose of providing documentary evidence of how EPA has exercised its discretionary authority when reviewing general permit programs similar to the Texas Standard Permits SIP. They also collectively provide an historical perspective on how EPA has exercised its discretion in reviewing regulatory schemes similar to the submitted PCP Standard Permit. The utility of these citations is not in the specific subject matter they address, but in their discussion of the regulatory principles to be applied in reviewing permit schemes that adopt emission limitations created through standardized protocols. For example, the memorandum titled *Approaches to Creating Federally-Enforceable Emissions Limits,* Memorandum from John S. Seitz, OAQPS, November 3, 1993, on page 5 discusses EPA recognition that emissions limitations can be created through standardized protocols. Likewise, the memorandum titled *Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and section 112 rules and General permits,* Memorandum from Kathie A Stein, Office of Enforcement and Compliance Assurance, January 25, 1995, discusses on page 6 the essential characteristics of a general permit that covers a homogenous group of sources.

Again, the **Federal Register** citations provided in the proposal serve to further highlight EPA's practical application of the policies enunciated in the above referenced memoranda. These documents demonstrate that EPA has consistently applied these policies with respect to approval of the minor source permit programs which feature rules which are similar to the Texas Standard Permits SIP. For example the **Federal Register** at 71 FR 5979, final approval of Wisconsin SIP revision, February 6, 2006, states on page 5981 that EPA regards the prohibitory rules and general permits are essentially similar and goes on to discuss requirements for approval of permit schemes of this nature. The cited notices address requirements for approval of general permit programs submitted as SIP revisions and are illustrative of regulatory policy applied by EPA in reviewing Standard Permit programs for SIP approval.

The cumulative effect of these documents is to provide the public with an insight to EPA's policy with regard to its application of discretionary authority in reviewing a variety of proposed general permit schemes. In this instance, EPA interprets the applicable statutes and rules to require that Standard Permits be limited to similar sources and they cannot be used to make site-specific determinations that are outside the scope of this type of permit. This is consistent with EPA's prior policy pronouncements on this subject as evidenced by the memoranda. EPA's interpretation is circumscribed by the statutory requirement that such a permit program not interfere with the attainment of the NAAQS. Consequently, the commenter's failure to find relevant information to illuminate EPA's decision to disapprove the submitted Texas' PCP Standard Permit is not a reflection on the utility of the cited documents.

Comment 8: TAB concludes by observing that there is no evidence of Standard Permit Program failure or adverse comments. The commenter criticizes EPA for not taking action on the PCP Standard Permit Program which the CAA required action long before 2009. EPA is further criticized for failing to review the record to determine the negative impacts of the PCP Standard Permit Program during the intervening time during which TCEQ has been issuing PCP authorizations under this program. EPA offers no example of a PCP Project that failed to protect public health or welfare, or could not be enforced, or that did not accomplish its valuable purpose of quickly, but carefully, authorizing emission reduction projects.

Response: EPA disagrees with this comment. The standard for review in this context is not the existence of adverse comments or failure in the implementation of a Standard Permit Program SIP. EPA reviews a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3). *See also BCCA Appeal Group* v. *EPA,* 355 F 3d. 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (DC Cir. 1995). This includes an analysis of the submitted regulations for their legal interpretation. The existence of adverse comments is not the exclusive criteria for review of submitted revisions. In this particular instance, EPA's review is limited to Texas's submission of a SIP revision for a new PCP Standard Permit at 30 TAC 116.617, not a SIP revision for general Standard Permits Program. EPA has already approved Texas' general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116 on November 14, 2003 (68 FR 64548) as meeting the minor NSR SIP requirements.

3. What are the grounds for disapproving the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision?

EPA is disapproving the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision because the PCP Standard Permit, as adopted and submitted by Texas to EPA for approval into the Texas Minor NSR SIP, does not meet the requirements of the Texas Minor NSR Standard Permits Program. It does not apply to similar sources. Because it does not apply to similar sources, it lacks the requisite replicable standardized permit terms specifying how the Director's discretion is to be implemented for the case-by-case determinations.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.F.2 above. Because the PCP Standard Permit, in 30 TAC 116.617, does not meet the Texas Minor NSR SIP requirements for Standard Permits, EPA is disapproving the PCP Standard Permit, as submitted February 1, 2006. *See* the proposal at 74 FR 48467, at 48475–48476, our background for these submitted SIP revisions in section IV.F.1 above, and our response to comments on these submitted SIP revisions in section IV.F.2 above for additional information.

G. No Action on the Revisions to the Definitions Under 30 TAC 101.1

We proposed to take no action upon the June 10, 2005, SIP revision submittal addressing definitions at 30 TAC Chapter 101, Subchapter A, section 101.1, because previous revisions to that section are still pending review by EPA. *See* 74 FR 48467, at 48476. We received no comments on this proposal. Accordingly, we will take appropriate action on the submittals concerning 30 TAC 101.1 in a separate action. As noted previously, these definitions are severable from the other portions of the two SIP revision submittals.

H. No Action on Provisions That Implement Section 112(g) of the Act and for Restoring an Explanation That a Portion of 30 TAC 116.115 Is Not in the SIP Because It Implements Section 112(g) of the Act

Texas originally submitted a new Subchapter C—Hazardous Air Pollutants: Regulations Governing Constructed and Reconstructed Sources (FCAA, § 112(g), 40 CFR Part 63) on July 22, 1998. EPA has not taken action upon the 1998 submittal. In the February 1,

2006, SIP revision submittal, this Subchapter C is recodified to Subchapter E and sections are renumbered. This 2006 submittal also includes an amendment to 30 TAC 116.610(d) to change the cross-reference from Subchapter C to Subchapter E. These SIP revision submittals apply to the review and permitting of constructed and reconstructed major sources of hazardous air pollutants (HAP) under section 112 of the Act and 40 CFR part 63, subpart B. The process for these provisions is carried out separately from the SIP activities. SIPs cover criteria pollutants and their precursors, as regulated by NAAQS. Section 112(g) of the Act regulates HAPs, this program is not under the auspices of a section 110 SIP, and this program should not be approved into the SIP. These portions of the 1998 and 2006 submittals are severable. For these reasons we proposed to take no action on this portion relating to section 112(g) of the Act. *See* 74 FR 48467, at 48476–48477. We received no comments on this proposal. Accordingly, we are taking no action on the recodification of Subchapter C to Subchapter (d) and 30 TAC 116.610(d).

In a related matter, we are making an administrative correction to an earlier action which inadvertently removed an explanation that 30 TAC 116.115(c)(2)(B)(ii)(I) is not in the SIP. When we approved 30 TAC 116.115 in the SIP on September 18, 2002, we excluded 30 TAC 116.115(c)(2)(B)(ii)(I) because it implemented the requirements of section 112(g) of the Act. *See* 67 FR 58679, at 58699. In a separate action, we approved revisions to 30 TAC 116.115 on April 2, 2010 (75 FR 16671), which are unrelated to the excluded provisions of 30 TAC 116.115(c)(2)(B)(ii)(I). However, that action inadvertently removed the explanation that excluded 116.115(c)(B)(ii)(I) from the SIP. In this action, we are making an administrative correction to restore into the Code or Federal Regulations the explanation that the SIP does not include 30 TAC 116.115(c)(B)(ii)(I).

I. No Action on Provision Relating to Emergency and Temporary Orders

We proposed to take no action upon the February 1, 2006, SIP revision submittal which recodified the severable provisions relating to Emergency Orders from 30 TAC Chapter 116, Subchapter E to a new Subchapter K. *See* 74 FR 48467, at 48477. We received no comments on this proposal. Accordingly, we will take appropriate action on the Emergency Order requirements in a separate action, according to the Consent Decree schedule.

J. Responses to General Comments on the Proposal

Comment 1: The following commenters support EPA's proposal to disapprove the Texas NSR Reform Program, 1-hour NNSR, 1997 8-hour NNSR, and PCP Standard Permit: HCPHES; several members of the Texas House of Representatives; the Sierra Club; the City of Houston, and the Clinic.

Response: Generally, these comments support EPA's analysis of Texas's NSR Reform Program, 1-hour NNSR, 1997 8-hour NNSR, and PCP Standard Permit, as discussed in detail at in the proposal at 74 FR 48467, at 40471–48476, and further support EPA's action to disapprove the Texas NSR Reform Program submission.

Comment 2: The SCMS and PSR sent numerous similar letters via e-mail that relate to this action. These comments include 1,789 identical letters from SCMS (sent via e-mail) and a comment letter from PSR, which support EPA's proposed ruling that major portions of TCEQ air permitting program do not adhere to the CAA and should be thrown out. While agreeing that the proposed disapprovals are a good first step, the commenters state that EPA should take bold actions such as halting any new air pollution permits being issued by TCEQ utilizing TCEQ's current illegal policy; creating a moratorium on the operations of any new coal fired power plants; reviewing all permits issued since TCEQ adopted its illegal policies and requiring that these entities resubmit their applications in accordance with the Federal CAA; and putting stronger rules in place in order to reduce global-warming emissions and to make sure new laws and rules do not allow existing coal plants to continue polluting with global warming emissions.

The commenters further state that Texas: (1) Has more proposed coal and petroleum coke fired power plants than any other State in the nation; (2) Is number one in carbon emissions; and (3) Is on the list for the largest increase in emissions over the past five years. Strong rules are needed to make sure the coal industry is held responsible and that no permits are issued under TCEQ's illegal permitting process. Strong regulations are vital to cleaning up the energy industry and putting Texas on a path to clean energy technology that boosts economic growth, creates jobs in Texas, and protects the air quality, health, and communities.

In addition, SCMS sent 273 similar letters (sent via e-mail) that contained additional comments that Texas should rely on wind power, solar energy, and natural gas as clean alternatives to coal. Other comments expressed general concerns related to: impacts on global warming, lack of commitment by TCEQ to protect air quality, the need for clean energy efficient growth, impacts upon human health, endangerment of wildlife, impacts on creation of future jobs in Texas, plus numerous other similar concerns. The PSR further commented that as health care professionals, they are concerned about the health effects they are seeing in their patients due to environmental toxins in the air and water.

Response: To the extent that the SCMS and PSR letters comment on the proposed disapproval of the submitted 1-hour ozone standard, 1997 8-hour ozone standard, and NSR Reform Programs, they support EPA's action to disapprove these submitted rules. The remaining comments are outside the scope of our actions in this rulemaking.

Comment 3: TCEQ understands that EPA's review was conducted by applying the current applicable law. The Executive Director will conduct a review of all EPA comments and propose changes to the rules proposed for disapproval.

TCEQ understands EPA's concerns with issues regarding, among other things, applicability, clarity, enforceability, replicable procedures, recordkeeping, and compliance assurance. Specifically, the Executive Director will consider rulemaking to address the following concerns:

- Clarify references for major stationary sources and major modifications to EPA rules for nonattainment and maintenance area definitions and removing rule language indicating that the 1-hour thresholds and offsets are not effective unless EPA promulgates rules, and clarifying the applicability of nonattainment permitting rules;
- Clarify the definition of baseline actual emission rate, and clarify the inclusion of maintenance, startup, and shutdown emissions when determining baseline actual emissions; and
- Add missing items and clarify the existing requirements to obtain and comply with a PAL to meet FNSR requirements.

New and amended rules will be subject to the statutory and regulatory requirements for a SIP revision, as interpreted in EPA policy and guidance on SIP revisions, as well as applicable Texas law. The revised program will ensure protection of the NAAQS, and

demonstrate noninterference with the Texas SIP control strategies and reasonable further progress.

In addition, and as noted, TCEQ will address EPA's concerns regarding public participation in a separate rulemaking action.

Response: EPA appreciates TCEQ's commitment to consider rulemaking to correct the deficiencies in the submitted 1-hour ozone standard, 1997 8-hour ozone standard, and NSR Reform Programs. However, our evaluation is based on the submitted rules that are currently before us.

Comment 4: The Clinic further asks that EPA take action to halt Texas's use of permits-by-rule that, like the PCP standard permit, fail to meet minimum standards for minor source permitting and for general permits and exclusionary rules. Texas has adopted and is applying a number of permits-by-rule that are not source specific, do not include specific emission limitations or monitoring, and are inadequate to protect the NAAQS. These include the permits-by-rule in Subchapter K of Chapter 106 of the Texas rules. In addition, like the PCP, some of these permits—rather than authorizing specific types of minor emission source categories—can be used to increase authorized emissions from any type of facility.[26] EPA has repeatedly stated that Texas's current use of permit-by-rule violates the Act and Texas's approved SIP.[27] Yet EPA has failed take action to stop the illegal use of permits-by-rule.

Response: Any action on Texas's use of permits-by-rule, as requested by the commenter, is outside the scope of our actions in this rulemaking.

Comment 5: Concerned Citizens of Grayson expressed concerns about a hot mix asphalt plant located near the small town of Pottsboro, TX, which is located near public schools and private residences and has caused significant disruptions in the lives of those liming nearby because or "the noxious stench repeatedly emitted from the plant." The commenters are concerned because the plant was authorized under a Standard Permit issued by TCEQ which only had public participation and comment when TCEQ issued the Standard Permit for hot mix asphalt plants and there was no opportunity for public participation and comment on a source that applied for authorization under a Standard Permit for a specific source after the Standard Permit has been authorized.

Response: These comments do not relate to the submitted Standard Permit for Pollution Control Projects that EPA is reviewing in this action. These comments, which relate to a Standard Permit for Hot Mix Asphalt Plants, are outside the scope of this action.

Comment 6: AECT believes that EPA's proposed disapproval has injected uncertainty into the Texas permitting program, will cause tremendous operational-uncertainty for companies-in light of significant air emission rule proposals considered by EPA (*e.g.* mercury MACT, PSD Tailoring Rule), this and other disapprovals may jeopardize or substantially delay the ability of electric generators to obtain necessary air permits to install pollution controls that will be necessary to comply with current and future rules; and prompt EPA approval of the proposed TCEQ NSR SIP Revisions is needed in order to provide the regulatory certainty necessary for economic development, creation of critically needed jobs, and generation of affordable, reliable electricity in Texas.

Response: We are disapproving the submitted Texas NSR Reform Program, 1-hour NNSR, and PCP Standard Permit programs because they do not meet applicable requirements of the Act, as discussed herein. EPA is required to review a SIP revision for its compliance with the Act and EPA regulations. *See* CAA section 110(k)(3); *see also BCCA Appeal Group* v. *EPA,* 355 F 3d.817, 822 (5th Cir 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (DC Cir. 1995).

Comment 7: BCCA and TIP comment that under Texas's integrated air permitting regime, air quality in the State is demonstrating strong, sustained improvement. The commenters cite to substantial reductions in nitrogen oxides and improvements in the ozone concentrations in the Houston-Galveston and Dallas-Fort Worth ozone nonattainment areas.

Response: We are disapproving the submitted Texas NSR Reform Program, 1997 8-hour NNSR, 1-hour NNSR, and PCP Standard Permit programs because they do not meet applicable requirements of the Act, as discussed herein. EPA is required to review a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3); *See also BCCA Appeal Group* v. *EPA,* 355 F 3d. 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (DC Cir. 1995).

Even if the commenters' premises are to be accepted, they fail to substantiate their claim that the Texas NSR Reform Program, 1-hour NNSR, 1997 8-hour NNSR, and PCP Standard Permit programs have had a significant impact on improving air quality in Texas by producing data showing that any such gains are directly attributable to the submitted Programs, and are not attributable to the SIP-approved control strategies (both State and Federal programs) or other Federal and State programs. They provide no explanation or basis for how their numbers were derived.

Furthermore, since the commenters thought EPA was acting inconsistently, they should have identified SIPs that are inconsistent with our actions and provided technical, factual information, not bare assertions.

Comment 8: GCLC, TIP, BCCA, AECT, and TCC comment that EPA ignores the fact that the Texas NSR Program has had a significant impact on improving air quality in Texas. TCEQ commented that significant emission reductions have been achieved by the submitted Program through the large number of participating grandfathered facilities, which resulted in improved air quality based upon the monitoring data.

BCCA, TAB, TxOGA, and ERCC comment that the legal standard for evaluating a SIP revision for approval is whether the submitted revision mitigates any efforts to attain compliance with a NAAQS. EPA's failure to assess the single most important factor in the submitted Program, the promotion of continued air quality improvement, is inconsistent with case law and the Act and is a deviation from the SIP consistency process and national policy. EPA should perform a detailed analysis of approved SIP programs through the United States and initiate the SIP consistency process within EPA to ensure fairness to Texas industries.

Response: EPA is required to review SIP revisions submission for their compliance with the Act and EPA regulations. CAA 110(k)(3); *See also BCCA Appeal Group* v. *EPA,* 355 F 3d. 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (DC Cir. 1995). EPA is not disapproving the

[26] For example, 30 TAC 106.261, 106.262, 106.263, and 106.264.

[27] *See* "Letter to Dan Eden, TCEQ Deputy Director" from Carl Edlund, EPA Region 6, Director Multimedia Planning and Permitting Division (March 12, 2008) ("EPA has consistently expressed concern about PBRs that authorize a category of emissions, such as startup or shutdown emissions, or that modify an existing NSR permit.") (Attachment 10 of the Clinic's comments); "Letter to Richard Hyde, TCEQ, Director, Air Permits Division" from Jeff Robinson, EPA Region 6, Chief, Air Permits Section (November 16, 2007) (Attachment 11 of then Clinic's comments); "Letter to Steve Hagle, TCEQ, Special Assistant, Air Permits Director" from David Neleigh, EPA Region 6, Chief, Air Permits Section (March 30, 2006) (Attachment 12 of the Clinic's comments); "Letter to Lola Brown, TCEQ, Office of Legal Services" from David Neleigh, EPA Region 6, Chief, Air Permits Section (February 3, 2006) (Attachment 13 of the Clinic's comments).

entire Texas NSR SIP. Specifically, on September 23, 2009, EPA proposed to disapprove *revisions* to the Texas NSR SIP submitted by the State of Texas that relate to the Nonattainment NSR (NNSR) Program for the 1-Hour Ozone Standard and the 1997 8-Hour Ozone Standard, NSR Reform, and a specific Standard Permit. Further, EPA is not required to initiate the SIP consistency process within EPA unless the pending SIP revision appears to meet all the requirements of the Act and EPA's regulations but raises a novel issue. EPA is disapproving the submitted revisions because they fail to meet the Act and EPA's regulations. Because the submitted revisions fail to meet the requirements for a SIP revision, the SIP consistency process is not relevant.

Comment 9: The ERCC comments that to avoid negative economic consequences EPA should exercise enforcement discretion statewide for sources that obtained government authorization in good faith and as required by TCEQ, the primary permitting authority. EPA should not require any injunctive relief and should consider penalty only cases in this rulemaking.

Response: EPA enforcement of the CAA in Texas is outside the scope of our actions.

V. Final Action

Under section 110(k)(3) of the Act and for the reasons stated above, EPA is disapproving the following: (1) The submitted definition of "best available control technology" in 30 TAC 116.10(3); (2) Major NSR in areas designated nonattainment for the 1-hour ozone NAAQS; (3) Major NSR in areas designated nonattainment for the 1997 8-hour ozone NAAQS; (4) Major NSR SIP requirements for PALs; (5) Non-PAL aspects Major NNSR SIP requirements; and (6) submittals for a Minor Standard Permit for PCP. EPA is also proposing to take no action on certain severable revisions submitted June 10, 2005, and February 1, 2006.

Specifically, we are disapproving the following regulations:

- Disapproval of the definition of best available control technology at 30 TAC 116.10(3), submitted March 13, 1996, and July 22, 1998;
- Disapproval of revisions to 30 TAC 116.12 and 116.150 as submitted June 10, 2005;
- Disapproving revisions to 30 TAC 116.12, 116.150, 116.151; and disapproving new sections at 30 TAC 116.121, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, 116.610(a), and 116.617, as submitted February 1, 2006.

We are also taking no action on the provisions identified below:

- The revisions to 30 TAC 101.1—Definitions, submitted June 10, 2005;
- The recodification of the existing Subchapter C under 30 TAC Chapter 116 to a new Subchapter E under 30 TAC Chapter 116;
- The provisions of 30 TAC 116.610(d); and
- The recodification of the existing Subchapter E under 30 TAC Chapter 116 to a new Subchapter K under 30 TAC Chapter 116.

Finally, we are making administrative corrections to reinstate an explanation to the SIP-approved 30 TAC 116.115, that was inadvertently removed in a separate action on April 2, 2010 (75 FR 16671).

Sources are reminded that they remain subject to the requirements of the Federally approved Texas Major NSR SIP and subject to potential enforcement for violations of the SIP (*See* EPA's Revised Guidance on Enforcement During Pending SIP Revisions, dated March 1, 1991).

VI. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

This final action has been determined not to be a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* because this SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b). Because this final action does not impose an information collection burden, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. This rule will not have a significant impact on a substantial number of small entities because SIP approvals and disapprovals under section 110 and part D of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the States are already imposing.

Furthermore, as explained in this action, the submissions do not meet the requirements of the Act and EPA cannot approve the submissions. The final disapproval will not affect any existing State requirements applicable to small entities in the State of Texas. Federal disapproval of a State submittal does not affect its State enforceability. After considering the economic impacts of today's rulemaking on small entities, and because the Federal SIP disapproval does not create any new requirements or impact a substantial number of small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 7410(a)(2).

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 "for State, local, or Tribal governments or the private sector." EPA has determined that the disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or Tribal governments in the aggregate, or to the private sector. This Federal action determines that pre-existing requirements under State or

local law should not be approved as part of the Federally approved SIP. It imposes no new requirements. Accordingly, no additional costs to State, local, or Tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications." "Policies that have Federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This action does not have Federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination With Indian Tribal Governments

This action does not have Tribal implications, as specified in Executive Order 13175 (59 FR 22951, November 9, 2000), because the SIP EPA is disapproving would not apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law. This final rule does not have Tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. This action does not involve or impose any requirements that affect Indian Tribes. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, (February 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this action. In reviewing SIP submissions, EPA's role is to approve or disapprove State choices, based on the criteria of the Clean Air Act. Accordingly, this action merely disapproves certain State requirements for inclusion into the SIP under section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. section 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 15, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to

enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: August 31, 2010.

Al Armendariz,

Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7410 *et seq.*

Subpart SS—Texas

■ 2. The table in § 52.2270(c) entitled "EPA–Approved Regulations in the Texas SIP" is amended by revising the entry for section 116.115 to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA—APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
*	*	*	*	*
Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification				
*	*	*	*	*
Subchapter B—New Source Review Permits				
*	*	*	*	*
Division 1—Permit Application				
Section 116.115	General and Special Conditions.	8/20/2003	4/2/2010, 75 FR 16671	The SIP does not include subsection 116.115(c)(2)(B)(ii)(I).
*	*	*	*	*

* * * * *

■ 3. Section 52.2273 is amended by adding a new paragraph (d) to read as follows:

§ 52.2273 Approval status.

* * * * *

(d) EPA is disapproving the Texas SIP revision submittals under 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction and Modification as follows:

(1) The following provisions in 30 TAC Chapter 116, Subchapter A—Definitions:

(i) 30 TAC 116.10—General Definitions—the definition of "BACT" in 30 TAC 116.10(3), adopted February 14, 1996, and submitted March 13, 1996; and repealed and readopted June 17, 1998, and submitted July 22, 1998;

(ii) The revisions to 30 TAC 116.12—Nonattainment Review Definition, adopted May 25, 2005, and submitted June 10, 2005;

(iii) The revisions to 30 TAC 116.12—Nonattainment and Prevention of Significant Deterioration Definitions, adopted January 11, 2006, and submitted February 1, 2006 (which renamed the section title);

(2) The following section in 30 TAC Chapter 116, Subchapter B—New Source Review Permits, Division 1—Permit Application: 30 TAC 116.121—Actual to Projected Actual Test for Emission Increase, adopted January 11, 2006, and submitted February 1, 2006;

(3) The following sections in 30 TAC Chapter 116, Subchapter B—New Source Review Permits, Division 5—Nonattainment Review:

(i) Revisions to 30 TAC 116.150—New Major Source or Modification in Ozone Nonattainment Area—revisions adopted May 25, 2005, and submitted June 10, 2005; and revisions adopted January 11, 2006, and submitted February 1, 2006;

(ii) Revisions to 30 TAC 116.151—New Major Source or Modification in Nonattainment Areas Other Than Ozone—revisions adopted January 11, 2006, and submitted February 1, 2006;

(4) The following sections in 30 TAC Chapter 116, Subchapter C—Plant-Wide Applicability Limits, Division 1—Plant-Wide Applicability Limits:

(i) 30 TAC 116.180—Applicability—adopted January 11, 2006, and submitted February 1, 2006;

(ii) 30 TAC 116.182—Plant-Wide Applicability Limit Permit Application—adopted January 11, 2006, and submitted February 1, 2006;

(iii) 30 TAC 116.184—Application Review Schedule—adopted January 11, 2006, and submitted February 1, 2006;

(iv) 30 TAC 116.186—General and Special Conditions—adopted January 11, 2006, and submitted February 1, 2006;

(v) 30 TAC 116.188—Plant-Wide Applicability Limit—adopted January 11, 2006, and submitted February 1, 2006;

(vi) 30 TAC 116.190—Federal Nonattainment and Prevention of Significant Deterioration Review—adopted January 11, 2006, and submitted February 1, 2006;

(vii) 30 TAC 116.192—Amendments and Alterations—adopted January 11, 2006, and submitted February 1, 2006;

(viii) 30 TAC 116.194—Public Notice and Comment—adopted January 11, 2006, and submitted February 1, 2006;

(ix) 30 TAC 116.196—Renewal of a Plant-Wide Applicability Limit Permit—adopted January 11, 2006, and submitted February 1, 2006;

(x) 30 TAC 116.198—Expiration and Voidance—adopted January 11, 2006, and submitted February 1, 2006;

(5) The following sections in 30 TAC Chapter 116, Subchapter F—Standard Permits:

(i) Revisions to 30 TAC 116.610—Applicability—paragraphs (a)(1) through (a)(5) and (b)—revisions adopted January 11, 2006, and submitted February 1, 2006;

(ii) 30 TAC 116.617—State Pollution Control Project Standard Permit—adopted January 11, 2006, and submitted February 1, 2006;

[FR Doc. 2010–22670 Filed 9–14–10; 8:45 am]

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SCHEDULE B: PENALTIES FOR FACILITIES SERVING PERSONS WITH MENTAL RETARDATION AND/OR RELATED CONDITIONS

DESCRIPTION OF CONDITIONS AND ELEMENTS OF CONDITIONS	FIRST OFFENSE (1)	SECOND OFFENSE (2)	THIRD OR SUBSEQUENT OFFENSE (3)
A. - G. (No change.)			
H. Failure to submit a renewal of change of ownership license application as required in accordance with §§90.15 or 90.16 of this title (relating to Renewal Procedures and Qualifications and Change of Ownership).			
1. 1. The facility does not submit a license renewal application at least 45 days before the current license expiration date.	500	1,000	1,500
2. 2. During a change of ownership process, the prospective purchaser does not submit a license application to the licensing program at least 30 days before the anticipated sale date.	500	1,000	1,500

(d)[(e)] The maximum hourly rate for legal services shall be as follows: Hourly rate:

(A) Attorney–$150;

(B) Legal assistant (not to include hours for general office staff) $50 [When an attorney's only service has been to assist a claimant with completing and filing claim forms and other documents, and the claim is not disputed, the range of hours allowed shall be in the range of one to three hours, depending upon the extent of services rendered.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on October 29, 1993.

TRD-9331266 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption: December 10, 1993

For further information, please call: (512) 440-3592

◆ ◆ ◆

TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 116. Control of Air Pollution by Permits For New Construction or Modification

Subchapter B. New Source Review Permits

Permit Application

• 30 TAC §116.110, §116.115

The Texas Natural Resource Conservation Commission (TNRCC) proposes amendments to §116.110, concerning Applicability; §116.115, concerning Special Provisions; §116.211, concerning the Standard Exemption List; and §116.311(b) and (c), concerning Permit Renewal Applications. Also, TNRCC proposes a new Subchapter F, Standard Permits, containing new §§116.610, 116.611, 116.614, and 116.617, to establish a category of standard permits. The proposed changes have been developed in response to recommendations by the Permits Workshop Task Force and directives from the former Texas Air Control Board to streamline the permit process. The proposed changes to the Standard Exemption List consist of revisions to Standard Exemption (SE) 75, SE 107, SE 113, and a new SE 124. The proposed revisions to SE 107, regarding vapor degreasers, and SE 113, regarding thermoset resin operations, were recommended by the Permits staff. The proposed new SE 124, relating to auto body shops, and revised SE 75, relating to surface coating facilities, were developed by the Auto Body Shop Task Force to provide a means for the thousands of auto body shops located in Texas to comply with Chapter 116 requirements.

The proposed new Subchapter F establishes a new category of new source review permits referred to as standard permits. The standard permit simplifies and accelerates the permit review process by establishing standardized conditions targeting a specific industry or type of facility. The permit will contain specific conditions and requirements pertaining to a specific industry or source type. If an applicant can meet all of the conditions of a standard permit, then it would not be necessary to submit a general application under the requirements of §116.111. This will streamline the agency review process, and allow more rapid approval than would be possible under the generalized permit review process. The first two standard permits will be for emission control projects required by rule and voluntary emission control projects. Standard Permit Number 1 will authorize the installation of emission control equipment or implementation of control techniques for emission control

projects required by rule. The replacement of component parts or appurtenances of a production facility will be allowed under Standard Permit Number 1, but the installation of a new production facility or the complete replacement of an existing production facility will not be authorized. The guideline for determination of whether or not the replacement of parts and appurtenances is considered to be a new production facility is based on the federal definition of reconstruction as defined in 40 Code of Federal Regulations §60.15(b)(1) and (c). The agency will address the need to develop additional standard permits to authorize the installation or complete replacement of existing production facilities in the near future. Such standard permits may include the requirement that new or replacement production facilities utilize the best available control technology (which will be specified by rulemaking) and will clarify whether emission reductions beyond those otherwise required by rule are fully creditable for netting and offset purposes. In addition, standard permits for specific source categories may be added in future rulemaking similar to the procedure that is used with the standard exemption list. Section 116.610 establishes the requirements to qualify for a standard permit, §116.611 lists the requirements to register a facility under a standard permit, §116.614 states the application fee requirements, and §116.617 begins a list of standard permits and states the specific conditions applicable to each standard permit.

The staff is requesting comments from the public and the regulated community regarding permit fees for standard permits. The proposed rules retain the current fee structure that is used for new source review permits in Subchapter B. The staff invites comments that either support the proposed fee structure, recommend elimination of fees for standard permits, or suggest alternative fee structures.

The staff also requests comments, particularly from the regulated community and U.S. Environmental Protection Agency, regarding the requirements in the proposed §116.617(1)(D)(iii). Section 116.617(1) covers Standard Permit Number 1 which authorizes the installation of emission control equipment or control techniques required by rule. Subparagraph (D) provides that the determination of whether a project will result in a significant net increase in emissions of any criteria pollutant are to be made without consideration of other increases or decreases not related to the project. Subparagraph (D)(iii) further clarifies that the owner or operator obtaining the standard permit does not have to perform the netting calculations that would normally be required if any associated emissions increase is above the level that would trigger netting for either PSD or nonattainment review. However, subparagraph (D)(iii) also provides that the emission increases and decreases from the project must be included in future netting calculations required by subsequent projects if otherwise creditable. Since Prevention of Significant Deterioration (PSD) and nonattainment netting rules specifically exclude the use of reductions which are required by rule, industry believes that they should not be required to include the increases which result from controls required by rule in those same netting calculations. However, at the same time, they would still like to use any decreases which go beyond those required by rule in the netting exercise.

The language in §116.617(1)(D)(i) and §116.617(1)(E) is intended to echo the language in the Federal Register, Volume 57, Number 140, page 32314, the so-called WEPCO fix, in both the nonattainment and PSD rules. In the WEPCO language, if a project is a pollution control project which meets the requirements similar to those contained in §116.617(1)(D)(i), it is not considered to be a physical change or change in the method of operation. A strict reading of this exclusion could mean that the change should not be included in any netting calculation. Although this strict interpretation would have some effect on those projects required by rule as in Standard Permit Number 1, it has an even greater effect on voluntary projects involving the installation of control equipment which are covered by Standard Permit Number 2 (§116.617(2)). Standard Permit Number 2 also contains the WEPCO language. This interpretation would mean that companies who voluntarily install pollution control equipment would not be allowed to use reductions obtained as a result of the project in future netting exercises. Since the staff does not wish to take this position, subparagraph (D)(iii) was added to both Standard Permit Numbers 1 and 2.

The proposed amendment to §116.110 will add reference to standard permits as an applicable new source review permit. The proposed amendment to §116. 115 will authorize the inclusion of special and general provisions in standard permits.

The proposed amendment to §116.211 will change the date of the Standard Exemption List to identify the date of revisions to SE 75, SE 107, SE 113, and the new SE 124, relating to auto body shops. The staff recommended changes to SE 75 will improve recordkeeping and facility maintenance requirements and expand the scope of the exemption to allow more facilities to qualify. The proposed changes to SE 107 are basically staff recommended clarifications. The proposed changes to SE 113 expand the scope to include all thermoset resin facility types and revise the ventilation requirements based on a new effects screening level which has been lowered from 430 micrograms per cubic meter to 215 micrograms per cubic meter. The new SE 124 establishes the requirements for auto body shops to qualify for a standard exemption. There is a correction to §116.211(a)(2)(iv) that volatile organic compounds (VOC) emissions allowed under standard exemption in ozone nonattainment areas must also be less than 25 tpy as specified for attainment areas. Also, §116.211(b) will be revised to clarify that the subsection only applies to nonattainment review and PSD review.

The proposed amendment of §116.311(b) will revise the requirements for compliance history considerations in the permit renewal review process. The proposed amendment of §116.311(c) will change the permit renewal schedule from five years to ten years to be consistent with recent changes to the statutory language.

Mr. Stephen Minick, division of budget and planning, has determined that for the first five-year period the rules are in effect, there will be fiscal implications for state government as a result of enforcing and administering the rules. The costs to state government will be approximately $522,000 in the first year and $469,000 in each succeeding year of the five-year period. These costs are associated with the increased workload in reviewing standard exemption applications authorized under proposed §116.211. Approximately 10, 000 automotive body and paint operations are anticipated to seek to qualify for standard exemptions over the five-year period. The costs to state government for review of the proposed standard exemptions will be significantly less than the costs of reviewing permit applications on an individual basis; however, no estimate of the potential cost savings under the current proposal has been made. There are no additional costs to state government related to other provisions of these sections as proposed. No effects on state revenues are anticipated. There may be effects on some local governments. The effects on local governments will be limited to those associated with vehicle maintenance and repair operations potentially undertaken by local governments. Local jurisdictions not engaged in such activities subject to standard exemption under these rules will not be affected.

Mr. Minick also has determined that for each year of the first five years the rules are in effect the public benefit from the proposed changes to the Standard Exemption List will be improved capture and control of VOC emissions and better enforcement of existing rules due to the recordkeeping requirements. The establishment of standard permits will provide better utilization of staff resources by allowing the Permits staff to allocate more time on the review of permit applications for complex facilities, and to reduce the review time on the smaller facilities that have a less significant impact on ambient air quality. The changes to the compliance history rules will make the compliance history requirements for permit renewals consistent with the recommendations of the Compliance History Task Force. The change in the renewal period to ten years will provide consistency with statutory requirements.

There will be costs to small businesses affected by the proposed changes to the standard exemption list (primarily for the auto body shops affected by SE 124) including the cost to prepare an exemption registration and the additional emissions control measures and recordkeeping required to meet the conditions of the exemption. Auto body shops qualifying for the standard exemption will not be required to obtain a preconstruction permit and will avoid increased costs of preparation of a permit application. The cost per facility to comply with SE 124 is estimated at an average of $5,000 per facility for a total of $50 million statewide over the first five years the exemption is in effect. There will be no significant expense to small business for the other proposed rule changes. There are no other anticipated economic costs to persons required to comply with the rules as proposed

Public hearings on the proposal will be held December 2, 1993, at 2:00 p.m. in the City of Houston Pollution Control Building Auditorium, 7411 Park Place Boulevard, Houston, and on December 3, 1993, at 10:00 a.m. in the Auditorium (Room 201S) of the TNRCC Central Office, Air Quality Planning Annex, located at 12118 North IH-35, Park 35 Technology Center, Building E, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Interrogation or cross-examination is not permitted; however, a TNRCC staff member will discuss the proposal 30 minutes before the hearing and will be available to answer questions.

Written comments not presented at the hearing may be submitted to the TNRCC, Air Quality Planning Division, P.O. Box 13087, Austin, Texas 78711 through December 17, 1993. Material received by the Regulation Development Section by 4:00 p.m. on that date will be considered by the Commission prior to any final action on the proposed sections. Copies of the proposal are available at the TNRCC Air Quality Planning Annex located at 12118 North IH-35, Park 35 Technology Center, Building E, Austin, Texas 78753, and at all TNRCC regional offices. For further information, contact Mr. Gary McArthur at (512) 908-1917.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 908-2245. Requests should be made as far in advance as possible.

The amendments are proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

§116.110. Applicability.

(a) Permit to construct. Any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of this state shall obtain a permit pursuant to §116.111 of this title (relating to General Applications), **satisfy the conditions for a standard permit pursuant to the requirements in Subchapter F of this chapter (relating to Standard Permits),** or satisfy the conditions for exempt facilities pursuant to Subchapter C of this chapter (relating to Permit Exemptions) before any actual work is begun on the facility. Modifications to existing permitted facilities may be handled through the amendment of an existing permit.

(b)-(e) (No change.)

§116.115. Special Provisions. Permits, special permits, **standard permits,** and exemptions may contain general and special provisions. The holders of permits, special permits, **standard permits,** and exemptions shall comply with any and all such provisions. Upon a specific finding by the Executive Director that an increase of a particular pollutant could result in a significant impact on the air environment, or could cause the facility to become subject to review under the undesignated heads of this subchapter relating to Nonattainment Review or Prevention of Significant Deterioration Review, the permit may include a special provision which states that the permittee must obtain written approval from the Executive Director before constructing a source under a standard exemption **or standard permit.**

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on November 3, 1993.

TRD-9331447 Mary Ruth Holder
Director, Legal Division
Texas Natural Resource Conservation Commission

Earliest possible date of adoption: February 1, 1994

For further information, please call: (512) 463-8159

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Subchapter C. Permit Exemptions

• 30 TAC §116.211

The amendment is proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the Texas Natural Resource Conservation Commission with the authority to adopt rules consistent with the policy and purposes of the TCAA.

§116.211. Standard Exemption List.

(a) Pursuant to the Texas Clean Air Act (TCAA), §382.057, the facilities or types of facilities listed in the Standard Exemption List, dated **October 13, 1993** [July 16, 1993], as filed in the Secretary of State's Office and herein adopted by reference, are exempt from the permit requirements of the TCAA, §382.0518, because such facilities will not make a significant contribution of air contaminants to the atmosphere. A facility shall meet the following conditions to be exempt from permit requirements:

(1) (No change.)

(2) Total actual emissions authorized under standard exemption from the proposed facility which is located in a nonattainment area shall not exceed:

(A)-(C) (No change.)

(D) in an ozone nonattainment area, the applicable major modification threshold of [VOC or] NO_x in Table 1 of the definition of "major modification" in §116.012 of this title (relating to Nonattainment Review Definitions).

(3)-(6) (No change.)

(b) Notwithstanding the provisions of this section, any facility which constitutes a new major source, or any modification which constitutes a major modification under [the FCAA,] nonattainment review or Prevention of Significant Deterioration review as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder, shall be subject to the requirements of §116.110 of this title (relating to Applicability) rather than this section.

(c)-(f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on November 3, 1993.

TRD-9331448 Mary Ruth Holder
Director, Legal Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: February 1, 1994

For further information, please call: (512) 463-8159

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Subchapter D. Permit Renewals

• 30 TAC §116.311

The amendment is proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

§116.311. Permit Renewal Application.

(a) (No change.)

(b) The TNRCC shall review the compliance history of the facility in consideration of granting a permit renewal. The compliance history review shall be conducted in accordance with the undesignated head in Subchapter B relating to Compliance History. In order for the permit to be renewed, the application shall include information demonstrating that the facility is or has been in substantial compliance with the provisions of the TCAA and the terms of the existing permit. If the facility has a history which demonstrates failure to maintain substantial compliance with the provisions of the TCAA or the terms of the existing permit, the renewal shall not be granted. [If the facility has any unresolved

nonclerical violations of the TNRCC rules, the renewal shall not be granted unless the facility is brought into compliance or is complying with the terms of an applicable board order or court order prior to the expiration of the permit as identified in subsection (c) of this section.] **If it is found that violations in the compliance history constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including failure to make a timely and substantial attempt to correct the violations, the renewal shall be denied. If a contested case hearing has not been called, then the staff must notify the applicant of the intent to recommend denial and state the basis of the findings. The applicant will be given an opportunity to respond to the notice. If the findings reflect a pattern of disregard for applicable regulations which do not warrant denial, additional conditions may be placed in the permit.**

(c) A permit holder that fails to submit an application for review and renewal within 90 days after receiving notification from the TNRCC pursuant to subsection (a) of this section will cause the subject permit to expire, unless the time period for the submission of the application is extended by the Executive Director. Permits are subject to the following renewal schedule.

(1) (No change.)

(2) Any permit issued on or after December 1, 1991, is subject for review every ten [five] years after the date of issuance.

(3) For cause, a permit issued on or after December 1, 1991, for a facility at a nonfederal source may contain a provision requiring the permit to be renewed at a period of between five and ten years.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on November 3, 1993.

TRD-9331449 Mary Ruth Holder
Director, Legal Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: February 1, 1994

For further information, please call: (512) 463-8159

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Subchapter F. Standard Permits

• 30 TAC §§116.610, 116.611, 116.614, 116.617

The new rules are proposed under the Texas Health and Safety Code (Vernon 1990), the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

§116.610. Applicability.

(a) Pursuant to the Texas Clean Air Act (TCAA), §382.051, projects involving the types of facilities or physical or operational changes to facilities which meet the requirements for a standard permit listed in §116.617 of this title (relating to Standard Permits List) are hereby entitled to the standard permit; provided, however, that:

(1) Any project which results in a net increase in emissions of air contaminants from the project other than those for which a National Ambient Air Quality Standard has been established must meet the emission limitations of Standard Exemption 106(c) or (d) or Standard Exemption 118(c).

(2) Construction or operation of the project shall be commenced prior to the effective date of a revision to §116.617 of this title, (relating to Standard Permits List), under which the project would no longer meet the requirements for a standard permit.

(3) The proposed project shall comply with the applicable provisions of the Federal Clean Air Act (FCAA), §111 (regarding Federal New Source Performance Standards) and §112 (regarding Hazardous Air Pollutants).

(4) There are no permits under the same Texas Natural Resource Conservation Commission (TNRCC) account number that contain a condition or conditions precluding use of a standard permit or standard permits under this subchapter.

(5) The owner or operator of the facility registers the proposed project in accordance with §116.611 of this title (relating to Registration Requirements).

(b) Any project which constitutes a new major source, or major modification under the new source review requirements of Part C (Prevention of Significant Deterioration review) or Part D (nonattainment review) of the FCAA and regulations promulgated thereunder shall be subject to the requirements of this rule.

(c) No persons shall circumvent by artificial limitations the requirements of this rule.

(d) The emissions from the facility shall comply with all applicable rules and regulations of the TNRCC adopted under the Texas Health and Safety Code, Chapter 382, and with the intent of the TCAA, including protection of health and property of the public, and all emissions control equipment shall be maintained in good condition and operated properly during operation of the facility.

(e) All representations with regard to construction plans, operating procedures, and maximum emission rates in any registration for a standard permit become conditions upon which the facility or changes thereto shall be constructed and operated. It shall be unlawful for any person to vary from such representations if the change will affect that person's right to claim a standard permit under this rule. Any change in conditions such that a person is no longer eligible to claim a standard permit under this rule requires proper authorization under this rule. The owner or operator of the facility must notify the TNRCC of any other change in conditions which will result in a change in the method of control of emissions, a change in the character of the emissions, or an increase in the discharge of the various emissions. Notice of changes in representations must be received by the TNRCC no later than 30 days after the change.

(f) All records relating to the applicability of and compliance with the terms of a standard permit shall be maintained by the permittee for at least two years and made available for review by authorized representatives of the TNRCC, U.S. Environmental Protection Agency, or local air pollution control agencies.

(g) All changes authorized by standard permit to a facility previously permitted pursuant to this rule shall be administratively incorporated into that facility's permit at such time as the permit is amended or renewed.

§116.611. Registration Requirements.

(a) Registration for a standard permit shall be sent by certified mail, return receipt requested, or hand-delivered to the Texas Natural Resource Conservation Commission (TNRCC) Office of Air Quality and appropriate Regional Office before a standard permit can be claimed. The registration shall:

(1) document compliance with the requirements of this section, including, but not limited to: the basis of emission estimates, quantification of all emission increases and decreases associated with the project being registered, sufficient information as may be necessary to demonstrate that the project will comply with §116.610(b) of this title (relating to Applicability), information that describes efforts to be taken to minimize any collateral emissions increases that will result from the project, a description of the project and

related process, and a description of any equipment being installed; and

(2) be received by the TNRCC no later than 45 days prior to the commencement of the project. Work may begin on the project any time upon receipt of written notification from the TNRCC that there are no objections to the project or 45 days after receipt by the TNRCC of the registration for the project, whichever occurs first.

§116.614. Standard Permit Fees. Any person who applies for a standard permit shall remit, at the time of registration, a fee based on the estimated capital cost of the project. The fee will be determined as set forth in Subchapter B of this chapter under the undesignated head entitled Permit Fees.

§116.617. Standard Permits List. Pursuant to the Texas Clean Air Act, §382.051, projects involving the types of facilities or physical or operational changes to facilities listed in this rule qualify for a standard permit subject to the conditions stated in §116.610 of this title (relating to Applicability).

(1) Installation of emissions control equipment or implementation of control techniques as required by any state or federal rule, standard, or regulation.

(A) Installation of the control equipment or implementation of the control technique must not result in an increase in the facility's production capacity unless the capacity increase occurs solely as a result of the requirement to install the control equipment or implement the control technique on existing units required to meet applicable emission limitations. Any production capacity increase resulting from the installation of control equipment or implementation of control techniques shall not be utilized until the owner or operator obtains any necessary authorization pursuant to §116.110 of this title (relating to Applicability).

(B) Any emission increase of an air contaminant must occur solely as a result of the requirement to install an emission control device or implement a control technique.

(C) Installation of emission control equipment or implementation of a control technique shall not include the installation of a new production facility, reconstruction of a production facility as defined in 40 Code of Federal Regulations (CFR), §60.15(b)(1) and (c), or complete replacement of an existing production facility.

(D) If the project, without consideration of any other increases or decreases not related to the project, will result in a significant net increase in emissions of any criteria pollutant, a person claiming this standard permit shall submit, with the registration, information sufficient to demonstrate that the increase will meet the conditions of clause (i) of this subparagraph.

(i) The emissions increase shall not:

(I) considering the emission reductions that will result from this project, cause or contribute to a violation of any national ambient air quality standard; or

(II) cause or contribute to a violation of any Prevention of Significant Deterioration (PSD) increment; or

(III) cause or contribute to a violation of any PSD visibility limitation.

(ii) For purposes of this rule, "significant net increase" means those emissions increases resulting solely from the installation of control equipment or implementation of control techniques that are equal to or greater than subclauses (I) or (II) of this clause:

(I) the major modification threshold listed in §116.012 of this title (relating to Nonattainment Review Definitions), Table I, for pollutants for which the area is designated as nonattainment;

(II) significant as defined in Title 40 CFR §52.21(b)(23) for pollutants for which the area is designated attainment or unclassifiable.

(iii) Although netting is not required when determining whether this demonstration must be made for the proposed project, the increases and decreases resulting from this project must be included in any future netting calculation if they are determined to be otherwise creditable.

(E) For purposes of compliance with the PSD and nonattainment new source review provisions of the Federal Clean Air Act, Parts C and D, and regulations promulgated thereunder, an increase that satisfies the requirements of subparagraph (D) of this paragraph shall not constitute a physical change or a change in the method of operation. For purposes of compliance with the Standards of Performance for New Stationary Sources regulations promulgated by the U.S. Environmental Protection Agency at 40 CFR §60.14, an increase that satisfies the requirements of subparagraph (D) of this paragraph shall satisfy the requirements of 40 CFR 60.14(e)(5).

(2) Voluntary installation of emissions control equipment.

(A) Installation of the control equipment must not result in an increase in the facility's production capacity unless the capacity increase occurs solely as a result of the installation of control equipment on existing units. Any production capacity increase resulting from the installation of controls shall not be utilized until the owner or operator obtains any necessary authorization pursuant to §116.110 of this title (relating to Applicability).

(B) Any emission increase of an air contaminant must occur solely as a result of installing an emission control device.

(C) Installation of emission control equipment shall not include the installation of a new production facility, reconstruction of a production facility as defined in 40 CFR §60.15(b)(1) and (c), or complete replacement of an existing production facility.

(D) If the project, without consideration of any other increases or decreases not related to the project, will result in a significant net increase in emissions of any criteria pollutant, a person claiming this standard permit shall submit, with the registration, information sufficient to demonstrate that the increase will meet the conditions of clause (i) of this subparagraph.

(i) The emissions increase shall not:

(I) considering the emission reductions that will result from this project, cause or contribute to a violation of any national ambient air quality standard; or

(II) cause or contribute to a violation of any PSD increment; or

(III) cause or contribute to a violation of any PSD visibility limitation.

(ii) For purposes of this rule, "significant net increase" means those emissions increases resulting solely from the installation of control equipment or implementation of control techniques that are equal to or greater than subclauses (I) or (II) of this clause:

(I) the major modification threshold listed in §116.012 of this title, Table I, for pollutants for which the area is designated as nonattainment;

(II) significant as defined in Title 40 CFR, §52. 21(b)(23) for pollutants for which the area is designated attainment or unclassifiable.

(iii) Although netting is not required when determining whether this demonstration must be made for the proposed project, the increases and decreases resulting from this project must be included in any future netting calculation if they are determining to be otherwise creditable.

(E) For purposes of compliance with the PSD and nonattainment new source review provisions of the Federal Clean Air Act, Parts C and D, and regulations promulgated thereunder, an increase that satisfies the requirements of subparagraph (D) of this paragraph shall not constitute a physical change or a change in the method of operation. For purposes of compliance with the Standards of Performance for New Stationary Sources regulations promulgated by the U.S. Environmental Protection Agency at 40 CFR, §60.14, an increase that satisfies the requirements of subparagraph (D) of this paragraph shall satisfy the requirements of 40 CFR, §60.14(e)(5).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on November 3, 1993.

TRD-9331450

Mary Ruth Holder
Director, Legal Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: February 1, 1994

For further information, please call: (512) 463-8159

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Chapter 290. Water Hygiene

Water Saving Performance Standards

- **30 TAC §§290.251, 290.253-290.256, 290.260, 290.265, 290.266**

The Texas Natural Resource Conservation Commission (Commission) proposes amendments to §§290.251, 290.253-290.256, 290.260, 290.265, and 290.266 concerning definitions, the plumbing fixture list, conditions for removal from the list, fees, exemptions, labeling, administrative and civil penalties, respectively.

Section 290.251 is amended to delete the definitions of "Texas Department of Health," the "Board of Health," and "Commissioner of Health," and provide definitions for the "Texas Natural Resource Conservation Commission" and the executive director. The amendments also revise a current definition of the term "order."

Sections 290.253, 290.254, and 290.255 are amended to delete references to the Texas Department of Health and replace with appropriate references to the Texas Natural Resource Conservation Commission. Section 290.254 is amended to define the hearing process.

Section 290.256 is amended to restrict the exemption provisions.

Section 290.260 concerning labeling has been changed to include clothes washing machines, dish washing machines, and lawn sprinklers. Labeling requirements for plumbing fixtures and plumbing fittings have been clarified.

Section 290.265 and §290.266 are amended to delete references to the Texas Department of Health and replace with appropriate references to the Commission.

Section 290.266 is amended to delete the bond requirement and condition requiring payment of an assessed penalty by a party seeking judicial review of a commission decision.

Stephen Minick, Division of Budget and Planning, has determined that for the first five years these sections as proposed are in effect, there will be no significant fiscal implications as a result of enforcement and administration of the sections. There are no significant implications anticipated for state or local governments. Generally, new requirements under these sections are consistent with existing state law and federal requirements under the National Energy Policy Act of 1992 or the National Appliance Energy Conservation Act of 1987. While there are costs associated with compliance with labeling requirements, the specific provisions proposed in these sections are not anticipated to represent significant additional costs to product manufacturers above the costs of compliance with existing statutory authority. The extension of the effective date for the labeling requirements to March will have cost savings implications for manufacturers required to label plumbing fixtures, but this savings has not been determined.

Mr. Minick also has determined that for the first five years these sections are in effect the public benefit anticipated as a result of enforcement of and compliance with the sections will be improvements in consumer awareness of the water usage features of plumbing fixtures and appliances and increases conservation of public water supplies. There are no significant implications for small businesses. There are no known costs to any persons required to comply with these sections as proposed.

Written comments on the proposal may be submitted to James M. Highberg, R.S. , Program Manager, Water Saving Fixture Program, Water Utilities Division, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087. In order to be considered, written comments must be received by the Water Utilities Division by 5:00 p.m. (DST) 30 days after the publication date of this proposal.

The amendments are proposed under the authority of the Health and Safety Code, Chapter 372, and the Texas Water Code, §5.103, which authorizes the Commission to adopt and enforce rules necessary to carry out its powers and duties. Former Health and Safety Code Chapter 421 was renumbered as Chapter 372 pursuant to Senate Bill 587, First Called Session, 72nd Legislature, effective August 12, 1991.

§290.251. Purpose, Authority, and Definitions.

(a) (No change).

(b) Authority. The authority for these sections is the Health and Safety Code, Chapter **372** [421], titled **"Environmental** [Water Saving] Performance Standards **for Plumbing Fixtures."**

(c) Definitions. The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

(2) **ASME–The American Society of Mechanical Engineers** [Board–The Board of Health].

(3) **Commission–The Texas Natural Resource Conservation Commission** [Commissioner–The Commissioner of Health].

[(4) Department–The Texas Department of Health.]

(4) Executive director–The executive director of the Texas Natural Resource Conservation Commission.

(5)-(7) (No change.)

(8) Model–A type or design of a plumbing fixture Order.

(9)[(8)] Order–A request to purchase plumbing fixtures from a manufacturer, major supplier or importer [with a merchandise delivery date not to exceed 90 days from the date of the request].

(10)[(9)] Plumbing Fixture–A sink faucet, lavatory faucet, faucet aerator, shower head, urinal, toilet, flush valve toilet, or drinking water fountain.

(11)[(10)] Toilet–A toilet or water closet except a wall mounted toilet that employs a flushometer valve.

(12)[(11)] **APA** [APTRA]–The Administrative **Procedures** [Procedure and Texas Register] Act. [Texas Civil Statutes, Article 6252-13a].

ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 22. EXAMINING BOARDS

Part V. Texas State Board of Dental Examiners

Chapter 109. Conduct

Infection Control

• 22 TAC §109.222

The Texas State Board of Dental Examiners adopts an amendment to §109. 222, without changes to the proposed text as published in the March 8, 1994, issue of the *Texas Register* (19 TexReg 1626).

The Texas State Board of Dental Examiners finds there is an imminent peril to the public health, safety or welfare due to the threat of infection, hepatitis A, B, and C, and tuberculosis and HIV being passed from infected dental lab workers to dental health care workers and dental patients through dental prostheses manufactured, repaired or handled in unsanitary conditions or by infectious lab workers. The rule is justified by the imminent effect of the North American Free Trade Agreement, resulting in commerce with many dental labs not subject to OSHA regulation and not in compliance with said regulation.

Section 109.222 states that when it is necessary to return items to a dental office from a dental lab said item shall be rendered non-biohazardous before return to the dentist by the dental lab or technician according to established OSHA guidelines.

No comments were received regarding adoption of the rule.

The amendment is adopted under Texas Civil Statutes, Articles 4551d(c), 4551f; and Texas Government Code, §2001.034, which provide the Texas State Board of Dental Examiners with the authority to adopt and enforce such rules and regulations not inconsistent with the laws of the state as may be necessary for the performance of its duties and/or to insure compliance with the state laws relating to the practice of dentistry to protect the public health and safety.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 14, 1994.

TRD-9439285 C. Thomas Camp
Executive Director
Texas State Board of Dental Examiners

Effective date: May 6, 1994

Proposal publication date: March 8, 1994

For further information, please call: (512) 463-6400

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 116. Control of Air Pollution by Permits for New Construction or Modification

The Texas Natural Resource Conservation Commission (TNRCC) adopts amendments to §116.110, concerning Applicability; §116.115, concerning Special Provisions; §116.211, concerning the Standard Exemption List; and §116.311(b) and (c), concerning Permit Renewal Applications. Also, the TNRCC adopts a new Subchapter F, Standard Permits, containing new §§116.610, 116. 611, 116.614, and 116.617, to establish a category of standard permits. Sections 116.211, 116.610, 116.611, 116.614, and 116.617 are adopted with changes to the proposed text as published in the November 9, 1993, issue of the *Texas Register* (18 TexReg 8145). Sections 116.110, 116.115, and 116. 311 are adopted without changes and will not be republished.

The proposed changes were developed in response to recommendations by the Permits Workshop Task Force and directives from the former Texas Air Control Board to streamline the permit process. The proposed changes to the Standard Exemption List consist of revisions to Standard Exemption (SE) 75, SE 107, SE 113, and a new SE 124. The proposed revisions to SE 107, regarding vapor degreasers, and SE 113, regarding thermoset resin operations, were recommended by the Office of Air Quality, Permits staff. The proposed new SE 124, relating to auto body shops, and revised SE 75, relating to surface coating facilities, were developed by the Auto Body Shop Task Force to provide a means for the thousands of auto body shops located in Texas to comply with Chapter 116 requirements.

The staff requested comments from the public and the regulated community regarding permit fees for standard permits. The staff also requested comments, particularly from the regulated community and the United States Environmental Protection Agency (EPA), regarding the requirements in the proposed §116. 617(1)(D)(iii). This clause allows the facilities covered by the standard permit to be excluded from netting calculations for the purposes of Prevention of Significant Deterioration (PSD) or nonattainment review.

A public hearing was held on December 2, 1993, in Austin and on December 3, 1993, in Houston to consider the proposed rule changes. Testimony was received from 23 commenters. The following commenters generally supported the proposed revisions to Chapter 116 with some suggested changes: Automotive Service Association of Texas (ASAT); Exxon Company USA (Exxon); Brown McCarroll & Oaks Hartline (Brown); Amoco Chemicals Company (Amoco Chem); Amoco Oil Company (Amoco Oil); Texas Chemical Council (TCC); Binks Manufacturing Company (Binks); Harris County Pollution Control Department (Harris County); Phillips Petroleum Company (Phillips); Pennzoil Company (Pennzoil); Eastman Chemical Company, Texas Eastman Division (Eastman); Houston Lighting & Power Company (HL&P); Texas Utilities Services (TU); Chuck's Custom Auto (Chuck); Exxon Chemical Americas (Exxon Chem); and DuPont Gulf Coast Regional Manufacturing Services (DuPont). The following commenters listed specific concerns without either supporting or opposing the overall proposal: City of Fort Worth (Fort Worth); International Cast Polymer Association (ICPA); City of Dallas Air Pollution Control Section (Dallas); Composite Fabricators Association (CFA); Benton & Associates (Benton); and one individual. Galveston/ Houston Association for Smog Prevention (GHASP) was opposed to the entire proposal but did offer suggested changes.

The following discussion addresses general comments followed by comments regarding each specific section proposed for change.

General Comments. Exxon and Brown suggested that standard permits should be excluded from amendments and alterations in §116.116(c).

Section 116.116 refers to permitted facilities that propose modifications which qualify for a standard exemption. Changes in representations to a facility which are covered by a standard permit are addressed in new §116.610(e). Facilities that are permitted and make modifications covered by a standard permit are addressed in new §116.610(g). The purpose of requiring the incorporation of standard permits into future amendments or alterations, which are related to a facility previously permitted under §116.110, is to collect all of the Chapter 116 authorizations for a particular facility into one document. This saves time and confusion for both the TNRCC and the permit holder when renewing permits, amending permits, dealing with compliance and enforcement matters, etc.

Phillips commented that there should be no netting of emission changes resulting from emission reduction projects required by rule. However, voluntary projects should allow netting of the increases and decreases.

The staff has requested comments from EPA regarding netting of emissions from standard permits. EPA guidelines do not allow reductions required by rule to be included in netting calculations. However, staff has not received any formal written guidance from EPA on whether increases which may be associated with these reductions must be included in netting calculations. Staff has therefore decided that increases associated with the project which are used to demonstrate compliance with the rule will not be used to trigger netting for that project as long as the "WEPCO exemption" is satisfied. Staff took this position primarily because we recognized the practical need to get these projects approved quickly, and netting, especially at large facilities, could involve a great deal of time and effort on behalf of both the applicant and the agency. After additional informal discussions with EPA, staff has also decided that none of the emission changes associated with projects required by rule should be included in any netting calculations. The WEPCO language exempts pollution control projects from the definition of physical change or change in method of operation contained in 40 Code of Federal Regulations, §52.21 and §51.165. Therefore, changes which satisfy this exemption are not modifications and do not have to be included in any netting calculations. Staff has elected to retain the proposed language in standard permit number 2 for voluntary projects. This will allow quick approval for these projects and still allow applicants to take credit for the reductions in future netting exercises. Since credit will be given for these decreases, any associated increases must also be accounted for in future netting calculations.

Pennzoil suggested a clarification of how the standard permits will relate to federal operating permits. There was a question as to when the provisions of the standard permit will be incorporated into the operating permit and if standard permits will be converted into general permits. Pennzoil commented that increases in production capacity under standard permits should not be restricted if the production increase does not result in an emission increase. In fact, production increases should be allowed which involve only de minimis emission increases of less than one ton per year.

Texas has structured its federal operating permit program totally separate from the new source review (NSR) permitting process. Therefore, there will be no connection between standard permits, which are part of the NSR permit process, and the federal operating permits. For the same reason, general permits, which are part of the federal operating permit program, will have no link with standard permits. The operating permit is basically a codification permit which summarizes the recordkeeping requirements and federal emission standards applicable to a particular facility and is required only for major source facilities. It does not contain all of the special provisions and allowable emission rates that are in the NSR permit.

The proposed rules do not prohibit production increases provided that there is no increase in emissions prior to the implementation of additional control, change in the character of emissions, or change in emission controls. The rules do prohibit changes in construction plans, operating procedures, and maximum emission rates if such changes exceed or conflict with conditions of the standard permit.

Eastman commented that permitting of pollution reduction projects should be limited to the affected unit only. Plantwide modeling to determine ambient impacts should not be required.

The new Subchapter F does not contain any modeling requirements. However, modeling may be required where the project will result in a significant net increase of a criteria pollutant. In this case, the person claiming the standard permit must demonstrate compliance with the National Ambient Air Quality Standards, PSD increment, and PSD visibility limitations. In order to make this demonstration, the person claiming the standard permit may have to perform a modeling analysis. If so, the claimant must follow federal and state modeling protocols which could result in a requirement to model the entire facility plus other sources outside the facility.

Dallas questioned the statement in the preamble regarding the estimated cost to state government of $522,000 per year to review standard exemptions for auto body shops. The comment followed that since the agency has already been reviewing exemption applications, there should be no added costs. Dallas also commented that control costs for auto body shops may be unaffordable for many of the small shop owners. It seems unreasonable to require body shop controls when aircraft refueling facilities do not require controls even with more potential volatile organic compound (VOC) reduction.

The estimated review costs are based on the new SE 124, which will greatly increase the workload on agency staff if the estimated 10,000 auto body shops in the state all submit exemption applications. Until now, most of the body shops have been operating without any TNRCC authorization and are potentially in violation of current rules, so the inclusion of this source category in the rules will definitely impact staff resources.

The emission control costs were considered by the Auto Body Shop Task Force during development of the rule language for SE 124. The body shop industry was represented on the task force, and it assisted in minimizing the costs of the proposed control requirements. Comments provided during the rulemaking process were also utilized to minimize costs.

The staff does not agree with the assertion that there are more potential VOC emission reductions from aircraft refueling than from auto body spraying operations. The TNRCC is currently studying potential control of aircraft refueling emissions, but has not yet determined if it is economically feasible or if significant reductions are even achievable. There is very little similarity between aircraft refueling and auto body spraying operations. The vapor pressure of kerosene is much lower than paint solvents, so potential emissions are much lower. Most of the VOC emissions from aircraft occur during takeoff and landing, not from refueling. In conclusion, the matter of aircraft refueling is a separate issue which is under review and is beyond the scope of the current rulemaking proposal.

GHASP is opposed to the use of standard permits. There is concern that air quality will gradually degrade because companies will not meet the requirements of the permit and will not maintain the emission control equipment. There is concern about no public input, no site review, and no review of compliance history. Also, GHASP is opposed to the use of offsets or netting as just a paper exercise without actual emission monitoring.

The staff has supported standard permits as a means to reduce the backlog of permit applications that has continued to escalate in recent years. Agency staff resources are limited, and standard permits are designed to provide a streamlined review process for pollution reduction projects and for facility types which have been reviewed and permitted or exempted on a routine basis.

During the development of future standard permits, the staff will strive to include specific conditions that will address the use of appropriate control technology. The public will be able to comment on each standard permit at the time that it is subject to rulemaking. Although individual standard permits are not subject to public notice and contested case hearing requirements, the public can contact the TNRCC with concerns or complaints regarding facilities operating under a standard permit. It is the responsibility of any permit holder to comply with all rules and regulations of the TNRCC. Also, standard permits at facilities that have other preconstruction permits may be incorporated into the permit upon amendment or renewal. Impacts from the permitted facility will be evaluated at the time of renewal.

The permits staff evaluates the use of reductions as offsets and in performing netting calculations on a case-by-case basis. Although monitoring is not required for every case, the permits staff does require documentation that the reductions are actual emissions. The best available information is used to make this determination. The information may include monitoring results, testing results, operating data, etc.

There were no comments received on the proposed changes to §116.110, concerning Applicability or §116.115, concerning Special Provisions.

The comments regarding §116.211, concerning Standard Exemption List, and SE 75, concerning surface coating operations, are as follows.

Fort Worth commented that condition (h) should reference Chapter 115 rather than Chapter 116. Condition (j) has a lot of unclear definitions for enclosed, indoor, outdoor, and nonenclosed facilities. Forced ventilation should not be required for dipping operations as stated in condition (j)(2). It will be difficult to enforce pressure drop requirements stated in condition (j)(1)(A), unless the facility is required to install a pressure gauge. Condition (l) should allow indoor or enclosed facilities to be included in the exemption.

The staff agrees that an error was made in specifying Chapter 116 and has changed the reference to Chapter 115. The staff believes that "enclosed" is clearly defined in condition (j) and that the other terms do not need further clarification.

Forced ventilation was included in (j)(2) since the dip tanks and the dripping and drying parts have significant emissions that would otherwise exit the facility as fugitives and produce unacceptable off-property concentrations. The staff does not support the elimination of the ventilation requirements.

Compliance with the pressure drop requirements in (j)(1)(A) for the filters could be demonstrated with a pressure indicator such as a manometer and many new booths already come equipped with them. It is also incumbent upon the applicant to be able to demonstrate compliance with the requirements of the exemption even if a compliance method is not specified. The staff does not support requiring additional monitoring or testing.

Condition (l) allows many small outdoor and partially enclosed operations with limited ventilation to perform coating operations. The condition is primarily intended to allow for small touch-up operations and indoor or enclosed areas by definition have higher control requirements as required in condition (j).

Harris County stated that condition (f)(4) should clarify the meaning of no visible emissions. Does it mean zero opacity or less than 5.0% opacity? Also, how does the exemption holder demonstrate the minimum velocity and pressure drop requirements in condition (j)?

No visible emissions is a qualitative evaluation of opacity rather than a quantitative evaluation with a specified percent opacity based on a number of readings over a time period. In other words, no visible emissions is based on an instantaneous observance of any emissions.

The booth or work area velocity in condition (j) can be determined through actual velocity traverses and measurements, or it may be preferably done by calculation. For compliance through calculation, the flow rate of the ventilation fan (in cubic feet per minute (CFM)) is divided by the flow area of the booth (height times width for an end draft booth). The pressure drop can be demonstrated with a pressure indicator such as a manometer as stated in response to Fort Worth's comment.

Eastman commented that condition (c)(4) should be more specific in identifying the exclusions. It also suggested the following: clarify "pounds per hour on a daily basis" in (e)(2)(i); revise (f)(3) to provide for facilities that have on-site disposal services by adding the phrase "or until emptying into authorized onsite waste management facilities;" and delete the requirement to operate only one outdoor or non-enclosed coating operation in (k)(1) and (l)(1) because multiple sources would produce a lower ambient impact.

The staff agrees that the conditions excluded in (c)(4) should be stated more clearly and the condition has been modified to indicate the specific exclusions.

The intent of pounds per hour on a daily basis in (e)(2)(i) indicates that the recordkeeping should be based on daily use of coatings and solvent and the number of hours of operation of coating use during the day. The staff has revised the proposed language to make this clear.

The staff agrees to make the suggested change in (f)(3), but the staff notes this change will benefit very few sources in the state.

The staff disagrees with the suggestion that more than one source located outdoors or in a non-enclosed area should be allowed to operate simultaneously. Dispersion modeling performed by the staff for a typical small source covered by this exemption indicated that there would be significant impacts problems if more than one source would be operating simultaneously.

Several suggestions were made by Dallas to revise the proposed exemption: define metalizing and metal spraying in condition (b); facilities that qualify under (c)(4) should also be excluded from the recordkeeping requirements of (e) (2) because of the very low consumption rates; explain why there is a 60 feet per minute (fpm) minimum velocity in paragraph (j) and clarify whether the 50 fpm face velocity applies to the "all other systems" category; and clarify paragraph (j)(1)(B) and (j)(2) by inserting the word "vertical" before the word "flow." Dallas objected to the removal of site approval in paragraph (l).

The staff has made a clarification to condition (b) that metalizing is actually metal deposition or spraying of molten metal onto a surface to form a coating. The proposed wording could cause some confusion that metallic paints are included.

The staff agrees that facilities covered under (c)(4) should be excluded from the recordkeeping requirements of the exemption and has made the suggested change.

The 60 fpm velocity requirement is a reflection of Occupational Safety and Health Administration and National Fire Prevention Association requirements for electrostatic application and is the velocity at a plane perpendicular to the air flow that is within the booth. The 50 fpm velocity requirement is a minimum requirement for all booths that have inlet openings to the atmosphere. This is the velocity at a plane perpendicular to the air flow that is at the opening of the booth. The staff has reorganized this condition to add clarity.

The staff agrees that the word "vertical" would provide further clarification to the requirements of (j) and has made the suggested change.

The staff agrees that the site approval requirement should be included in condition (l) and the final rule language has been changed.

GHASP commented that conditions (e)(1) and (4) should require a five-year recordkeeping period to coincide with the five-year compliance history requirement. Condition (f)(1) should contain a statement requiring proper storage and disposal of materials.

Other recordkeeping requirements in Chapter 116 and contained in other standard exemptions are based on a two-year period. The staff believes that two years of operating records is a sufficient time period for verifying or making a determination of a compliance problem. The five-year period for compliance history is a statutory requirement for obtaining a preconstruction permit. The statute requires consideration of any adjudicated decision or compliance proceeding within five years before the permit application filing date before issuing a permit. The two-year recordkeeping requirement is used to verify or confirm a compliance problem; and the five-year compliance history period is used to evaluate a company's past enforcement matters to determine if there is a reasonable basis for denial of a permit. The staff supports the existing time frames and recommends against the suggested change to conditions (e)(1) and (4) on the basis that two years should be sufficient for discovering and confirming a compliance problem.

Regarding condition (l)(1), GHASP stated that materials should use proper storage and disposal. This requirement is contained in condition (f)(3) and does not need to be duplicated in (f)(1).

An individual commented that the proposed revisions will prohibit the use of VOC control equipment to meet the emission limits of the exemption. This appears to contravene the Texas Clean Air Act (TCAA), §382.057. The exemption should be revised to allow control equipment that reduces emissions by at least 80%.

The staff believes that the use of VOC control equipment to meet the exemption would not be appropriate, since the operation and maintenance of the equipment has very limited enforceability. By basing the exemption on controlled emissions, there is a much higher potential for uncontrolled emissions. The higher the emission potential, the greater the probability for excessive emissions and toxic emission releases, resulting in citizen complaints and potential health concerns. The staff believes that controlled facilities should undergo permit review and has not incorporated the suggested change.

The comments regarding SE 107, concerning degreasing operations, are as follows.

Fort Worth commented that this exemption will be difficult to enforce. Sections (b)(2) and (3) set pressure limitations with no requirement to monitor or measure. The 0.3 pounds per square inch, Absolute (psia) limitation in (b)(3) is different from Chapter 115, which allows 0.6 psia. With separate requirements for remote reservoir units in (b), and cold solvent units in (c), it is unclear which one applies to remote reservoir cold solvent units. Fort Worth asked why the total solvent makeup in (c)(6) is less than the other sections. Subsection (c)(4) is inconsistent with Chapter 115. The ventilation requirements in (d)(5) and (6), as well as (e)(5), appear to be taken from sections of Chapter 115 which apply to different operating scenarios which should not be combined.

The staff disagrees with the inclusion of a requirement to use test methods to determine the vapor pressure of the solvent for such small units. However, the staff has added a reference to §115.415, which requires testing and specifies test methods. The rule requires that testing for the solvent vapor pressure be performed, but it appears that if the facility owner or operator has documentation in the form of a Material Safety Data Sheet or test results from the solvent supplier of the vapor pressure of the solvent that this would satisfy the test requirement of the rule.

The staff has reviewed the latest version of Chapter 115, which has no specific limits on solvent vapor pressure. The chapter simply requires certain controls be required on the unit for specific vapor pressures. Additional controls are required if the vapor pressure is above 0.3 psia for cold solvent with an exemption that allows 0.6 psia if the solvent is not heated above 120 degrees Fahrenheit for cold solvent units. The 0.6 psia stated in condition (c) is not a limitation, but a trigger for additional controls. The staff agrees that the 0.3 psia limitation in condition (b) will be changed to 0.6 psia for consistency with Chapter 115. However, the staff has changed the vapor pressure and drain area limitations for remote reservoir cleaners in condition (b)(3) to match the exemption limits in Chapter 115.

There should be no confusion about remote reservoir units being considered as cold solvent units. According to the definition in Chapter 115, cold solvent cleaning is the batch process of cleaning and removing soils from metal surfaces by spraying, brushing, flushing, and/or immersion while maintaining the solvent below its boiling point. These units typically have a high freeboard and the solvent surface is exposed within the degreaser so that parts may be dipped or immersed in the solvent, or placed on a rack just above the solvent, and rinsed with a nozzle. These units may hold anywhere from 20 to 200 gallons of solvent. These units are typically used in manufacturing operations or in large parts rebuilding operations. The remote reservoir cleaners, on the other hand, usually consist of a small sink with a solvent spray nozzle that is manually operated and mounted on a small, separate reservoir. These units typically contain five to 20 gallons of room temperature solvent. They are found in auto repair shops or auto parts stores and are used for hand washing a few dirty automotive parts that are being repaired or serviced. The staff does not believe that any further clarification is needed in the exemption.

The staff agrees that the solvent use limits in condition (c)(6) should be changed for consistency with (d)(7) and (e)(7).

The language in condition (c)(4) matches that in the current version of Chapter 115. However, it does not allow for a separate external drainage facility as covered in §115.417. The staff recommends adding an allowance for an external drainage facility that is consistent with Chapter 115.

The ventilation requirements were based on the limits found in Chapter 115 and American Conference of Governmental Industrial Hygienist's (ACGIH) *Industrial Ventilation*. The 50 fpm/square foot (sq. ft.) requirement is taken from *Industrial Ventilation* and provides enough flow to effectively capture fumes. The 65 cfm/sq. ft. comes from Chapter 115 and provides an upper limit on air flow, since flows above this level tend to increase solvent loss. The staff recommends no change to the ventilation requirements of the proposed exemption.

Eastman suggested revising condition (a)(2) to provide for facilities that have on-site disposal services by adding the phrase "or until emptying into authorized on-site waste management facilities." Solvent makeup stated in (a) (1)(B), (c)(5), and (d)(7) should subtract "inventory change" from "gross purchased" to account for facilities that inventory and service their own units.

The staff has added the suggested language to condition (a)(2) referencing on-site waste management and clarified that solvent makeup should be based on gross usage minus waste disposal.

Dallas pointed out that the stack height of 1.3 times the building height as stated in condition (d)(6) appears to be an error. Other references to stack heights in the rule are based on 1.5 times the building height.

The staff disagrees that this is an error. The two stack heights included in the exemption were based on dispersion modeling run by the staff. Conveyorized degreasers have higher emission rates than open top units and a taller stack was required to provide acceptable impacts.

The comments regarding SE 113, concerning polyester/styrene copolymer resins applications, are as follows.

Fort Worth commented that both spraying and nonspraying operations should have the same limitations. The acetone usage limitations should be raised back to the rates allowed under the current exemption.

The staff disagrees that both operations should have the same limitations. Based on EPA AP-42, Compilation of Air Pollutant Emission Factors, emissions of styrene are higher for spray application than nonspray application. Therefore, spray application would have to use less resin and gelcoat in order to reduce styrene emissions to levels comparable to the nonspray application.

Harris County asked how an exemption holder would demonstrate compliance with the 95% removal efficiency requirement in condition (b)(2).

Similar to other coatings operations where there are particulate emissions, the applicant is normally requested to provide specifications or a guarantee from the manufacturer of the products.

Eastman commented that material usage stated in (b)(1) and (c)(1) should subtract "inventory change" from "gross purchased" to account for facilities that inventory and service their own units.

The staff agrees to revise the description of material usage for clarification of the rule.

GHASP commented that the recordkeeping requirement in condition (a)(2) should be extended to five years to coincide with the five-year compliance history requirements in Chapter 116. Conditions (b)(2) and (c)(2) should require a 98% control efficiency as Best Available Control Technology BACT rather than 95%.

The staff is opposed to the five-year recordkeeping requirement. See the response to the same comment by GHASP regarding SE 75. The staff is also opposed to raising the control efficiency which is beyond the scope of this rulemaking. It should be understood that BACT is not a required criteria in standard exemptions, which are by definition insignificant sources.

Both ICPA and CFA were concerned about the restriction to daylight operations in condition (a)(3) which will limit the ability to compete in the marketplace. They were also concerned about the stack height and flow rate limitations in conditions (b)(3) and (c)(3). Most shops cannot meet these limits with their existing equipment. ICPA and CFA both suggested a limitation on the stack concentration for styrene of 50 parts per million (ppm) instead of the flow limitation. CFA also suggested a 30-foot stack height.

The health effects screening level for styrene was reduced a couple of years ago from 430 micrograms per cubic meter (ug/m3) to 215 ug/m3. This change was made by the Toxicology & Risk Assessment Section to more accurately describe the odor detection level of styrene. The limitations on stack height, flow rates, and daylight operating hours were all the result of screening models that were made by the Permits staff to determine the potential ambient impacts from thermoset resin facilities based on the new screening levels. The staff does not believe that any relaxation of these limitations can be recommended without creating a potential of exceeding the styrene screening level. The staff is also opposed to substitution of a 50 ppm concentration limitation in lieu of the stack height and flow restrictions. Additional modeling would be required to confirm that the 50 ppm limitation would provide equivalent protection of the effects screening level. Also, it would be difficult for most facilities to verify compliance with the 50 ppm requirement without installing expensive continuous monitoring equipment. Facilities that are unable to meet the standard exemption can apply for a permit which allows for individual case review.

The proposed changes to this exemption will only affect new or modified facilities that are not currently authorized under standard exemption. Any facility that is now operating under SE 113 may continue to operate under the conditions that existed at the time the exemption was granted.

The comments regarding SE 124, concerning automobile body shops, are as follows.

The staff has decided that it would be inappropriate, within the rules, to specify a requirement to submit a checklist. Therefore, the reference to Table 124 is being deleted from condition (a). Also, the Permits Division has developed a new simplified registration Form, PI-7-124, to be used by auto body shops in place of the Standard PI-7. Condition (a) will be changed to reference the new Form PI-7-124.

Eastman commented that condition (r) of SE 124 appears to allow preexisting facilities to qualify for standard exemption authorization. The TNRCC should advise the regulated community of the authorizing mechanism for existing insignificant sources of air contaminants that have not previously applied for permit or exemption.

Condition (r) is only intended to allow existing facilities a grace period for achieving compliance with certain conditions of the exemption. It has nothing to do with the applicability of the exemption to existing facilities. Any facility which is not grandfathered is required by law to obtain a permit or qualify for a standard exemption before start of construction. Any such facility that is operating without preconstruction authorization is in violation of Chapter 116. There are approximately 10,000 body shops operating statewide, and the TNRCC is aware that many of them do not have a permit or standard exemption. Whenever the TNRCC performs an unscheduled investigation at one of these facilities in response to a citizen complaint, compliance action is initiated for any Chapter 116 violation. The TNRCC does not have the staff or resources to attempt to track down and take enforcement action against all of the auto body shops across the state. Many of these facilities are very small with relatively insignificant emissions. Many existing body shops have been authorized to construct under SE 75. Others have been unable to meet all of the conditions of SE 75 and have not applied for a permit due to their lack of knowledge regarding the permit process or the need for a permit. The new SE 124 has been developed with input from auto body shop owners and operators to provide a mechanism for most of the shops to comply with Chapter 116. SE 75 has been revised to specifically exclude auto body shops in the future-they must either satisfy SE 124 or else apply for a permit. Following the grace period stated in condition (r), compliance action will be initiated against existing facilities that still fail to register for SE 124 or apply for a permit.

ASAT, Binks, Chucks, and Benton commented that the 15,000 cfm flow rate requirement for spray booths is not reasonable. Spray booth equipment manufacturers produce units designed for flow rates in the range of 10,000 to 12,000 cfm. It would be costly and impractical to attempt to modify existing booths to generate the additional flow capacity. Also, the benefits of such a move is questionable, as existing booth designs appear to perform efficiently in capturing and removing paint fumes.

The staff agrees with this assessment and has revised the flow rate requirements to 10,000 cfm.

Fort Worth commented that the exemption should not be made retroactive to cover all facilities. Many existing facilities, especially small shops, will be unable to comply with the distance limitations and ventilation requirements.

The exemption contains different emission control requirements depending on the capacity of the shop. Therefore, smaller shops which would have fewer capital resources, are allowed to operate with less controls. Also, the smaller capacity shops would generate lower emissions just by the fact that the use of coatings is less. The staff believes that existing shops will have sufficient time to implement the control requirements.

Harris County stated that facilities qualifying under condition (b) should also be required to meet the requirements under (c). Harris County requested clarification of the meaning of no visible emissions in (d).

The staff supports the recommendation of including good housekeeping requirements from condition (c) for sources exempted under condition (b).

No visible emissions is a qualitative evaluation of opacity rather than a quantitative evaluation with a specified percent opacity based on a number of readings over a time period. In other words, no visible emissions is based on an instantaneous observance of any emissions.

Chuck was concerned about the distance limitation. Chuck requested that condition (l) be revised by eliminating the "or other structure" phrase with regard to how close a body shop may be located to its neighbors since it is too restrictive.

The staff agrees that the wording as proposed is too restrictive and has made the distance restriction apply only to specified receptors.

Dallas suggested several changes to the exemption. Subsection (b) should set the limit at one pint per hour rather than 1/2 pint. Dallas questioned the time frame for the nine square foot limitation in subsection (f). A carbon adsorption system should not be required in subsection (f)(2) for small facilities when it is not required for larger facilities. Subsection (h) should allow electrostatic spray guns if usage is less than one pint per hour. Dallas requested clarification as to whether electric heaters are allowed in subsection (j). Condition (k)(3) may be too restrictive for compliance by existing facilities. The list of coating categories in condition (o) should be better defined.

The staff agrees that the options for low usage facilities should be somewhat broader. A second category which specifies a maximum of two gallons per week will be added to condition (b) to provide more flexibility.

The time frame for compliance with all of the conditions of this exemption will be listed in condition (r).

A carbon adsorption system is not specifically required in condition (f). The condition states that IF one is used it shall be maintained properly.

The staff does not support the change to condition (h) for the use of electrostatic application equipment. The exemption as written allows for the use of electrostatic spray equipment regardless of the hourly use rate with a minimal demonstration of transfer efficiency.

Language has been added to condition (j) to clarify that electric heaters are not prohibited.

Condition (k)(3) was included in the proposed exemption to protect the public in hilly terrain from adverse health effects, since the stack height requirements were based on dispersion models run using simple terrain. Shops that cannot use the proposed exemption need to pass through a permit review and more detailed modeling to insure that public health is protected.

The coating categories used in condition (o) are based on the definitions found in Chapter 115 for auto refinish products. The staff believes that no further definition is necessary.

GHASP suggested several changes to the proposed exemption: condition (c) should also require those liquids to be stored in covered containers; condition (f)(2) should require covering or enclosure to avoid degassing from the activated carbon; each coating category in condition (o) should specify the units; a five-year recordkeeping period should be required in condition (p) to coincide with the five-year compliance history requirements.

The staff supports the proposal to require covered containers for liquid waste in condition (c).

Covering or enclosing the activated carbon referenced in (f)(2) is impractical, since it is in the form of carbon panels which are in the exhaust duct of the preparation stations. The staff does not support this change.

The units for each coating category in condition (o) are gallons per month.

The staff is opposed to the five-year recordkeeping requirement. See the response to the same comment by GHASP regarding SE 75.

The comments regarding §116.311, concerning Permit Renewal Applications, are as follows.

Exxon requested an explanation in the preamble for the meaning of the phrase "for cause" in the new §116.311(c)(3).

The use of the term "for cause" in the proposed rule echoes the TCAA, §382.055(a)(3). While it is not possible, or necessary, to identify all possible situations in which the TNRCC might limit a permit's term, we provide the following generic situations to illustrate our understanding of the legislative intent. First, the TNRCC might be issuing a permit timed so that a major regulatory development (promulgation of an EPA rule that will affect the facility or development of a new

TNRCC policy on certain processes, for example) is scheduled to occur before the expiration of the usual permit term. Second, a particular facility may have a negative compliance history which suggests that the operator's maintenance efforts are not acceptable. In that case, a shorter permit term could provide the TNRCC a mechanism to review maintenance efforts in addition to standard enforcement options. In addition, certain types of process equipment may be more prone to technical performance degradation, such as equipment which operates at high temperatures or pressures.

Amoco Oil commented that compliance history should be used as a basis to determine whether existing emission controls are acceptable given the age of the facility. No additional controls should be required at renewal if compliance history and impacts are acceptable.

Section 116.311(a)(4) contains the requirement that in order to be granted a permit renewal the facility must use "that control technology determined by the Executive Director to be economically reasonable and technically practicable considering the age of the facility and the impact of its emissions on the surrounding area." Although not requiring BACT, this paragraph does require a review of control technology to evaluate whether it is reasonable considering the age of the facility and the impact of its emissions. In those limited cases where additional controls have been required at a facility during permit renewal, the requirement to add the controls was either because the impacts from the emissions were not acceptable, or because the staff determined that the additional controls were reasonable with consideration given to the age of the facility.

Fort Worth commented that the sentence in §116.311(b) that is proposed for deletion should be retained. A facility that is out of compliance should not be granted a permit.

The proposed changes resulted from instructions to the staff from the former Texas Air Control Board (TACB) at the August 23, 1993, Board meeting to revise the compliance history requirements for renewals. A special Permits Workshop was conducted on July 26, 1993, to resolve concerns over the compliance history requirements for permit renewals that were raised at the July 16, 1993, Board meeting. The proposed language resulted from that workshop.

The new language proposed to be added to this section still contains provisions for denial of a permit renewal. The new language is more specific in stating the basis for denial.

Dallas expressed strong opposition to the proposed language in §116.311(b) as being very nebulous. Dallas and GHASP commented that there are too many undefined terms that will complicate the enforcement process. GHASP is also opposed to the ten-year renewal cycle in subsection (c) and favors a five-year renewal.

As stated previously in the response to Fort Worth's comment, the changes to this section resulted from a special Permits Workshop that was ordered by the TACB. A lot of the terms used in enforcement are legal terms. Since compliance action typically involves lawyers, these terms are generally understood by the parties involved in the action. Writing definitions could severely limit the ability of the TNRCC to resolve some of the enforcement matters, which can become very complex and diverse. Some violations are very serious in nature and others are not, so flexibility is needed to deal with the variety of situations that occur. The staff favors retaining the proposed language.

In response to the comment by GHASP regarding the ten-year renewal cycle, this is an existing statutory requirement. The proposed rule change will merely adopt rule language that is consistent with the statute.

The comments regarding §116.610, concerning Applicability, are as follows.

Exxon commented that subsections (a)(1)-(5), (c), (d), (e), (f), and (g) in §116.610 appear to be general conditions that should be located in a new section titled "General Conditions" rather than part of the applicability section.

The staff agrees that most of the items in §116.610 do not relate to applicability, but should be considered conditions for obtaining a standard permit. However, the *Texas Register* does not allow a new section number to be adopted without being proposed. Therefore, §116.610 will be retitled "Applicability and General Conditions" to provide some clarification. Creation of a new section to contain the general conditions will be considered in future rulemaking.

Exxon, Brown, and Exxon Chem commented that §116.610(a)(1) should be revised by deleting the words "project which results in a" to clarify that the applicability is to the emissions increase and not the project itself. Exxon, Brown, and TCC suggested that this subsection should be moved to §116.617(2) so that increases of toxic emissions required to comply with SE 106 and SE 118 will only apply to voluntary emission reduction projects.

The TNRCC does not permit emissions, it permits facilities and physical or operational changes to facilities. The applicability of this rule is to the project, meaning the facility or change to the facility as outlined in §116.610(a), not the emissions increase. The staff believes that there should be some protection of the environment against increases of toxic emissions from all standard permits. In lieu of evaluating every possible scenario prior to proposing a standard permit, the staff has elected to include this requirement as a general condition applicable to both standard permits. Staff also realizes that there may be specific situations where this requirement may not be necessary. Staff has agreed to consider this in future rulemaking. Two possible standard permits which staff has agreed to consider are for CFC substitutions and changes required by the federal Title 3 maximum achievable control technology standards.

Exxon Chem suggested adding a phrase, for clarification, at the end of §116.610(a)(4) which reads "in order to prevent increased emissions at a facility of a particular chemical of concern."

The staff believes that the addition of this phrase would imply that if there is no increase in emissions of the particular pollutant in question, a standard permit may be claimed even though an existing NSR permit specifically prohibits a standard permit. If a permit contains such an exclusion, it is generally to flag a potential impacts concern for future changes at the facility. The staff is opposed to this suggested language.

Exxon and Brown commented that §116.610(b) should replace the closing phrase "of this rule" with the phrase "of §116.110 of this title" rather than "this Subchapter F."

The staff agrees that the language is clearer if §116.110 is specified and will make this change.

Brown, TCC, and DuPont suggested that the meaning of §116.610(e) should be clarified. Brown suggested adding the phrase "as compared to the representations in the registration" at the end of the second to last sentence. This will establish a benchmark for determining whether or not a change in representations will cause an emissions increase.

Staff agrees to the suggested change with minor rewording as follows: "as compared to the representations in the original registration or any previous notification of a change in representations."

GHASP had several comments about §116.610. Standard permits do not provide for case-by-case BACT review. No changes in representations should be allowed in subsection (e) without review by the TNRCC and public input. Recordkeeping requirements in subsection (f) should be for five years to track compliance history requirements.

It is true that standard permits will not include a case-by-case BACT review for each permit. The purpose of the first two standard permits is to simplify and accelerate the permit review process for pollution reduction projects. These two standard permits contain specific conditions which limit applicability. Future standard permits may target specific industries or types of facilities and will also contain specific conditions and requirements that the applicant will have to meet in order to qualify for the standard permit. These future standard permits may include the requirement that the facilities utilize best available control technology. The public will have an opportunity for comment during the rulemaking process.

The changes allowed under §116.610(e) are very limited. Section 116.610(e) does not prohibit changes in representations provided that there is no increase in emissions, change in the character of emissions, or change in emission controls. It does prohibit changes in construction plans, operating procedures, and maximum emission rates if such changes exceed or conflict with conditions of the standard permit.

The staff is opposed to changing subsection (f) to a five-year recordkeeping requirement. See the response to the same comment by GHASP regarding SE 75.

Dallas commented that the proposed wording of §116.610(f) would allow an applicant to

discard all records, including the permit and application. Operational records should be maintained for a two-year rolling average and all other records should be retained permanently.

Unlike a preconstruction permit, there is no document or permit certificate issued on a standard permit. The applicant is required to register for and document that it complies with the conditions of the permit as stated in the rule. The TNRCC retains copies of the registrations both in Austin and the regional offices. The rule language has also been changed to require the applicant to send a copy of the registration to all local programs with jurisdiction. With regard to operating records, it is unreasonable to require a facility to retain these records forever. The staff does agree to revise the language in §116.610(f) to clarify that the recordkeeping should be on a two-year "rolling" average.

The comments regarding §116.611, concerning Registration Requirements, are as follows.

Exxon suggested a revision to §116.611(a)(2) to eliminate the 45-day waiting period and allow construction to commence upon mailing of the standard permit registration. Alternatively, it suggested that the TNRCC tie the 45 days to beginning of actual construction, which is less nebulous than commencement of construction.

The wording used in §116.611(a)(2) is "commencement of the project." This wording was chosen because there may be projects for which a standard permit is used which do not involve "construction;" therefore, the staff does not agree that the wording should be changed. The staff also believes that for the type of projects contemplated by standard permits 1 and 2, some opportunity for prior review by the staff is necessary. During internal discussions regarding possible future standard permits, the staff has discussed the possibility of not requiring the 45-day period for prior review of certain of these future standard permits. The staff will consider whether to change this requirement from a general condition to a condition specific to only certain standard permits in future rulemaking.

Harris County commented that the registration required in §116.611(a) should also be sent to any affected local program. Pennzoil suggested sending the registration only to the central office.

The staff agrees that the local programs should be kept apprised of the existence of standard permits to avoid unwarranted enforcement actions. The rule language has been revised to include this provision. The staff does not agree that the regional offices should be excluded from notification.

GHASP is opposed to §116.611 on the basis that facilities may be constructed without public input, hearings, or TNRCC approval.

GHASP repeated its general opposition to standard permits in the general comments. The staff response is the same as it was to the general comment.

The comments regarding §116.614, concerning Standard Permit Fees, are as follows.

DuPont, TCC, and Brown suggested revising §116.614 by deleting the words "applies for" and substituting "claims" to eliminate the presumption of preapproval requirements.

The staff agrees with this comment and has made the suggested change.

In response to a solicitation for comments regarding the proposed fee structure in the preamble, Brown, Exxon, and Exxon Chem have all stated that there should be no fee for standard permits. The argument is that the level of staff review is comparable to standard exemptions which assess no fee. If the staff decides to include the fee, it should be a minimal flat fee.

Seven commenters responded to the permit fee issue by suggesting a minimum fee. Amoco Oil, TCC, Fort Worth, TU, and DuPont suggested a minimum flat fee without specifying what the amount should be. Phillips suggested a flat fee of $200 and HL&P suggested a flat fee of less than $450. Justifications for the flat fee included the comments that fewer agency resources are needed to review standard permits versus regular permits, and capital based fees are inappropriate because no BACT or impacts review is performed.

The staff appreciates the comments received in response to this issue. Staff agrees that the amount of agency resources needed to review standard permits is less than regular permits and therefore is changing the fee to a flat fee of $450.

The comments regarding §116.617, concerning Standard Permits List, are as follows.

EPA Region 6 responded to the TNRCC solicitation of comments in the proposed rule preamble regarding future netting calculations for emission control projects that qualify for a standard permit. EPA Region 6 supported the proposal to defer netting calculations for the facilities covered by the standard permit, but to include those emission increases and decreases associated with the standard permit in any future netting demonstration. Subsequent discussions with industry and EPA Office of Air Quality Planning and Standards caused the staff to revise the netting requirements for projects required by rule as indicated in the response to Phillips' previous general comment. EPA commented on the provisions of §116.611, which allow a facility to commence construction upon written notification from the TNRCC, or 45 days after receipt of the registration, whichever occurs first. The public record should address any procedures that the TNRCC will implement to ensure timely and effective review of the standard permit registrations. EPA also commented that §116.617(1)(D)(ii)(I) and (2)(D)(ii)(I) should include emissions of pollutants which are precursors to the primary pollutant.

Staff has every intention of reviewing all of the standard permit registrations within the 45-day time frame. If the 45-day time period expires without agency review, the applicant is free to begin the project. However, this does not mean that the agency agrees that the applicant meets the conditions of the standard permit. The agency would still be free to take enforcement action against the applicant if it is later determined that the project began without the applicant meeting the conditions of the standard permit. This is similar to the current situation with standard exemptions, except that the staff believes that because of the potential for a great variety of project types under the first two proposed standard permits a 45-day review period is necessary.

Staff agrees with EPA's comment concerning precursors and has made the suggested changes.

Exxon commented that, in §116.617, any of the conditions in the two standard permits that are considered to be general conditions that will be used in other standard permits, should be moved to the general condition list. Also, it suggested that the TNRCC revise the wording in §116.617(1) by substituting "to comply" instead of "required by" and substitute "requirement" for "rule, standard, or regulation."

The conditions in standard permits 1 and 2 are only applicable to emission reduction projects. As more standard permits are added to the list in the future, each will have specific conditions attached, but not necessarily any of the conditions from standard permits 1 and 2. No action is necessary in regard to this comment.

The staff does not see a need to revise the wording in §116.617(1).

Exxon, Brown, Amoco Chem, Amoco Oil, Eastman, and HL&P commented that the prohibition against production increases in §116.617(1)(A) and (2)(A) should be removed. The suggestions ranged from deleting both subparagraphs entirely, deleting the second sentence from each subparagraph, or revising the subparagraphs to allow production increases that occur solely as a result of implementing the control measures. There was a general consensus that industry should not be penalized for production increases that can be achieved with emission reductions. Also, according to HL&P, there is no mechanism in Chapter 116 for authorizing production increases that have no related emission increases.

In general, the staff does not agree with these comments. The NSR program staff have historically looked at whether an increase in production will result in an increase in emissions prior to the implementation of any additional control. The primary reason for this is that if we were to look at whether there has been an increase in emissions (a modification) only after the addition of controls, it would result in facilities installing "just enough control technology" to get out of review instead of BACT as is required by the TCAA. This would in effect extend the life of the facility without ever achieving the intent of the TCAA of replacing outdated controls with the "best available controls." In addition, staff disagrees with Brown's comment that the standard permit will authorize the increase in emissions, but not the increase in production. As currently written, the language will authorize an increase in emissions subject to certain limitations. However, the increase in emissions will only be that portion coincidental with the pollution reduction project. It is not our intent to authorize any additional in-

creases in emissions which might result from an increase in capacity. However, staff has agreed to change the language in §116.617(1)(A) to allow production increases that occur solely as a result of implementing required controls provided that the increased production does not result in an exceedance of any current emission limit. The emissions increase resulting from the increase in production must also be less than the decrease resulting from the installation of control equipment or implementation of a control technique.

Exxon suggested clarifying §116.617(1)(D)(i) and (2)(D)(i) by moving the phrase "considering the emissions reductions that will result from the project" out of paragraphs (1)(D)(i)(I) and (2)(D)(i)(I) and inserting it in clause (i) in each case so that it will apply to both nonattainment and PSD cases. Also, add the word "net" before "emissions increase" in clause (i).

Section 116.617(1)(D)(i)(I) and (2)(D)(i)(I) already apply to both PSD and nonattainment cases. The language in §116.617(1)(D) and (E) and (2)(D) and (E) was adopted from the so-called "WEPCO exclusion" contained in 40 Code of Federal Regulations 51.165 and 52.21. The staff does not see the need to change this language. Our procedure for netting is outlined in the rule and the response to Phillips' general comment above.

Pennzoil suggested allowing de minimis increases of one ton per year under the two standard permits in §116.617. This will allow operational flexibility and encourage voluntary reduction projects.

As long as emissions increases of criteria pollutants are less than significant (these levels are much higher than one ton per year (TPY)), they are allowed under the standard permit without additional review. Emission increases of non-criteria pollutants must meet the requirements of either SE 106(c) or (d) or SE 118(c). In many cases, these limits are also greater than one TPY. The staff has retained the proposed language, because it provides more flexibility than the suggested one TPY.

Commenters from Exxon, Brown, TCC, Phillips, Eastman, HL&P, and DuPont suggested revising §116.617(2) to allow implementation of control techniques on voluntary emission reduction projects. Brown stated that subparagraphs (A) and (C) already protect against construction of projects where the agency believes permitting should be required. TCC commented that the TNRCC already has adequate authority to take action against companies that improperly represent a project as a voluntary reduction. In general, the commenters believe that disallowing control techniques as an option, will discourage many companies from making voluntary emission reductions.

The staff believes that the term "control techniques" should be better defined before allowing the use of standard permits to authorize these types of projects in "voluntary" situations. The use of control techniques in standard permit 1 is appropriate, since the scope of these projects is limited to those required by the regulations. Unless this term is narrowed down, there may be opportunities for projects which should be required to be reviewed under §116.110 to slip through by attaching themselves to the term "voluntary pollution control technique." The staff has determined that control techniques should remain excluded from standard permit 2. After the rule is effective and the staff has an opportunity to review some standard permit applications, this issue may be revisited.

Amoco Chem commented that §116.617(1)(D) and (2)(D) should allow credit for emission reductions in voluntary projects.

Section 116.617(1)(D) does not address voluntary projects. Section 116. 617(2)(D) does not prohibit credit for reductions obtained by voluntary projects. What this subparagraph does, along with subparagraph (E), is exclude these projects from the definition of major modification. Therefore, no netting is required for these specific projects. However, as stated in response to Phillips' general comment, any increases and decreases associated with these projects are still creditable and must be included in the netting calculations for future projects, as long as the reductions are not excluded by other rule requirements.

Exxon and Brown suggested revising §116.617(1)(D)(iii) to allow emission increases that are associated with state or federally required emission decreases to be excluded from netting and to take credit for all decreases that are not state or federally required. TCC went further in stating that standard permits should not be included in netting calculations at all. Netting is a NSR concept and not part of a mandated emission reduction project. Section 116.617(1)(D)(iii) should be rewritten to eliminate all netting considerations. Voluntary reductions under §116.617(2)(D)(iii) should also be excluded from netting unless the source chooses to take credit for the reductions, in which case, the increases will also be netted.

See the response to general comments by Phillips. In regard to the last sentence of this comment, the staff believes that all sources should be treated the same with regard to whether increases and decreases from voluntary projects are included in the netting calculations. Tracking of emissions credits is complicated enough without having to keep track of which projects an individual source decides should and should not be included in the netting exercise.

TCC, Brown and DuPont suggested revising the last sentence in §116.617(1) (A) and (2)(A) to cover standard exemptions by adding "or qualifies for" before "any necessary authorization."

The staff agrees with this comment and has made the suggested change.

GHASP objected to allowing installation of control equipment without the TNRCC approval in §116.617. GHASP repeated its general opposition to standard permits in the General Comments.

The staff response is the same as it was to the general comment.

Subchapter B. New Source Review Permits

Permit Application

• 30 TAC §116.110, §116.115

The amendments are adopted under the Texas Health and Safety Code (Vernon 1990), the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and proposes of the TCAA.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 6, 1994.

TRD-9439069 Mary Ruth Holder
Director, Legal Division
Texas Natural Resource Conservation Commission

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For further information, please call: (512) 239-0615

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Subchapter C. Permit Exemptions

• 30 TAC §116.211

The amendment is adopted under the Texas Health and Safety Code (Vernon 1990), the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and proposes of the TCAA.

§116.211. Standard Exemption List.

(a) Pursuant to the Texas Clean Air Act (TCAA), §382.057, the facilities or types of facilities listed in the Standard Exemption List, dated April 6, 1994, as filed in the Secretary of State's Office and herein adopted by reference, are exempt from the permit requirements of the TCAA, §382.0518, because such facilities will not make a significant contribution of air contaminants to the atmosphere. A facility shall meet the following conditions to be exempt from permit requirements:

(1) (No change.)

(2) Total actual emissions authorized under standard exemption from the proposed facility which is located in a nonattainment area shall not exceed:

(A)-(C) (No change.)

(D) in an ozone nonattainment area, the applicable major modification threshold of NO_x in Table 1 of the definition of "major modification" in §116.12 of this title.

(3)-(6) (No change.)

(b) Notwithstanding the provisions of this section, any facility which constitutes a new major source, or any modification which constitutes a major modification under nonattainment review or Prevention of Significant Deterioration review as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder shall be subject to the requirements of §116.110 of this title (relating to Applicability) rather than this section.

(c)-(f) (No change.)

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Director, Legal Division
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Subchapter D. Permit Renewals

• 30 TAC §116.311

The amendment is adopted under the Texas Health and Safety Code (Vernon 1990), the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and proposes of the TCAA.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter F. Standard Permits

• 30 TAC §§116.610, 116.611, 116.614, 116.617

The new sections are adopted under the Texas Health and Safety Code (Vernon 1990), the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and proposes of the TCAA.

§116.610. Applicability and General Conditions.

(a) Pursuant to the Texas Clean Air Act (TCAA), §382.051, projects involving the types of facilities or physical or operational changes to facilities which meet the requirements for a standard permit listed in §116.617 of this title (relating to Standard Permits List) are hereby entitled to the standard permit; provided however, that:

(1) any project which results in a net increase in emissions of air contaminants from the project other that those for which a National Ambient Air Quality Standard has been established must meet the emission limitations of Standard Exemption 106(c) or (d) or Standard Exemption 118(c);

(2) construction or operation of the project shall be commenced prior to the effective date of a revision to §116.617 of this title under which the project would no longer meet the requirements for a standard permit;

(3) the proposed project shall comply with the applicable provisions of the Federal Clean Air Act (FCAA), §111 (regarding Federal New Source Performance Standards) and §112 (regarding Hazardous Air Pollutants);

(4) there are no permits under the same Texas Natural Resource Conservation Commission (TNRCC) account number that contain a condition or conditions precluding use of a standard permit or standard permits under this subchapter;

(5) the owner or operator of the facility registers the proposed project in accordance with §116.611 of this title (relating to Registration Requirements).

(b) Any project which constitutes a new major source, or major modification under the new source review requirements of Part C (Prevention of Significant Deterioration review) or Part D (nonattainment review) of the FCAA and regulations promulgated thereunder shall be subject to the requirements of §116.110 of this title (relating to Applicability) rather than this subchapter.

(c) No persons shall circumvent by artificial limitations the requirements of §116. 110 of this title.

(d) The emission from the facility shall comply with all applicable rules and regulations of the TNRCC adopted under the Texas Health and Safety Code, Chapter 382, and with intent of the Texas Clean Air Act (TCAA), including protection of health and property of the public and all emissions control equipment shall be maintained in good condition and operated properly during operation of the facility.

(e) All representations with regard to construction plans, operating procedures, and maximum emission rates in any registration for a standard permit become conditions upon which the facility or changes thereto, shall be constructed and operated. It shall be unlawful for any person to vary from such representations if the change will affect that person's right to claim a standard permit under this section. Any change in conditions such that a person is no longer eligible to claim a standard permit under this section requires proper authorization under §116. 110 of this title. The owner or operator of the facility must notify the TNRCC of any other change in conditions which will result in a change in the method of control of emissions, a change in the character of the emissions, or an increase in the discharge of the various emission as compared to the representations in the original registration or any previous notification of a change in representations. Notice of changes in representations must be received by the TNRCC no later than 30 days after the change.

(f) All records relating to the applicability of and compliance with the terms of a standard permit shall be maintained by the permittee for at least a two-year rolling retention basis, and made available for review by authorized representatives of the TNRCC, United States Environmental Protection Agency, or local air pollution control agencies.

(g) All changes authorized by standard permit to a facility previously permitted pursuant to §116.110 of this title shall be administratively incorporated into that facility's permit at such time as the permit is amended or renewed.

§116.611. Registration Requirements. Registration for a standard permit shall be sent by certified mail, return receipt requested or hand delivered to the Texas Natural Resource Conservation Commission (TNRCC) Office of Air Quality, the appropriate TNRCC Regional Office, and any local air pollution program with jurisdiction, before a standard permit can be claimed. The registration shall:

(1) document compliance with the requirements of this section, including, but not limited to: the basis of emission estimates, quantification of all emission increases and decreases associated with the project being registered, sufficient information as may be necessary to demonstrate that the project will comply with §116.610(b) of this title (relating to Applicability), information that describes efforts to be taken to minimize any collateral emissions increases that will result from the project, a description of the project and related process, and a description of any equipment being installed;

(2) be received by the TNRCC no later than 45 days prior to the com-

mencement of the project. Work may begin on the project any time upon receipt of written notification from the TNRCC that there are no objections to the project or 45 days after receipt by the TNRCC of the registration for the project, whichever occurs first.

§116.614. Standard Permit Fees. Any person who claims a standard permit shall remit, at the time of registration, a flat fee of $450 for each standard permit claimed. All standard permit fees will be remitted in the form of a check or money order made payable to the Texas Natural Resource Conservation Commission (TNRCC) and delivered with the permit registration to the TNRCC, P.O. Box 13087, Austin, Texas 78753. No fees will be refunded.

§116.617. Standard Permits List. Pursuant to the Texas Clean Air Act, §382.051, projects involving the types of facilities or physical or operational changes to facilities listed in this section qualify for a standard permit subject to the conditions stated in §116.610 of this title (relating to Applicability and General Conditions).

(1) Installation of emissions control equipment or implementation of control techniques as required by any state or federal rule, standard, or regulation.

(A) Installation of the control equipment or implementation of the control technique must not result in an increase in the facility's production capacity unless the capacity increase occurs solely as a result of the requirement to install the control equipment or implement the control technique on existing units required to meet applicable emission limitations. The owner or operator must obtain or qualify for any necessary authorization pursuant to §116.110 of this title (relating to Applicability) prior to utilizing any production capacity increase that:

(i) results in the exceedance of any emission limit in an existing permit, other authorization, or grandfathered baseline; or

(ii) does not result solely from the installation of control equipment or implementation of control techniques; or

(iii) results in an emissions increase which exceeds the emission reduction due to the installation of control equipment or implementation of control techniques.

(B) Any emission increase of an air contaminant must occur solely as a result of the requirement to install an emission control device or implement a control technique.

(C) Installation of emission control equipment or implementation of a control technique shall not include the installation of a new production facility, reconstruction of a production facility as defined in 40 Code of Federal Regulations (CFR) 60.15(b)(1) and (c) , or complete replacement of an existing production facility.

(D) If the project, without consideration of any other increases or decreases not related to the project, will result in a significant net increase in emissions of any criteria pollutant, a person claiming this standard permit shall submit, with the registration, information sufficient to demonstrate that the increase will meet the conditions of clause (i) of this subparagraph.

(i) The emissions increase shall not:

(I) considering the emission reductions that will result from this project, cause or contribute to a violation of any national ambient air quality standard; or

(II) cause or contribute to a violation of any Prevention of Significant Deterioration (PSD) increment; or

(III) cause or contribute to a violation of any PSD visibility limitation.

(ii) For purposes of this section, "significant net increase" means those emissions increases resulting solely from the installation of control equipment or implementation of control techniques that are equal to or greater than subclauses (I) or (II) of this clause:

(I) the major modification threshold listed in §116. 12 of this title (relating to Nonattainment Review Definitions), Table I, for pollutants for which the area is designated as nonattainment, or for precursors to these pollutants;

(II) significant as defined in Title 40 CFR §52.21(b)(23) for pollutants for which the area is designated attainment or unclassifiable, or for precursors to these pollutants.

(iii) Netting is not required when determining whether this demonstration must be made for the proposed project, and the increases and decreases resulting from this project should not be included in any future netting calculation.

(E) For purposes of compliance with the PSD and nonattainment new source review provisions of Part C and Part D of the Federal Clean Air Act (FCAA) and regulations promulgated thereunder, any increase that is less than significant, or satisfies the requirements of subparagraph (D) of this paragraph shall not constitute a physical change or a change in the method of operation. For purposes of compliance with the Standards of Performance for New Stationary Sources regulations promulgated by the United States Environmental Protection Agency (EPA) at 40 CFR 60.14, an increase that satisfies the requirements of subparagraph (D) of this paragraph shall satisfy the requirements of 40 CFR 60.14(e)(5).

(2) Voluntary installation of emissions control equipment.

(A) Installation of the control equipment must not result in an increase in the facility's production capacity unless the capacity increase occurs solely as a result of the installation of control equipment on existing units. Any production capacity increase resulting from the installation of controls shall not be utilized until the owner or operator obtains or qualifies for any necessary authorization pursuant to §116.110 of this title (relating to Applicability).

(B) Any emission increase of an air contaminant must occur solely as a result of installing an emission control device.

(C) Installation of emission control equipment shall not include the installation of a new production facility, reconstruction of a production facility as defined in 40 CFR 60.15(b)(1) and (c), or complete replacement of an existing production facility.

(D) If the project, without consideration of any other increases or decreases not related to the project, will result in a significant net increase in emissions of any criteria pollutant, a person claiming this standard permit shall submit, with the registration, information sufficient to demonstrate that the increase will meet the conditions of clause (i) of this subparagraph.

(i) The emissions increase shall not:

(I) considering the emission reductions that will result from this project, cause or contribute to a violation of any national ambient air quality standard; or

(II) cause or contribute to a violation of any PSD increment; or

(III) cause or contribute to a violation of any PSD visibility limitation.

(ii) For purposes of this section, "significant net increase" means those emissions increases resulting solely from the installation of control equipment that are equal to or greater than subclause (I) or (II) of this clause:

(I) the major modification threshold listed in §116.12 of this title, Table I, for pollutants for which the area is designated as nonattainment, or for precursors to these pollutants;

(II) significant as defined in Title 40 CFR §52.21(b)(23) for pollutants for which the area is designated attainment or unclassifiable, or for precursors to these pollutants.

(iii) Although netting is not required when determining whether this demonstration must be made for the proposed project, the increases and decreases resulting from this project must be included in any future netting calculation if they are determined to be otherwise creditable.

(E) For purposes of compliance with the PSD and nonattainment new source review provisions of the FCAA, Part C and Part D and regulations promulgated thereunder, any increase that is less than significant, or satisfies the requirements of subparagraph (D) of this paragraph shall not constitute a physical change or a change in the method of operation. For purposes of compliance with the Standards of Performance for New Stationary Sources regulations promulgated by the United States Environmental Protection Agency at 40 CFR 60.14, an increase that satisfies the requirements of subparagraph (D) of this paragraph shall satisfy the requirements of 40 CFR 60. 14(e)(5).

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Director, Legal Division
Texas Natural Resource Conservation Commission

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For further information, please call: (512) 239-0615

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Chapter 330. Municipal Solid Waste

Subchapter P. Fees and Reporting

- **30 TAC §§330.601-330.604, 330.621, 330.641**

The Texas Natural Conservation Commission (TNRCC) adopts amendments to §§330.601-330.603, 330.621, and 330.641, and new §330.604, concerning fees and reports. Sections 330.601-330.603 and new §330.604 are adopted with changes to the proposed text as published in the October 15, 1993, issue of the *Texas Register* (18 TexReg 7130). Section 330.621 and §330.641 are adopted without changes and will not be republished.

The adopted amendments and the new section implement the new provisions of the Solid Waste Disposal Act, Chapter 361, Health and Safety Code, promulgated by the 73rd Legislature in Senate Bill 1051 (SB 1051) and clarify certain operating procedures, related primarily to solid waste fees, measurement options, and reporting requirements.

The amended rules and the new rule provide new procedures and rates for calculating solid waste disposal fees and criteria for providing refunds to facilities that compost source-separated yard waste. The amended rules also clarify reporting requirements and add interest penalties for late payment of fees.

As a result of the public comment process, 49 specific comments and several general comments were received from five organizations, corporations, and political subdivisions.

The commission received comments from North Central Texas Council of Governments; City of Dallas; City of Plano; Texas Chapter, National Solid Wastes Management Association; and Laidlaw Waste Systems, Inc.

One commenter recommended that the following be added at the end of §330. 601(b)(1): "The commission shall credit any fee payment due under this subsection for any material received and converted to compost or product for composting through a composting process. Any compost or product for composting that is not used as compost and is deposited in a landfill is not exempt from the fee." The statements have been added as they are contained in the Health and Safety Code (HSC), §361.013(f), as amended by SB 1051.

Another comment concerning §330.601(b)(1) took exception to the use of the definition of "yard waste" as contained in the Health and Safety Code, §361.421. The commenter expressed concern that with this definition a facility operator would be required to inspect loads for oversized material for the fee exemption and then put it back in the load to be composted. However, the Health and Safety Code, §361.0135(e), as added by §1.09 of SB 1051 states that: "In this section, 'yard waste' has the meaning assigned by the Health and Safety Code, §361.421." Therefore, the commission will retain the original language. Nonsource-separated yard waste, or yard waste that contains material larger than six inches in diameter, is not exempt from a fee. The operator therefore has the responsibility in accordance with §330.602(b) to assess a fee of one half of the rate assessed for waste destined for landfilling on the entire load if all of the waste is to be composted. The hauler should be forewarned that he will be assessed a fee if unallowable waste is discovered upon unloading unless the operator chooses to segregate the wastes at the gate and assess the one-half disposal fee rate on only that waste that exceeds six inches in diameter. Haulers and customers must be educated on the need for source separation.

Also with respect to §330.601(b)(1), two commenters were concerned that wood waste greater than six inches in diameter was excluded from the term "source-separated yard waste" and hence not exempt from the fee, although when such wood is regularly collected and chipped into mulch and then composted there is no distinction in the process or the end product. The commission appreciates the concern; however, the statute is specific in exempting only source-separated yard waste from the fee.

Also with respect to §330.601(b)(1), two commenters were concerned that the collection of bulk yard waste inevitably results in some contamination level of other waste items, including plastic bags in which leaves and brush are placed. They noted, however, that these contaminants are removed during the composting operation. The commission recognizes that some amounts of contaminants are always a possibility in source-separated materials and will make allowances for minor amounts.

Again, also with respect to §330.601(b)(1), another commenter recommended that there be no limit to the diameter of vegetative material if the intent of waste reduction is achieved since modern grinding equipment can handle large diameter wastes. The diameter of the vegetative waste is specified in the statutory definition of yard waste and the intent is for beneficial use of the composted product, not for waste reduction. For that reason, any compost or product for composting that is not used as compost and is deposited in a landfill is not exempt from the fee. Materials larger than six inches in diameter may be added to the composting operation after grinding but they are not exempt from a fee. In accordance with the Health and Safety Code, §361. 013(a); and §330.602(b) of this title (relating to Fees), such waste received at a shredding and composting facility will pay one half of the fee set for waste received at a landfill for disposal.

With respect to §330.601(b)(4), two comments were received recommending that the provisions requiring the commission to assess interest penalties be made flexible by using the term "may" instead of "shall" to be consistent with the use in §330.602 and §330.603. One of the commenters also suggested that a flat penalty be set rather than a sliding scale. The commission believes that the use of "shall" and a sliding scale is necessary to conform to the language in House Bill

those that develop property for sale or lease. [~~The individual owner of a single family dwelling is not required to be a licensed installer in order to install or repair an on-site sewage facility (OSSF) on the owner's property. This provision does not apply to developers or to those that develop property for sale or lease. If the owner compensates a person to construct any portion of an OSSF, the individual performing the work must be a licensed installer. The owner must meet all permitting, construction, and maintenance requirements of the permitting authority. The owner must have the site evaluation performed by an individual who possesses either a current site evaluator or a professional engineer license.~~]

(b) If the aerobic treatment system owner elects to maintain the system, the aerobic treatment system owner is not required to register with the agency as a maintenance provider, but must comply with the requirements of Chapter 285 of this title (relating to On-Site Sewage Facilities).

(c) [~~(b)~~] A licensed electrician who installs the electrical components, or a person that [~~who~~] delivers a treatment or pump tank and sets the tank or tanks into an excavation, is not required to have an installer license.

(d) [~~(c)~~] A professional engineer may perform site evaluations without obtaining a site evaluator license.

§30.247. Registration of Maintenance Providers.

(a) A maintenance provider must be registered with the executive director.

(b) To register as required by Subchapter A of this chapter (relating to Administration of Occupational Licenses and Registrations), a person must:

(1) meet the requirements of Subchapter A of this chapter;

(2) submit a completed application and a $70 fee to the executive director on a form approved by the executive director;

(3) submit documentation by the manufacturer of an on-site sewage disposal system using aerobic treatment that the applicant is certified to maintain the on-site sewage facility systems under a maintenance contract; and

(4) any additional information required by the executive director.

(c) To renew a maintenance provider registration, a maintenance provider must every two years:

(1) meet the requirements in Subchapter A of this chapter; and

(2) submit a completed renewal application and a $70 fee to the executive director on a form approved by the executive director.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Commission on Environmental Quality
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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§116.12, 116.150, 116.151, 116.160, and 116.610; the repeal of §§116.180 - 116.183, 116.410, and 116.617; and new §§116.121, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, 116.400, 116.402, 116.404, 116.406, 116.617, and 116.1200.

Sections 116.400, 116.402, 116.404, 116.406, and 116.1200 are proposed with identical language as currently exists in §§116.180 - 116.183, and 116.410, respectively. The amended, repealed, and new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

The commission also proposes to rename the title of Subchapter C from Hazardous Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, Section 112(G), 40 CFR Part 63) to Plant-Wide Applicability Limits; to rename the title of Subchapter E from Emergency Orders to Hazardous Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, Section 112(G), 40 CFR Part 63); and to add a new Subchapter K, Emergency Orders.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

EPA adopted revisions to 40 Code of Federal Regulations (CFR) §§52.21, 51.165, and 51.166 in the December 31, 2002, publication of the *Federal Register* (67 FR 251), which amended the application of federal new source review (NSR). Federal NSR is triggered by a new major source or major modification. If the area in which the source will be located is also classified as nonattainment for a pollutant that will be emitted by the source, the source would need to offset the emission increase with emission decreases at other facilities or through the purchase and retirement of emission reduction credits. The source would also have to apply control technology that meets the lowest achievable emission rate to the new and modified units.

Federal NSR reform is intended to limit the instances where federal NSR will be required of facilities that undergo modifications. It will streamline plant modifications by allowing small changes to be completed without the delay associated with federal NSR. Currently, most modifications are evaluated to determine the applicability of federal NSR through a netting exercise. Netting is an accounting exercise where, prior to the modification of a facility, the sum of emission increases and decreases over a specified period of time at the plant site is determined. If the total exceeds the major modification threshold, then the modification is subject to federal NSR. NSR reform provides an additional path that may be taken to avoid federal NSR applicability (plant-wide applicability limit) as well as methods to minimize the emission increase determined in the netting exercise (baseline and actual to projected actual emission rates).

Plant-wide Applicability Limit (PAL)

Plant-wide applicability limit (PAL) is proposed for implementation by building on the current state permitting flexibility provided by the state flexible permit. A plant may have several facilities producing the same pollutant and may apply for this permit to

establish an emission limit on a particular pollutant for those facilities. This limit would be established at the baseline emission rate for the facilities and best available control technology (BACT) must be implemented, on average, on the facilities over an implementation period. This option would be available to state flexible permit holders based on their previous flexible permit review. Modifications at individual facilities resulting in emission increases that stay below the plant-wide limit are exempt from netting. The commission solicits comments on its proposed method of implementing the PAL and the relative benefits of the proposal versus the federal PAL. The commission also solicits comments on the benefits of adopting both the proposed version and the federal version of PAL into the commission's rules, such as a specific PAL model based on an east/west division of the state.

Baseline

The emission increase associated with a modification is determined by taking the difference, in tons per year, between the proposed emission rate and the actual average annual emissions (or baseline emissions) during the baseline period. The baseline period can be any consecutive 24-month period in the previous ten years (typically that period where the emissions from the facility to be modified are the greatest). The baseline period is a 24-month period in the previous five years for electric utility steam generating units.

Actual to Projected Actual Emissions

Actual to projected actual emissions consist of two parts. The first allows for the use of projected actual emissions rates based on projected demand rather than relying solely on the potential to emit, or proposed allowable emission rate, to determine the emission increase associated with the modification at modified and affected units. Secondly, it extends the concept of excluding demand growth from the projected emission increase to all source types by allowing sources to remove that portion of emission increase (the difference between the projected actual emission rate and the baseline emission rate) that could have been accommodated in the baseline years.

NSR reform included two other components, the clean unit designations, and pollution control projects.

As a result of a petition for review of EPA's final action, on June 24, 2005, the District of Columbia Circuit Court of Appeals in *State of New York, et al v. U.S. Environmental Protection Agency*, No. 02-1387, vacated the clean unit and pollution control project provisions of the rule and remanded recordkeeping provisions to the EPA. As a result of this court decision the commission is not proposing rule changes concerning clean unit and federal pollution control projects.

Although the commission is not proposing a federal pollution control project rule, in this rulemaking it proposes changes to the standard permit for state pollution control projects. The standard permit for state pollution control projects allows projects that will have better or equivalent controls, but increases and decreases for projects qualifying for the standard permit for state pollution control projects requires evaluation for federal permitting applicability, which may include netting calculations. This new requirement for the state pollution control projects is also a result of the June 24, 2005, ruling, which does not allow an NSR exemption for incidental emission increases resulting from pollution control projects. In addition, the standard permit for state pollution control projects may be used to authorize emissions reductions and collateral increases for facilities authorized under a permit by rule as long as any collateral increases do not cause emission rates to exceed limits found in 30 TAC §106.4(a), or other standard permits as long as any collateral increases do not exceed the limits of §116.610.

The executive director had considered a federal pollution control project standard permit(FPCP) as a method to authorize collateral emissions that would otherwise qualify as major sources or modifications. The FPCP was part of the NSR reform program adopted by the EPA. A June 24, 2005, decision by the federal Court of Appeals for the District of Columbia vacated that portion of the EPA rules that authorized the FPCP. As a result of this ruling, the commission is not able to propose the FPCP as a method that excludes nonattainment and prevention of significant deterioration (PSD) review without a modification of the court of appeals' decision upon rehearing or appeal. The commission seeks comments on alternative processes for authorizing landfill gas flares and other ancillary facilities that have collateral emissions that would be considered major modifications or major sources for nonattainment or PSD review.

SECTION BY SECTION DISCUSSION

The commission proposes administrative changes throughout this rulemaking to be consistent with guidance provided in the *Texas Legislative Council Drafting Manual*, November 2004, and to conform with Texas Register requirements and agency guidelines.

§116.12. Federal Permit Definitions.

The commission proposes to amend §116.12 by changing the title to reflect the addition of all definitions associated with federal NSR permit applicability analysis. In addition to the changes necessary to incorporate NSR reform into the nonattainment permit program, changes associated with including PSD applicability analysis in §116.12 are also proposed. These definitions now apply to the revised sections of the PSD rules in Chapter 116, Subchapter B, Division 6 of this chapter as well as the new sections associated with PAL permits.

The definition of actual emissions, in paragraph (1), has been modified to exclude this definition from being used in the federal NSR applicability test. When determining whether the emission increase associated with a project is significant, the baseline actual emissions, defined in new paragraph (3), must be used. Paragraph (3)(A) allows electric utility steam generating units to identify baseline actual emissions as the average rate, in tons per year, at which an existing unit emitted the pollutant during any consecutive 24-month period within the five-year period immediately preceding construction. A different time period may be selected if it is shown to be more representative of normal source operations. This is consistent with past guidance provided by EPA for these sources.

Proposed paragraph (3)(B) allows other source types to choose 24 consecutive months in the ten years preceding start of construction to establish their baseline emissions. In this case, the source must adjust this emission rate down for any emission limitations that would currently apply to the facility. These limitations include requirements in the SIP, federal rules with the exception of 40 CFR Part 63, or permit requirements that would apply when the analysis is completed.

Proposed paragraph (3)(C) identifies baseline emissions for new facilities as being zero and also defines baseline emissions for new facilities that have operated for less than two years to be the facility's potential to emit. Paragraph (3)(D) would require

that a project affecting all facilities use the same 24-month baseline period for each pollutant. For example, if a project affected five facilities that emitted volatile organic compounds and particulate matter (PM), all five would have to identify the same baseline period for volatile organic compounds; however, a different 24-month period could be chosen for particulate matter. The source must have sufficient records to document the baseline emissions, which cannot have occurred before November 15, 1990.

Proposed paragraph (3)(D) also requires that baseline emission rates be adjusted down to exclude noncompliant emissions. The EPA's reform rule requires that baseline emissions include startup, shutdown, and malfunction emissions. The commission's policy, which has evolved over a number of years, currently allows for permitting of emissions from certain maintenance, startup, and shutdown activities. Changes to this policy are being evaluated. The commission has been unsuccessful in getting clarification on the EPA's basis for inclusion of malfunction emissions in the baseline calculation. Given these circumstances, proposed paragraph (3)(E) has been added to allow for the inclusion of those emissions that could currently be authorized by permit to be included in the baseline. Given that sources would become aware of this change with adoption of this rule amendment, the effort involved in authorizing these types of emissions, and the baseline period having to be within ten years of the project, this method of determining baseline emissions would be available for some time but not beyond ten years from the effective date of this rule amendment. After that date, all baseline emissions will have to have been authorized under minor or major NSR. The proposed paragraph (3)(D) also requires that fugitive emissions be included in the baseline to the extent they can be quantified.

Proposed paragraphs (6) and (7), associated with the federal definition of clean coal, have been added as a result of including PSD applicability into the definitions under this section. The definition of *de minimis* threshold test would be renumbered as paragraph (11) and would be revised to reference major modification thresholds, including those for PSD as well as nonattainment.

The federal definition of electric utility steam generating unit is provided in proposed new paragraph (12). It identifies those units that are subject to a different baseline emissions determination than other source types. New paragraph (13) would define federally regulated NSR pollutant, providing a comprehensive list of pollutants that may be subject to federal NSR.

The definition for major stationary source would be renumbered as paragraph (15) and would be modified to remove references to facility for clarity, as well as to include PSD review within the definition. 40 CFR §51.166(b)(1) is referenced to identify the PSD major source thresholds. The "source" identified in this definition is the EPA NSR source that is, in most cases, analogous to "account" as defined in 30 TAC §101.1.

A number of changes are proposed for the definition of major modification in renumbered paragraph (16). Language would be added to incorporate PSD review into the definition and references to facility would be removed for clarity. Language would be added to clearly identify the two criteria, a significant project emission increase and a significant net emission increase, that must be met for a modification to be considered major at a major source. The definition would be expanded to identify projects performed at facilities within a PAL as being major modifications if the modifications result in emission increases at facilities outside the PAL that are significant. This requirement ensures that if a PAL is not established for an entire process, any significant emission changes at non-PAL permitted facilities result in a federal permit review. Exceptions would be added to the definition for projects satisfying the requirements for a PAL except as previously noted and for various clean coal projects.

The commission proposes changes to the definition of net emission increase in renumbered paragraph (18) specifying that baseline actual emissions are to be used to determine emission increases and decreases, adjusting the language to accommodate for PSD applicability, and excluding emission increases at facilities under a PAL from being creditable. Under the proposed amendment, emission decreases cannot be counted in both an attainment demonstration and credit for nonattainment netting because this would be double credit for the same reduction. Emission decreases need only be enforceable as a practical matter rather than federally enforceable and the emission decrease cannot have been relied upon in the issuance of a PAL. Emission decreases may be creditable at these types of facilities, but they must go beyond what is required for the permit exclusion or designation. An emission reduction may be generated within a PAL, but the PAL must be lowered by that amount and the reduction must be real and enforceable in the same way as if the PAL were not in place.

The definition of offset ratio in renumbered paragraph (19) has been revised to incorporate the same limits relating to emission reductions that have been relied upon in the issuance of a PAL.

Proposed new paragraphs (20) - (24) have been added to incorporate new definitions from NSR reform related to PALs into the commission rules. These new paragraphs include definitions for: PAL; effective date; PAL major modification; PAL permit; and PAL pollutant.

The requirement to use baseline actual emissions has been added to renumbered paragraph (26), in the definition of project net.

Proposed new paragraphs (27) and (28) are added to define the new concepts of projected actual emissions and projects emissions increase. The project emissions increase may be determined in a different manner than the other emission increases that might be part of a netting exercise (used to determine the net emissions increase). For existing facilities, the emission increase at modified or affected facilities may be determined by using the projected actual emissions rate rather than the potential to emit for the facility. The projected emission rate must be developed using all relevant information including company projections and filings with regulatory authorities. The basis for the projection must be maintained by the source and would be submitted with any documentation required for a state NSR authorization to demonstrate that the project is not subject to federal review. The source would be required to demonstrate compliance with the projected emission rates for ten years if there was a change to the source's potential to emit or increase in capacity. Other affected facilities would be required to demonstrate compliance with projected rates for five years.

The actual to projected actual emissions rate test also allows the source to remove from the project increase any emissions increase that could have been accommodated in the baseline period. These must be unrelated to the project and may include demand growth. This federal rule change extends this concept that was developed for the electrical generation industry where

traditionally there had been a captured, or limited, customer base that was expected to grow at some rate unrelated to the available capacity of the generator. While this concept appears reasonable for the electric power industry as well as some sources with a limited customer base due to geography (such as gasoline terminals), it is not as useful for industries that have national or international markets served by multiple sources. In these cases, a demonstration would need to be made that the market conditions expected in the future are expected to be significantly different than any time in the past ten years and that if they had occurred in the baseline, they would have resulted in different operations. It is likely that this case would only be made in cases such as a prolonged outage at a major producer or a significant shift in market conditions. The determination of what could have been accommodated is limited to what could have been produced or handled and does not allow for changes in emissions that could have occurred due to a lower emission control device efficiency or the use of a fuel or solvent that might have resulted in greater emissions. The commission encourages comments on the interpretations related to the actual to projected actual emissions rate.

A definition for temporary clean coal technology demonstration project is proposed as new paragraph (31) to fully incorporate all of EPA's exclusions to what is considered a major modification under NSR reform.

Existing paragraphs are proposed to be renumbered to accommodate the proposed new definitions.

§116.121. Actual to Projected Actual and Emissions Exclusion Test for Emissions Increases.

This new section is proposed to require documentation associated with the projected actual emissions rates and records of compliance as identified in the federal rule. New subsection (a) would require a demonstration that federal NSR review does not apply be submitted with any permit application or registration. This demonstration must be documented by records that include a project description, the facilities affected, and a description of the applicability test. New subsection (b) would require monitoring of emissions that could increase as a result of the project if projected actual emissions are used to determine the project emission increase at a facility.

New subsection (c) would require electric utility steam generating units to provide the executive director documentation of emissions for each calendar year that records are required under the actual to projected actual test. New subsection (d) would require facilities other than electric generating units to submit a report to the executive director if annual emissions exceed the baseline actual emissions by a significant amount. Any other information that the owner or operator wishes to include in the report, such as an explanation as to why the emissions differ from the preconstruction projection, may be included as well. New subsection (e) would establish record retention periods.

The commission expects that projected actual emissions will be used extensively in registrations or claims for state NSR authorization where a maximum allowable emission rate is not specified in the rule. The use of a projected actual emissions rate for a modified source in a state NSR construction permit is expected to be limited because the state allowable emission rate would not generally be based on an activity level that would not be reached for more than ten years.

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

The proposed amendment to subsection (b) would delete language referring to a modified facility that will be a new major stationary source, which has caused confusion about what constitutes a major modification at an emission source that becomes major after the modification. A minor modification to a minor source that results in a major source does not qualify the modification as major. The commission will refer this determination to the definitions of major stationary source and major modification in §116.12. The commission would also substitute the term "facility" for "emission unit" in subsection (e)(1) for consistency in use of terms. The amendment to this section would also update the reference of the §116.12 title to Federal Permit Definitions.

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

The proposed amendments to this section consist primarily of administrative and formatting changes. This section is proposed to be reformatted into subsections. The reference to November 15, 1992, would be deleted from subsection (a) because that date has passed and is not necessary for application of the section. The commission would also substitute the term "facility" for "emission unit" in subsection (c)(1) for consistency in use of terms. Subsections (b) and (c) are proposed to state when netting will be required.

§116.160. Prevention of Significant Deterioration Requirements.

The proposed amendment to this section would limit the incorporation by reference of definitions from 40 CFR §52.21 that are used to administer the PSD program, deleting most of the language in subsection (a) and all of the language in existing subsections (b) - (d).

Amended subsection (a) would delete the federal rule references and replace them with language that requires a proposed new major source or major modification in an attainment or unclassifiable area to meet the requirements of this section.

The proposed new subsection (b) would state that the *de minimis* threshold test (netting) is required for all modifications to existing major sources of federally regulated NSR pollutants, unless the proposed emissions increases associated with a project, without regard to decreases, are less than major modification thresholds for the pollutant.

Proposed new subsection (c) would incorporate by reference the following definitions and requirements located in 40 CFR §52.21: baseline concentrations, baseline dates, baseline areas, innovative control technology, federal land manager, terrain, Indian reservations/governing bodies, increments, ambient air ceilings, restrictions on area classifications, exclusions from increment consumption, redesignation, stack heights, exemptions, source impact analysis, air quality analysis, source information, additional impact analysis, sources impacting federal Class I areas, and innovative technology. Other definitions used for the PSD program or visibility in Class I areas program are currently in the commission's rules. The proposed amendment would also substitute the term "facility" for "emissions unit" in the definitions incorporated from the CFR because the commission's permitting actions are based on the individual facility or groups of facilities as defined in the commission's rules.

Existing subsection (d) is proposed to be relettered as subsection (e).

In addition to renaming Subchapter C, the commission also proposes new Division 1, Plant-Wide Applicability Limits.

The commission proposes the repeal of existing §116.180, Applicability; §116.181, Exclusions; §116.182, Application; and §116.183, Public Notice Requirements.

Proposed new §§116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, and 116.198 would be in new Division 1.

§116.180. Applicability.

This proposed new section limits a PAL to one pollutant as required by the EPA and a site to one PAL permit in subsection (a). A PAL permit may contain separate PALs for several pollutants and will likely be consolidated with a state or federal construction or flexible permit at the site. Subsections (b) and (c) identify the administrative procedure for changes in ownership as well as responsibility for the PAL permit application.

§116.182. Plant-wide Applicability Limit Permit Application.

This proposed new section identifies the information necessary for a PAL permit application. Paragraph (1) requires the facilities that would be included in the PAL to be identified with their design capacities and potential to emit, and state NSR authorizations. Paragraph (2) requires that the baseline emissions for those facilities be identified so that they may be used to set the PAL. Paragraphs (3) and (5) require the applicant to identify how plans to monitor and use that information will be used to demonstrate compliance with the PAL. This information will serve as a starting point to develop PAL permit conditions.

New paragraphs (4) and (6) would require that BACT, on average, be implemented on all existing facilities to be included in the PAL over a period of time (typically less than five years). This is beyond what the EPA reform requires, but is consistent with the state flexible permit program. BACT also allows flexible permit holders to establish a PAL based on their past flexible permit review to allow for maximum flexibility at a plant site. The BACT requirement does not change the PAL, which is set using baseline emissions for the facilities. Paragraph (6) would require an implementation schedule for BACT if control technology requires upgrading.

§116.184. Application Review Schedule.

This proposed new section would require that PAL applications be reviewed on a schedule similar to other air permits as provided for in §116.114, Application Review Schedule.

§116.186. General and Special Conditions.

This proposed new section identifies the PAL as an annual emission rate for a federally regulated NSR pollutant covering all facilities identified in the application in subsection (a). Emissions from all facilities must be determined and compliance with the PAL must be documented monthly.

Subsection (b) identifies the general conditions applicable to every PAL. Paragraph (1) emphasizes that the PAL is not an authorization to construct but only sets an emission rate, below which federal NSR is not required. Paragraphs (2) and (3) identify sampling procedures and how a permit holder might obtain approval for an equivalent method. These requirements ensure consistency between various types of the commission's air permits.

Subsection (b)(4) would integrate common recordkeeping and reporting requirements for most other air permits with the much more extensive requirements identified in the EPA rule. Subparagraphs (A) and (B) of paragraph (4) require that the PAL permit application, and records associated with demonstrating cap compliance be maintained on site. Subsection (b)(4) includes the reporting requirements from the EPA rule. The semiannual and deviation reporting requirements in the federal rule are redundant with the current requirements in 30 TAC Chapter 122, Federal Operating Permits, and were not included in this proposed rule.

Subsection (b)(5) - (7) contains language common to air permits identifying what facilities are covered by the PAL, and requiring proper operation of control equipment and compliance with all rules. The PAL life of ten years is identified in paragraph (8). Paragraphs (9) and (10) incorporate requirements from the EPA rule requiring facility emissions to be reported as the potential to emit if monitoring data is not available, and that all data used to establish the PAL be re-validated at least every five years.

Subsection (c) identifies those EPA requirements that must be incorporated into the permit through special conditions. All facilities in a PAL must be monitored using one of the following four methods: mass balance; continuous emission monitoring system, continuous parameter monitoring system, or predictive emission monitoring system; or emission factors. An alternate approach may be approved by the executive director. Performance standards for each type of monitoring are specified. The special conditions will also require a BACT implementation schedule, if applicable.

§116.188. Plant-wide Applicability Limit.

This proposed new section identifies how the PAL is to be determined. Paragraph (1) allows the inclusion of emissions up to the significance level in addition to baseline emissions, but notes that adding these emission will affect any evaluation of emission increases at non-PAL sources. Paragraph (2) limits all facilities to the same baseline period for a given pollutant. Paragraph (3) addresses how to determine the PAL if there is a major modification involved. Modified sources contribute their allowable emission rates while existing unmodified sources contribute their baseline emission rates. Paragraph (4) would require that the PAL be reduced for any effective rules that have a future compliance date.

§116.190. Federal Nonattainment and Prevention of Significant Deterioration Review.

This proposed new section identifies that any changes that occur under a PAL are not considered federal modifications unless the PAL will be exceeded. Subsection (b) would restrict the generation of offsets from facilities under a PAL to cases where the PAL is lowered and such a decrease would be creditable without the PAL.

§116.192. Amendments and Alterations.

This proposed new section would allow increases to a PAL only through amendment in subsection (a). Subsection (a) requires that the new or modified facilities causing the need for the PAL increase be reviewed under the appropriate federal NSR program. Modified sources contribute their allowable emission rates to the new PAL while existing unmodified sources contribute their previous emission rates. The amended PAL is subject to public notice. The PAL increases are effective when the new and modified units become operational. Subsection (b) would limit reconsideration of controls associated with a PAL to amendments, but allow for changes in the implementation schedule to be requested through alteration. Subsection (c) identifies other changes that may be completed by alteration. These include changes to the special conditions that do not increase the emission cap, as well

as adding new facilities to the PAL to ensure adequate monitoring is in place.

§116.194. Public Notice and Comment.

This proposed new section requires that all PAL initial issuances, amendments, and renewals go to public notice with a possible notice and comment hearing as specified in 30 TAC Chapter 39, Subchapters H and K, Applicability and General Provisions; and Public Notice of Air Quality Applications.

§116.196. Renewal of a Plant-wide Applicability Limit Permit.

This proposed new section requires that a PAL renewal application be submitted within six to 18 months of the PAL expiration date in subsection (a). Submittal within that time period ensures that the PAL will not expire. Subsection (b) makes all PALs issued with flexible permits under past guidance subject to renewal under this proposed rule. Any PAL that has been in place for more than ten years must be submitted for renewal by December 31, 2006, or within the time specified, whichever is later.

Subsection (c) identifies the information necessary for a renewal application. This information includes: the proposed PAL level; identification of and justification for those qualified facilities to be included in the PAL; the potential to emit for qualified facilities and highest consecutive 12-month emissions in the last ten years for those that are not qualified; the associated state NSR authorizations; and any other information the executive director may require to determine at what level to renew the PAL.

Subsection (d) would require public notice for the renewed PAL, while subsection (e) includes the requirements for establishing the renewed PAL. These include summing the potential to emit for qualified facilities and the greatest rolling 12-month emissions for the facilities that are not qualified. The significance level for the pollutant may be added to that, but in no case may the new PAL level exceed the previous level. The significance level for a criteria pollutant is the netting trigger level found in the definition of major modification (Table 1) in §116.12.

§116.198. Expiration or Voidance.

This proposed new section requires that all BACT upgrades either be complete or be made enforceable in another manner prior to a PAL being voided. Once the controls have been implemented, a PAL may be dissolved at the permit holder's request. There is no need to allocate the PAL among facilities because there will be allowables associated with the state or federal authorizations.

§116.400. Applicability; §116.402. Exclusions; §116.404. Application; and §116.406. Public Notice Requirements.

These proposed new sections contain identical language to that found in the current §§116.180 - 116.183. These sections apply to the regulation of sources of hazardous air pollutants. The new sections are proposed as a reorganization of this chapter in order to accommodate new sections concerning NSR reform and do not contain substantive changes. The commission proposes administrative changes to be consistent with previously mentioned guidelines and to remove dates that are no longer applicable. The commission is not seeking comments on the substance of the sections, but rather, seeking only comments regarding the new organization structure, or non-substantive changes that would improve clarity of these sections.

The commission proposes the repeal of §116.410, Applicability.

§116.610. Applicability.

The proposed amendment to this section would remove references in subsection (a)(1) to specific paragraphs within 30 TAC §106.261 because the paragraph numbering of §106.261 has changed. The reference to 30 TAC §106.262 would be deleted because §106.261 refers to the use of §106.262, when applicable. The proposed change to subsection (b) would delete the exemption from NSR requirements for projects authorized under proposed new §116.617. As discussed earlier, this change is based on the June 24, 2005, decision that vacated EPA rules exempting incidental emission increases from NSR.

The commission proposes the repeal of §116.617, Standard Permits for Pollution Control Projects.

§116.617. State Pollution Control Project Standard Permit.

This proposed new section would incorporate existing requirements listed throughout the current rule, while clarifying the language in new subsection (a). Subsection (a) is organized into paragraphs (1) - (4), which include scope and applicability conditions currently found in existing §116.617. Proposed new subsection (a)(1) lists the three types of existing authorizations that may be modified by a state pollution control projects standard permit. Proposed new subsection (a)(2) clarifies the types of projects that may be authorized by a state pollution control projects standard permit, reorganized from the existing §116.617 requirements.

Proposed new subsection (a)(3) outlines the prohibitions for use of the state pollution control projects standard permit, clarifying the existing intent and requirements of current §116.617. Specifically, subsection (a)(3) does not allow production facilities to be replaced or modified in any way under this authorization since these types of changes need to be reviewed for BACT and potential harmful effects to health and property in accordance with Texas Health and Safety Code (THSC), Chapter 382, the Texas Clean Air Act (TCAA), §382.0518 and §116.610, unless the conditions of a standard permit or permit by rule are met. Proposed subsection (a)(3)(A) states that the standard permit will not be used to authorize complete replacement of an existing facility or reconstruction of a production facility.

Proposed new subsection (a)(3)(B) states that any collateral emission increase associated with the state pollution control projects standard permit must not cause or contribute to any exceedance of a national ambient air quality standard or cause adverse health effects. Proposed new subsection (a)(3)(C) prohibits the use of the state pollution control projects standard permit for the purpose of bringing a facility or group of facilities into compliance with an existing authorization or permit, which, by practice and intent, has never been allowed. Correcting such violations using the state pollution control projects standard permit would circumvent the potential evaluation of BACT and review of environmental and health effects that should have occurred during the original facility authorization review.

Proposed new subsection (a)(4) addresses how projects that have been registered under the existing §116.617 may continue to be authorized and subsequently meet the conditions of this proposed new §116.617. Projects authorized prior to the effective date of this rulemaking may defer the inclusion of emission increases or decreases resulting from the project until future netting calculations. Paragraph (4) allows currently authorized control projects to continue operation uninterrupted until the ten-year renewal anniversary of the original registration or until otherwise incorporated into a permit or standard permit. The current review period of 30 days would be extended to 45 days to allow

evaluation of netting, which would be required under the state pollution control projects standard permit.

Proposed new subsection (b) is organized into paragraphs (1) - (5) and includes the general requirements dispersed throughout current §116.617. Proposed new subsection (b)(1) requires compliance with the specific conditions of §116.604, Duration and Renewal of Registrations to Use Standard Permits; §116.605, Standard Permit Amendment and Revocation; §116.610, Applicability; §116.611, Registration to Use a Standard Permit; §116.614, Standard Permit Fees; and §116.615, General Conditions. While these requirements are not new, they are reorganized to emphasize and remind applicants of these conditions to ensure submittal of more complete registration information.

Proposed new subsection (b)(2) contains a new requirement specifying that construction or implementation of the state pollution control projects standard permit must begin within 180 days of receiving written acceptance of the registration from the executive director, and that changes to maximum allowable emission rates are effective only upon completion or implementation of the project. This requirement is added for three reasons: 1) questions regarding the start of construction deadlines and effective dates of new emissions limitations are frequently asked of the executive director; 2) setting a deadline consistent with §116.120, Voiding of Permits, ensures timely progress toward pollution control; and 3) this deadline keeps any emission changes within a contemporaneous netting window if federal permit applicability is of concern.

Proposed new subsection (b)(3) would exempt for state pollution control projects standard permits from the emission limits and distance requirements of permit by rule, §106.261, as referenced in §116.610(a)(1). Pollution control projects are considered environmentally beneficial so any emission increases associated with these projects do not require further authorization.

Proposed new subsection (b)(4) contains a new requirement that predictable maintenance, startup, and shutdown (MSS) emissions directly associated with the state pollution control projects standard permit be included in the maximum emissions represented in the registration application, consistent with the ongoing efforts of the commission to authorize all aspects of normal operations. The commission solicits comments regarding the calculation, reporting, and inclusion of MSS emissions within this standard permit.

Proposed new subsection (b)(5) contains the same requirements as in current §116.617(5) and (6) and limits emission increases to only those directly as a result of the pollution control project. Any incidental production capacity cannot be authorized by the state pollution control projects standard permit, but requires some other preconstruction authorization.

Proposed new subsection (c) includes the same requirements as in current §116.617(4), as well as two new requirements. Subsection (c) is organized into paragraphs (1) - (3) and pertains to requirements specific to replacement projects. Proposed subsection (c)(1) repeats the current §116.617(4) and allows replacement controls or techniques to be different than those currently authorized as long as the new project is at least as effective in controlling emissions. Proposed new subsection (c)(2) allows for increases in MSS emissions if these emissions were reviewed as part of the original authorization for the existing control equipment or technique, and if the increases are necessary to implement the replacement project. Proposed new subsection (c)(3) is a new requirement and is intended to clarify that the applicable testing and recordkeeping requirements associated with the currently permitted control or technique apply to the replacement to ensure continuing compliance with associated emission limits. If the control or technique is substantially different than an existing control or technique, applicants may also propose equivalent alternatives for review by the executive director.

Proposed new subsection (d) clarifies the requirements of current §116.617(4)(C), adds varying fees for different project types, and clearly specifies documentation required in a state pollution control projects standard permit registration application. Proposed new subsection (d)(1) includes existing language found in current §116.617(4)(C), but changes the required fees based on whether the project or change in representation results in an increase in the maximum authorized emission rates. Changes to fee requirements are proposed to encourage the installation and use of pollution control projects, especially where there is no increase in emissions or the changes require minimal review. This subsection also describes when a registration should be submitted and when construction or implementation may begin. Various deadlines are proposed to provide flexibility and encourage the use of pollution control projects. Regardless of these deadlines, all projects must meet all requirements of the state pollution control projects standard permit and the responsibility to do so remains with the applicant at all times. Proposed new subsection (d)(2) clarifies current registration requirements. These include a process and project description, a list of affected permits and emission points, calculated emission rates, the basis of those emission rates, proposed monitoring and recordkeeping, and the proposed method for incorporating the state pollution control projects standard permit into existing permits.

Proposed new subsection (e) incorporates requirements found in §116.615, General Conditions, but expands, clarifies, and focuses those requirements specifically for the state pollution control projects standard permit. Proposed new subsection (e)(1) emphasizes that a project should be constructed and operated in accordance with good engineering practices to minimize emissions. Proposed new subsection (e)(2) specifically requires copies of documentation to be kept demonstrating compliance with this standard permit.

Proposed new subsection (f) provides clarification of the procedures for, and under what conditions, a state pollution control projects standard permit should be incorporated or administratively referenced into a facility's NSR authorization. Proposed new subsection (f)(1) applies to facilities authorized by a permit or standard permit. Proposed new subsection (f)(1) applies to those state pollution control projects standard permits that authorize new facilities or changes in method of control and would require incorporation upon the next amendment or renewal of the facility's authorization. Although incorporation is not a new requirement, subsection (f)(1) clarifies that the project will have an impacts review, no evaluation of BACT is required, and that the increases will not trigger public notice.

Proposed new subsection (f)(2) applies to facilities authorized under a permit by rule and requires that all increases in previously authorized emissions, new facilities, or changes in method of control or technique authorized by this standard permit comply with §106.4, except for the emission limitations in §106.4(a)(1) and §106.8.

§116.1200. Applicability.

This proposed new section contains the identical language found in existing §116.410 and allows facility owners or operators to apply to the commission for a suspension of permit conditions for the addition, repair, or replacement of control equipment in the event of a catastrophe. This new section is proposed in order to reorganize this chapter to accommodate new sections associated with NSR reform and does not contain substantive changes. The commission is not seeking comment on the substance of the section, but rather, seeking only comments regarding the new organization structure or non-substantive changes that would improve the clarity of this section.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed rules would implement EPA regulations concerning NSR reform.

The proposed rules seek to implement NSR reform by repealing, amending, and proposing new sections of this chapter. EPA received feedback that needed improvements to facilities have not been undertaken because of the cost of federal NSR evaluations. EPA indicated that the intent of the reform of the process is to limit the instances of modification that would, under current rules, trigger federal NSR. Fewer planned facility modifications would be subject to emission accounting exercises where increases and decreases of emissions in a certain time period are totaled to determine if a facility modification is classified as a major modification and, therefore, subject to federal NSR.

Reform of federal NSR offers options by which facility owners or operators can avoid the triggering mechanisms of federal NSR. The reforms that these proposed rules would implement are: state pollution control and prevention projects, PALs, and changes in the calculation of emission increases and actual emission baselines. The use of these reforms is not mandatory and owners or operators of modified facilities would implement these reforms on a voluntary basis.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be consistency between federal and state regulations concerning NSR. Owners or operators making facility modifications would not incur the cost of procedures, upgrades to emission equipment, or the purchase of pollution credits that could be required under federal NSR.

Industry would save costs by reducing the number of facility modifications that would be subject to federal NSR. Fewer emission increases that result from facility modification would have to be offset by emission reductions, upgrade of emission controls, or by the purchase of emission credits or allowances. The exact amount of cost savings at this time is not known due to the variety of methods and operating systems employed by different entities in industry. However, savings could be as much as $40,000 per ton of pollutant, the current market price of an emission credit, which an entity would have been required to purchase under NSR if emission calculations showed planned modifications would increase emissions above the allowable amount.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. A small business is defined as having fewer than 100 employees or less than $1 million in annual gross receipts. A micro-business is defined as having no more than 20 employees. Typically, small or micro-businesses do not participate in the type of industrial activities to which NSR, and therefore, NSR reform would apply.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission 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 proposed rulemaking does not meet the definition of a "major environmental rule." Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). 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 proposed rulemaking would revise the rules regarding federal permitting applicability, including adding additional options under federal air quality permitting applicability and plant-wide applicability limit options. The proposed rulemaking revises the existing pollution control projects standard permit. In addition, the proposed rulemaking would modify and add definitions, and change some general formatting of this chapter. The proposed rules will not 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.

In addition, Texas Government Code, §2001.0225, only applies 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 do not exceed a standard set by federal law or exceed an express requirement of state law. The proposed rules do not incorporate federal NSR reform verbatim but provide for a different, yet equivalent, approach for implementation that is best suited to benefit Texas' industry and environment. This equivalence will also be demonstrated to EPA for these rules to be included in the SIP. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of the THSC and the Texas Water Code (TWC) that are cited in the STATUTORY AUTHORITY section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government

Code, §2001.0225(b), because the proposed rules do not meet any of the four applicability requirements.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the proposed rules, including adding additional options under federal air quality permitting applicability and plant-wide applicability limit options. The proposed rulemaking revises the existing pollution control projects standard permit. The specific purpose of this rulemaking is to revise the rules regarding federal permitting applicability. In addition, the proposed rulemaking would modify and add definitions, and change some general formatting of this chapter. Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking because they do not affect private real property. Specifically, the proposed rules do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Therefore, the proposed rules do not constitute a takings 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's 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, the commission's rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action 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)). No new sources of air contaminants will be authorized and the proposed revisions will maintain the same level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is the policy that the commission's 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 action 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 action is consistent with CMP goals and policies.

The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The new and amended sections in this proposal are applicable requirements under Chapter 122. Upon the effective date of this rulemaking, owners or operators subject to the Federal Operating Permit Program that modify any NSR authorized sources at their sites will be subject to the amended requirements of these sections.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on October 27, 2005, at 2:00 p.m. in Building B, Room 201A, 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 before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact Joyce Spencer, Office of Legal Services, at (512) 239-5017. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, MC 205, Texas Register Team, Office of Legal Services, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., October 31, 2005, and should reference Rule Project Number 2005-010-116-PR. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Beecher Cameron, Air Permits Division, at (512) 239-1495 or Kurt Kind, Air Permits Division, at (512) 239-1337.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.12

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.0512, concerning Modification of Existing Facility, which establishes a modification and its limits; §382.0518, concerning Preconstruction Permit, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility; and Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.*, which requires permits for construction and operation of new or modified major stationary sources.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.051, 382.0512, and 382.0518; and FCAA, 42 USC, §§7401 *et seq*.

§116.12. Federal Permit [~~Nonattainment Review~~] Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas. In addition to the terms 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 title (relating to Nonattainment Review and Prevention of Significant Deterioration Review); and Chapter 116, Subchapter C, Division 1 of this title (relating to Plant-Wide Applicability Limits) [~~§116.150 and §116.151 of this title (relating to Nonattainment Review)~~], 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 a two-year 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 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) (No change.)

(3) Baseline actual emissions--The average rate of actual 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 reviewing authority 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 average 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 average actual 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 average actual emissions rate shall include fugitive emissions to the extent quantifiable. Until March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under Chapter 101 of this title (relating to General Air Quality Rules) may be included to the extent that they have been authorized, or are being authorized, in a permit action under Chapter 106 of this title (relating to Permits by Rule) and this chapter.

(4) [~~(3)~~] 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.

(5) [~~(4)~~] 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.

(6) 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.

(7) 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.

(8) [~~(5)~~] 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.

(9) [~~(6)~~] 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.

(10) [~~(7)~~] 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.

(11) [~~(8)~~] *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 major modification threshold [~~MAJOR MODIFICATION column of Table I located in the definition of major modification in this section~~] for that pollutant [~~specific nonattainment area~~]. If the major modification level is exceeded, then prevention of significant deterioration and/or nonattainment review is required.

(12) 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 also considered in determining the electrical energy output capacity of the affected facility.

(13) Federally regulated new source review pollutant--As defined in subparagraphs (A) - (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.

(14) [~~(9)~~] 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.

(15) [~~(10)~~] Major [~~facility/~~] stationary source--Any [~~facility/~~] stationary source that emits, or has the potential to emit, a threshold quantity of emissions [~~the amount specified in the MAJOR SOURCE column of Table I located in the definition of major modification in this section~~] 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 provided 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 §51.166(b)(1). A source that is major for one prevention of significant deterioration pollutant is considered major for all prevention of significant deterioration pollutants. Any physical change that would occur at a stationary source not qualifying as a major stationary source will make the source major [~~in Table I of this section~~], if the change would constitute a major stationary source by itself. 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 Code of Federal Regulations §51.165(a)(1)(iv)(C).

(16) [~~(11)~~] Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a major [~~facility/~~] stationary source that causes a significant project emissions increase and a significant net emissions increase for any federally regulated new source review pollutant [~~air contaminant for which a national ambient air quality standard (NAAQS) has been issued~~]. At a [~~facility/~~] stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified for a major source [~~in the MAJOR SOURCE column of Table I of this section~~]. At an existing major [~~facility/~~] stationary source, the increase must equal or exceed that specified for a major modification to be significant. The major source and major modification 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. Any physical change in, or change in the method of operation of a facility in a plant-wide applicability limit (PAL) that causes a significant project emissions increase for any federally regulated new source review pollutant at non-PAL facilities is a major modification. [~~in the MAJOR MODIFICATION column of Table I.~~]
Figure: 30 TAC §116.12(16)(A)
[~~Figure: 30 TAC §116.12(11)(A)~~]

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

(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 unless the project emission increases at non-PAL facilities are significant;

(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.

(17) [~~(12)~~] 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.

(18) [~~(13)~~] Net emissions increase--The amount by which the sum of the following exceeds zero: the total increase in actual emissions from a particular physical change or change in the method of operation at a stationary source, 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 [~~actual~~] emissions is creditable only if both of the following conditions are met:

(i) it occurs during the contemporaneous period; and

(ii) the executive director has not relied on it in issuing a federal permit of same type [~~nonattainment permit~~] for the source and that permit is in effect [~~(under regulations approved during which the permit is in effect)~~] when the increase in [~~actual~~] emissions from the particular change occurs.

(B) An increase in [~~actual~~] 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 [~~actual~~] emissions exceeds the baseline actual emission rate. Emission increases at facilities under a plant-wide applicability limit are not creditable. [~~old level.~~]

(C) A decrease in [~~actual~~] emissions is creditable only to the extent that all of the following conditions are met:

(i) the baseline actual emission rate [~~old level of actual emissions or the old level of allowable emissions, whichever is lower,~~] exceeds the new level of [~~actual~~] emissions;

(ii) it is enforceable as a practical matter [~~federally enforceable~~] at and after the time that actual construction on the particular change begins;

(iii) the reviewing authority has not relied on it in issuing a prevention of significant deterioration, [~~or a~~] nonattainment , or plant-wide applicability limit permit; [~~permit, or the state has not relied on the decrease to demonstrate attainment or reasonable further progress; and~~]

(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.

(19) [~~(14)~~] Offset ratio--For the purpose of satisfying the emissions offset reduction requirements of the 42 United States Code, §7503(a)(1)(A), the emissions offset ratio is the ratio of total actual reductions of emissions to total [~~allowable~~] emissions increases of such pollutants. The minimum offset ratios are included in Table I of this section under the definition of major modification [~~of this section~~]. 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 or 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, or plant-wide applicability limit permit.

(20) Plant-wide applicability limit--An emission limitation expressed, in tons per year, for a pollutant at a major stationary source, that is enforceable as a practical matter and established in a plant-wide applicability limit permit under §116.186 of this title (relating to General and Special Conditions).

(21) Plant-wide applicability limit effective date--The date of issuance of the plant-wide applicability limit permit. The plant-wide applicability limit effective date for a plant-wide applicability limit established in an existing flexible permit is the date that the flexible permit was issued.

(22) 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.

(23) Plant-wide applicability limit permit--The state or federal new source review permit that establishes the plant-wide applicability limit.

(24) Plant-wide applicability limit pollutant--The pollutant for which a plant-wide applicability limit is established.

(25) [~~(15)~~] Potential to emit--The maximum capacity of a [~~facility/~~] stationary source to emit a pollutant under its physical and operational design. Any physical or enforceable operational limitation on the capacity of the [~~facility/~~] 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.

(26) [~~(16)~~] Project net--The sum of the following: the total proposed increase in emissions resulting from a physical change or change in the method of operation at a stationary source, minus any sourcewide creditable [~~actual~~] emission decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. 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.

(27) 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 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.

(28) 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.

(29) [~~(17)~~] 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.

(30) [~~(18)~~] 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*.

(31) 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.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron Perdue
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SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.121

STATUTORY AUTHORITY

The new section is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new section is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.0512, concerning Modification of Existing Facility, which establishes a modification and its limits; §382.0518, concerning Preconstruction Permit,

which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility; and FCAA, 42 USC, §§7401 *et seq.*, which requires permits for construction and operation of new or modified major stationary sources.

The proposed new section implements THSC, §§382.002, 382.011, 382.012, 382.051, 382.0512, and 382.0518; and FCAA, 42 United States Code, §§7401 *et seq*.

§116.121. Actual to Projected Actual and Emissions Exclusion Test for Emissions Increases.

(a) If projected actual emissions are used or emissions are excluded from the emission increase resulting from the project, the owner or operator shall document and maintain a record of the following information before beginning construction, and this information will be provided as part of the notification, certification, registration, or application submitted to the executive director to claim or apply for state new source review authorization for the project. If the emissions unit is an existing electric utility steam generating unit, the owner or operator shall provide a copy of this information to the executive director before beginning actual construction:

(1) a description of the project;

(2) identification of the facilities of which emissions of a federally regulated new source review pollutant could be affected by the project; and

(3) a description of the applicability test used to determine that the project is not a major modification for any pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded from the project emissions increase and an explanation for why such amount was excluded, and any netting calculations, if applicable.

(b) If projected actual emissions are used to determine the project emission increase at a facility, the owner or operator shall monitor the emissions of any regulated new source review pollutant that could increase as a result of the project at that facility and calculate and maintain a record of the annual emissions from that facility, in tons per year, on a calendar year basis for:

(1) a period of five years following resumption of regular operations after the change; or

(2) a period of ten years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated new source review pollutant at that facility.

(c) If the facility is an electric utility steam generating unit, the owner or operator shall submit a report to the executive director within 60 days after the end of each year of which records must be maintained setting out the unit's annual emissions during the calendar year that preceded submission of the report.

(d) If the facility is not an electric utility steam generating unit, the owner or operator shall submit a report to the executive director if the annual emissions from the project exceed the baseline actual emissions by a significant amount for that pollutant, and the emissions exceed the preconstruction projection for any facility. The report shall be submitted to the executive director within 60 days after the end of such year. The report shall contain:

(1) the name, address, and telephone number of the major stationary source; and

(2) the calculated actual annual emissions.

(e) The owner or operator of the facility shall make the required information maintained to document projected actual emissions and any emissions excluded from the project emission increase available for review upon request for inspection by the executive director, local air pollution control program, and the general public.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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DIVISION 5. NONATTAINMENT REVIEW PERMITS

30 TAC §116.150, §116.151

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.0512, concerning Modification of Existing Facility, which establishes a modification and its limits; §382.0518, concerning Preconstruction Permit, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility; and FCAA, 42 USC, §§7401 *et seq.*, which requires permits for construction and operation of new or modified major stationary sources.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.051, 382.0512, and 382.0518; and FCAA, 42 USC, §§7401 *et seq*.

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

(a) (No change.)

(b) The owner or operator of a proposed new [~~or modified facility that will be a new~~] major stationary source , as defined in §116.12 of this title (relating to Federal Permit Definitions) of volatile organic compound (VOC) emissions or nitrogen oxides (NO_x) emissions, or the

owner or operator of an existing [~~major~~] stationary source of VOC or NO_x emissions that will undergo a major modification, as defined in §116.12 of this title with respect to VOC or NO_x, shall meet the requirements of subsection (e)(1) - (4) of this section, except as provided in subsection (f) of this section. Table I, located in the definition of major modification [~~modifications~~] in §116.12 of this title, [(~~relating to Nonattainment Review Definitions~~)] specifies the various classifications of nonattainment along with the associated emission levels that designate a major stationary source or major modification for those classifications.

(c) - (d) (No change.)

(e) In applying the *de minimis* threshold test, if the net emissions increases, aggregated over the contemporaneous period, are greater than the major modification levels stated in Table I located in the definition of major modification in §116.12 of this title, then the following requirements apply.

(1) The proposed facility shall comply with the lowest achievable emission rate (LAER) as defined in §116.12 of this title for the nonattainment pollutants for which the facility is a new major source or major modification except as provided in paragraph (3)(B) of this subsection and except for existing major stationary sources that have a potential to emit (PTE) of less than 100 tpy of the applicable nonattainment pollutant. For these sources, best available control technology (BACT) can be substituted for LAER. LAER shall otherwise be applied to each new facility [~~emission unit~~] and to each existing facility [~~emission unit~~] at which the net emissions increase will occur as a result of a physical change or change in method of operation of the unit.

(2) - (4) (No change.)

(f) (No change.)

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

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

(b) The *de minimis* threshold test (netting) 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 the major modification threshold for the pollutant identified in Table I of §116.12 of this title.

(c) In applying the *de minimis* threshold test, if the net emissions increases, aggregated over the contemporaneous period, are greater than the major modification levels stated in Table I of §116.12 of this title, the following requirements apply.

(1) The proposed facility shall comply with the lowest achievable emission rate (LAER) as defined in §116.12 of this title for the nonattainment pollutants for which the facility is a new major source or major modification. LAER shall be applied to each new facility [~~emission unit~~] and to each existing facility [~~emission unit~~] at which the net emissions increase will occur as a result of a physical change or change in method of operation of the unit.

(2) All major stationary sources owned or operated by the applicant (or by any person controlling, controlled by, or under common control with the applicant) in the state shall be in compliance or on a schedule for compliance with all applicable state and federal emission limits and standards.

(3) At the time the new or modified facility or facilities commence operation, the emission increases from the new or modified facility or facilities shall be offset. The proposed facility shall use the offset ratio for the appropriate nonattainment classification as defined in §116.12 of this title and shown in Table I of §116.12 of this title.

(4) In accordance with the Federal Clean Air Act, the permit application shall contain an analysis of alternative sites, sizes, production processes, and control techniques for the proposed source. The analysis shall demonstrate that the benefits of the proposed location and source configuration significantly outweigh the environmental and social costs of that location.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron Perdue
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DIVISION 6. PREVENTION OF SIGNIFICANT DETERIORATION REVIEW

30 TAC §116.160

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.0512, concerning Modification of Existing Facility, which establishes a modification and its limits; §382.0518, concerning Preconstruction Permit, which requires that a permit be obtained from the commission

prior to new construction or modification of an existing facility; and FCAA, 42 USC, §§7401 *et seq.*, which requires permits for construction and operation of new or modified major stationary sources.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.051, 382.0512, and 382.0518; 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. 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. [~~Prevention of Significant Deterioration (PSD) of Air Quality regulations promulgated by the EPA in Title 40 Code of Federal Regulations (CFR) at 40 CFR §52.21 as amended March 12, 1996 and the Definitions for Protection of Visibility promulgated at 40 CFR §51.301 as amended July 1, 1999, hereby incorporated by reference.~~]

(b) The *de minimis* threshold test (netting) 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).

(c) In applying the *de minimis* threshold test (netting), if the net emissions increases, aggregated over the contemporaneous period, are greater than the major modification levels for the pollutant identified in 40 CFR 52.21(b)(23), the following requirements apply.

(1) In addition to those definitions in §116.12 of this title (relating to Federal Permit 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)(13) - (15), concerning 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) - (i), concerning increments, ambient air ceilings, restrictions on area classifications, exclusions from increment consumption, redesignation, stack heights, and exemptions;

(B) 40 CFR §52.21(k), concerning source impact analysis;

(C) 40 CFR §52.21(m) - (p), concerning air quality analysis, source information, additional impact analysis, and sources impacting federal Class I areas; 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) A determination to issue or not issue a permit shall be made within one year after receipt of a complete permit application, provided a contested case hearing has not been called on the application.

[~~(b) The following paragraphs are excluded:~~]

[~~(1) 40 CFR §52.21(j), concerning control technology review;~~]

[~~(2) 40 CFR §52.21(l), concerning air quality models;~~]

[~~(3) 40 CFR §52.21(q), concerning public notification (provided, however, that a determination to issue or not issue a permit shall be made within one year after receipt of a complete permit application so long as a contested case hearing has not been called on the application);~~]

[~~(4) 40 CFR §52.21(r)(2), concerning source obligation;~~]

[~~(5) 40 CFR §52.21(s), concerning environmental impact statements;~~]

[~~(6) 40 CFR §52.21(u), concerning delegation of authority; and~~]

[~~(7) 40 CFR §52.21(w), concerning permit rescission.~~]

[~~(c) The definitions of building, structure, facility, or installation (40 CFR §52.21(b)(6)) and secondary emissions (40 CFR §52.21(b)(18)) are excluded and replaced with the following definitions:~~]

[~~(1) building, structure, facility, or installation - all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.~~]

[~~(2) secondary emissions - emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emission except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.~~]

[~~(d) The term "executive director" shall replace the word "administrator," except in 40 CFR §52.21(b)(17), (f)(1)(v), (f)(3), (f)(4)(i), (g), and (t). "Administrator or executive director" shall replace "administrator" in 40 CFR §52.21(b)(3)(iii), and "administrator and executive director" shall replace "administrator" in 40 CFR §52.21(p)(2).~~]

(d) [~~(e)~~] 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 [~~PSD~~] 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.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron Perdue
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SUBCHAPTER C. HAZARDOUS AIR POLLUTANTS: REGULATIONS GOVERNING CONSTRUCTED OR RECONSTRUCTED MAJOR SOURCES (FCAA, SECTION 112(G), 40 CFR PART 63)

30 TAC §§116.180 - 116.183

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeals are proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The repeals are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.0512, concerning Modification of Existing Facility, which establishes a modification and its limits; §382.0518, concerning Preconstruction Permit, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility; and FCAA, 42 USC, §§7401 *et seq.*, which requires permits for construction and operation of new or modified major stationary sources.

The proposed repeals implement THSC, §§382.002, 382.011, 382.012, 382.051, 382.0512, and 382.0518; and FCAA, 42 USC, §§7401 *et seq*.

§116.180. Applicability.

§116.181. Exclusions.

§116.182. Application.

§116.183. Public Notice Requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. PLANT-WIDE APPLICABILITY LIMITS
DIVISION 1. PLANT-WIDE APPLICABILITY LIMITS

30 TAC §§116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198

STATUTORY AUTHORITY

The new sections are proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.0512, concerning Modification of Existing Facility, which establishes a modification and its limits; §382.0518, concerning Preconstruction Permit, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility; and FCAA, 42 USC, §§7401 *et seq.*, which requires permits for construction and operation of new or modified major stationary sources.

The proposed new sections implement THSC, §§382.002, 382.011, 382.012, 382.051, 382.0512, and 382.0518; and FCAA, 42 USC, §§7401 *et seq*.

§116.180. Applicability.

(a) The following requirements apply to a plant-wide applicability limit (PAL) permit.

(1) Only one PAL may be issued for each pollutant at an account site.

(2) A PAL permit may include more than one PAL.

(3) A PAL permit may not cover facilities at more than one source.

(4) A PAL permit may be may be consolidated with a state or federal permit at the source.

(b) The new owner of a facility, group of facilities, or account shall comply with §116.110(e) of this title (relating to Applicability), provided that all facilities covered by a PAL permit change ownership at the same time and to the same person, or both the new owner and existing permit holder must obtain a PAL permit alteration allocating the emission prior to the transfer of the permit by the commission. After the sale of a facility, or facilities, but prior to the transfer of a permit requiring a permit alteration, the original PAL permit holder remains responsible for ensuring compliance with the existing PAL permit and all rules and regulations of the commission.

(c) The owner of the facility, group of facilities, or account or the operator of the facility, group of facilities, or account that is authorized to act for the owner is responsible for complying with this section, except as provided by subsection (b) of this section.

§116.182. Plant-wide Applicability Limit Permit Application.

Any application for a new plant-wide applicability limit (PAL) permit or PAL permit amendment must include a completed application that must be signed by an authorized representative. In order to be granted a PAL permit or PAL permit amendment, the owner or operator of the proposed facility shall submit information to the commission that demonstrates that all of the following information is submitted:

(1) a list of all facilities, including their registration or permit number to be included in the PAL, their potential to emit, and the expected maximum capacity. In addition, the owner or operator of the source shall indicate which, if any, federal or state applicable requirements, emission limitations, or work practices apply to each unit;

(2) calculations of the baseline actual emissions with supporting documentation;

(3) the calculation procedures that the permit holder proposes to use to convert the monitoring system data to monthly emissions and annual emissions based on a 12-month rolling total for each month;

(4) use of best available control technology (BACT) at the proposed facility or group of facilities, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility on a proposed facility, group of facilities, or account basis. Control technology beyond BACT may be used on certain facilities to provide the emission reductions necessary to comply with this requirement on a group of facilities or account basis, provided that the existing level of control may not be lessened for any facility. Until December 31, 2006, facilities authorized by a flexible permit under Subchapter G of this chapter (relating to Flexible Permits) may satisfy this requirement on the basis of that review if the PAL effective period is limited to ten years from the date the PAL permit was issued. Facilities with flexible permits issued more than ten years ago must satisfy the control requirements for PAL permit renewals and the PAL effective period is limited to 20 years after the flexible permit issuance date;

(5) the monitoring and recordkeeping proposed satisfy the requirements of §116.186 of this title (relating to General and Special Conditions) for each PAL; and

(6) a control technology implementation schedule, if necessary, to satisfy the BACT requirement in paragraph (4) of this section.

§116.184. Application Review Schedule.

The plant-wide applicability limit permit application will be reviewed by the commission in accordance with §116.114 of this title (relating to Application Review Schedule).

§116.186. General and Special Conditions.

(a) The plant-wide applicability limit (PAL) will impose an annual emission limitation in tons per year, that is enforceable as a practical matter, for all facilities included in the PAL. For each month during the PAL effective period after the first 12 months of establishing a PAL, the major stationary source owner or operator shall show that the sum of the monthly emissions from each facility under the PAL for the previous 12 consecutive months is less than the PAL (a 12-month average, rolled monthly). For each month during the first 11 months from the PAL effective date, the major stationary source owner or operator shall show that the sum of the preceding monthly emissions from the PAL effective date for each facility under the PAL is less than the PAL. Each PAL must include emissions of only one pollutant. The PAL must include all emissions, including fugitive emissions, to the extent quantifiable, from all facilities included in the PAL that emit or have the potential to emit the PAL pollutant.

(b) The following general conditions will be applicable to every PAL permit.

(1) Applicability. This section does not authorize any facility to emit air pollutants but establishes an annual emissions level below which new and modified facilities will not be subject to federal new source review for that pollutant.

(2) Sampling requirements. If sampling of stacks or process vents is required, the PAL permit holder shall contact the commission's Office of Compliance and Enforcement prior to sampling to obtain the proper data forms and procedures. All sampling and testing procedures must be approved by the executive director and coordinated with the appropriate regional office of the commission. The PAL permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(3) Equivalency of methods. It shall be the responsibility of the PAL permit holder to demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the PAL permit. Alternative methods must be applied for in writing and must be reviewed and approved by the executive director prior to their use in fulfilling any requirements of the permit.

(4) Recordkeeping and reporting.

(A) A copy of the PAL permit along with information and data sufficient to demonstrate continuous compliance with the emission caps contained in the PAL permit must be maintained in a file at the plant site and made available at the request of personnel from the agency or any air pollution control program having jurisdiction. For facilities that normally operate unattended, this information must be maintained at the nearest staffed location within Texas specified by the permit holder in the permit application. This information may include, but is not limited to, emission cap and individual emission limitation calculations based on a 12-month rolling basis and production records and operating hours. Additional recordkeeping requirements may be specified in special conditions attached to the PAL permit.

(B) The owner or operator shall retain a copy of the PAL permit application and any applications for revisions to the PAL, each annual certification of compliance under §122.146 of this title (relating to Compliance Certification Terms and Conditions), and the

data relied on in certifying the compliance for the duration of the PAL plus five years.

(5) Plantwide applicability limits. A PAL permit covers only those sources of emissions and those air contaminants identified in the table attached to the permit.

(6) Maintenance of emission control. The facilities covered by the PAL permit will not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations.

(7) Compliance with rules. Acceptance of a PAL permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all rules and orders of the commission issued in conformity with the Texas Clean Air Act and the conditions precedent to the granting of the permit. If more than one state or federal rule or PAL permit condition is applicable, then the most stringent limit or condition will govern and be the standard by which compliance must be demonstrated. Acceptance includes consent to the entrance of commission employees and agents into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the PAL permit.

(8) Effective period. The PAL will be effective for ten years.

(9) Absence of monitoring data. A source owner or operator shall record and report maximum potential emissions without considering enforceable emission limitations or operational restrictions for a facility during any period of time that there is no monitoring data, unless another method for determining emissions during such periods is specified in the PAL permit special conditions.

(10) Re-validation. All data used to establish the PAL pollutant must be re-validated through performance testing or other scientifically valid means approved by the executive director. Such testing must occur at least once every five years after issuance of the PAL.

(c) Each PAL permit must include special conditions that satisfy the following requirements.

(1) The PAL monitoring system must accurately determine all emissions of the PAL pollutant in terms of mass per unit of time. Any monitoring system authorized for use in the PAL permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation. Additionally, the information generated by such a system must meet minimum legal requirements for admissibility in a judicial proceeding to enforce the PAL permit.

(2) The PAL monitoring system must employ one or more of the general monitoring approaches meeting the minimum requirements as described in subparagraphs (A) - (D) of this paragraph.

(A) An owner or operator using mass balance calculations to monitor PAL pollutant emissions from activities using coating or solvents shall meet the following requirements:

(i) provide a demonstrated means of validating the published content of the PAL pollutant that is contained in, or created by, all materials used in or at the facility;

(ii) assume that the facility emits all of the PAL pollutant that is contained in, or created by, any raw material or fuel used in or at the facility, if it cannot otherwise be accounted for in the process; and

(iii) where the vendor of a material or fuel that is used in or at the facility publishes a range of pollutant content from such material, the owner or operator shall use the highest value of the range to calculate the PAL pollutant emissions unless the executive director determines that there is site-specific data or a site-specific monitoring program to support another content within the range.

(B) An owner or operator using a continuous emission monitoring system (CEMS) to monitor PAL pollutant emissions shall meet the following requirements.

(i) The CEMS must comply with applicable performance specifications found in 40 Code of Federal Regulations Part 60, Appendix B.

(ii) The CEMS must sample, analyze, and record data at least every 15 minutes while the emissions unit is operating.

(C) An owner or operator using continuous parameter monitoring system (CPMS) or predictive emission monitoring system (PEMS) to monitor PAL pollutant emissions shall meet the following requirements.

(i) The CPMS or the PEMS must be based on current site-specific data demonstrating a correlation between the monitored parameter(s) and the PAL pollutant emissions across the range of operation of the facility.

(ii) Each CPMS or PEMS must sample, analyze, and record data at least every 15 minutes or at another less frequent interval approved by the executive director, while the facility is operating.

(D) An owner or operator using emission factors to monitor PAL pollutant emissions shall meet the following requirement.

(i) All emission factors must be adjusted, if appropriate, to account for the degree of uncertainty or limitations in the factors' development.

(ii) The facility must operate within the designated range of use for the emission factor, if applicable.

(iii) If technically practicable, the owner or operator of a significant facility that relies on an emission factor to calculate PAL pollutant emissions shall conduct validation testing to determine a site-specific emission factor within six months of PAL permit issuance, unless the executive director determines that testing is not required.

(E) An alternative monitoring approach must meet the requirements in paragraph (1) of this subsection and be approved by the executive director.

(3) Where an owner or operator of a facility cannot demonstrate a correlation between a monitored parameter(s) and the PAL pollutant emissions rate at all operating points of the facility, the executive director shall:

(A) establish default value(s) for determining compliance with the PAL based on the highest potential emissions reasonably estimated at such operating point(s); or

(B) determine that operation of the facility during operating conditions when there is no correlation between monitored parameter(s) and the PAL pollutant emissions is a violation of the PAL.

(4) If a facility requires the installation of additional controls to meet the best available control technology requirement in §116.182(4) of this title (relating to Plant-wide Applicability Limit Permit Application) for the pollutant, the PAL permit must specify an implementation schedule for such additional controls.

§116.188. Plant-wide Applicability Limit.

The plant-wide applicability limit (PAL) will be established as the sum of the baseline actual emissions of the PAL pollutant for each existing facility at the source to be covered. The allowable emission rate may be used for facilities that did not exist in the baseline period.

(1) An amount equal to the applicable significant level for the PAL pollutant may be added to the baseline actual emissions when establishing the PAL, but that quantity must be added to the result of the project emission increase at non-PAL facilities for any physical change, or change in the method of operation of a facility in the PAL. The amount must also be added to the result of the *de minimis* threshold test for any physical change, or change in the method of operation of a non-PAL facility.

(2) When establishing the PAL level for a PAL pollutant, only one consecutive 24-month period must be used to determine the baseline actual emissions for all existing facilities. However, a different consecutive 24-month period may be used for each different PAL pollutant.

(3) A PAL established concurrently with a federal major modification will be determined as follows. Prior to the start of operation of the new or modified facilities subject to federal NSR, the PAL shall be determined using baseline emissions as identified in §116.182(1) and (2) of this title (relating to Plant-wide Applicability Limit Permit Application). Upon the start of operation of the new or modified facilities subject to the major modification under prevention of significant deterioration and/or nonattainment review, as applicable, these facilities will contribute the authorized allowable emission rates to the PAL. Any baseline emissions associated with these facilities must be removed from the PAL at that time.

(4) The executive director shall specify a reduced PAL level(s) in the PAL permit to become effective on the future compliance date(s) of any applicable federal or state regulatory requirement(s) that is effective prior to issuance of the PAL permit.

§116.190. Federal Nonattainment and Prevention of Significant Deterioration Review.

(a) An increase in emissions from operational or physical changes at a facility covered by a plant-wide applicability limit (PAL) permit is insignificant, for the purposes of federal new source review under this subchapter, if the increase does not exceed the PAL.

(b) At no time are emissions reductions of a PAL pollutant that occur during the PAL effective period creditable as decreases for purposes of offsets, unless the level of the PAL is reduced by the amount of such emissions reductions and such reductions would be creditable in the absence of the PAL.

§116.192. Amendments and Alterations.

(a) Any increase in a plant-wide applicability limit (PAL) must be made through amendment. The new or modified facilities causing the need for the increase in the PAL must be reviewed prior to start of construction as a major modification under prevention of significant deterioration and/or nonattainment review, as applicable, for each pollutant requiring an increase in a PAL. The PAL must be reestablished concurrently with the issued or amended permit by adding the authorized allowable emission rates for the new or modified facilities to the baseline emissions for operating facilities used to establish the issued or renewed PAL for the remaining facilities. Amendments must also include the information identified in §116.182 of this title (relating to Plant-wide Applicability Limit Permit Application) for new and modified facilities to be included in the PAL and are subject to the public notice requirements under §116.194 of this title (relating to Public Notice and Comment). The PAL level will be increased effective on the day each facility that is part of the PAL major modification becomes operational and emits the PAL pollutant.

(b) Any changes to the control technology proposed to satisfy §116.182(4) of this title must be made through amendment. These changes shall include information necessary to demonstrate that the proposed change satisfies those requirements. Changes to the implementation schedule must be requested through permit alteration.

(c) Changes to PAL permits that do not require the PAL to be increased must be completed through permit alteration. Unless allowed in the PAL permit special conditions, the permit holder shall submit an alteration request prior to start of construction for physical modifications to facilities or installation of new facilities under the PAL. Approval must be received from the executive director prior to start of operation of the facilities if the emissions from the new or modified facilities may exceed 100 tons per year.

§116.194. Public Notice and Comment.

The applicant shall also provide for public notice on the draft plant-wide applicability limit permit in accordance with Chapter 39, Subchapters H and K of this title (relating to Applicability and General Provisions; and Public Notice of Air Quality Applications) for all initial applications, amendments, and renewals of a plant-wide applicability limit permit.

§116.196. Renewal of a Plant-wide Applicability Limit Permit.

(a) A stationary source owner or operator shall submit a timely application to the executive director to request renewal of a plant-wide applicability limit (PAL) permit. A timely application is one that is submitted at least six months prior to, but not earlier than 18 months from, the date of permit expiration. If the owner or operator of a stationary source submits a complete application to renew the PAL permit within this time period, then the permit will continue to be effective until the revised permit with the renewed PAL is issued or the PAL permit is voided.

(b) All PAL permits issued prior to the effective date of this section are subject to the renewal requirements under this section. These permits must be renewed by December 31, 2006, or within the time frame specified in subsection (a) of this section, whichever is later.

(c) The following information must be submitted with a PAL renewal application:

(1) a proposed PAL level;

(2) an identification of the facilities that are qualified as defined in §116.10 of this title (relating to General Definitions) with supporting documentation;

(3) the sum of the potential to emit of all facilities under the PAL, with supporting documentation, and the greatest rolling 12-month actual emission rate during the PAL effective period for facilities that are not qualified;

(4) information as identified in §116.182(1) and (5) of this title (relating to Plant-wide Applicability Limit Permit Application); and

(5) any other information the owner or operator wishes the executive director to consider in determining the appropriate level for renewing the PAL.

(d) The proposed PAL level and a written rationale for the proposed PAL level are subject to the public notice requirements in §116.194 of this title (relating to Public Notice and Comment). During such public review, any person may propose a PAL level for the source for consideration by the executive director.

(e) The level of the renewed PAL must be established by setting the cap to equal the sum of the design emission rates from all qualified facilities, the greatest rolling 12-month actual emissions during the PAL effective period for facilities that are not qualified, and the applicable federal *de minimis* level subject to the following limitations.

(1) If the potential to emit of the stationary source is less than the PAL, the PAL must be adjusted to a level no greater than the potential to emit of the source.

(2) A renewed PAL must not be set at a level higher than the current PAL, unless the PAL is being amended concurrently with the renewal.

(3) If the compliance date for a state or federal requirement that applies to the PAL source occurs during the PAL effective period, the PAL cap contribution for the affected facility shall be adjusted down accordingly.

§116.198. Expiration or Voidance.

(a) A plant-wide applicability limit (PAL) permit holder may request that the permit be voided at any time after initial issuance. That request must include documentation demonstrating that all required control technology upgrades have been completed for that pollutant or propose an alternate mechanism for making the upgrades enforceable. The PAL permit remains effective until voided by the executive director.

(b) If a PAL permit expires or is voided, each facility must comply with all allowable emission limitations associated with the state new source review authorization. Any physical change or change in the method of operation at the major stationary source will be subject to major new source review requirements if such change meets the definition of major modification. The owner or operator shall continue to comply with any state or federal applicable requirements that may have applied during the PAL permit effective period.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. HAZARDOUS AIR POLLUTANTS: REGULATIONS GOVERNING CONSTRUCTED OR RECONSTRUCTED MAJOR SOURCES (FCAA, SECTION 112(G), 40 CFR PART 63)

30 TAC §§116.400, 116.402, 116.404, 116.406

STATUTORY AUTHORITY

The new sections are proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.0512, concerning Modification of Existing Facility, which establishes a modification and its limits; and §382.0518, concerning Preconstruction Permit, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility.

The proposed new sections implement THSC, §§382.002, 382.011, 382.012, 382.051, and 382.0518.

§116.400. Applicability.

(a) The provisions of this subchapter implement Federal Clean Air Act (FCAA), §112(g), Modifications, and 40 Code of Federal Regulations Part 63, Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources, Subpart B, Requirements for Control Technology, as amended December 27, 1996. Affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to this subchapter are those sources for which the United States Environmental Protection Agency has not promulgated a maximum available control technology (MACT) standard under 40 Code of Federal Regulations (CFR) Part 63. For purposes of this subchapter, the following terms apply.

(1) Construct a major source--As follows.

(A) To fabricate, erect, or install at any green field site a stationary source or group of stationary sources that are located within a contiguous area and under common control and that emit or have the potential to emit ten tons per year of any hazardous air pollutant (HAP) or 25 tons per year of any combination of HAPs;

(B) to fabricate, erect, or install at any developed site a new process or production unit that in and of itself emits or has the potential to emit ten tons per year of any HAP or 25 tons per year of any combination of HAPs, unless the process or production unit satisfies clauses (i) - (vi) of this subparagraph:

(i) all HAPs emitted by the process or production unit that would otherwise be controlled under the requirements of this subchapter will be controlled by emission control equipment that was previously installed at the same site as the process or production unit;

(ii) either of the following regarding control of HAP emissions:

(I) the executive director has determined within a period of five years prior to the fabrication, erection, or installation of the process or production unit that the existing emission control equipment represented best available control technology (BACT), lowest achievable emission rate (LAER) under 40 CFR Part 51 or Part 52, toxics-best available control technology (T-BACT), or MACT based on state air toxic rules for the category of pollutants that includes those HAPs to be emitted by the process or production unit; or

(II) the executive director determines that the control of HAP emissions provided by the existing equipment will be equivalent to that level of control currently achieved by other similar sources using a level of control equivalent to current BACT, LAER, T-BACT, or state air toxic rule MACT determination;

(iii) the executive director determines that the percent control efficiency for emissions of HAP from all sources to be controlled by the existing control equipment will be equivalent to the percent control efficiency provided by the control equipment prior to the inclusion of the new process or production unit;

(iv) the executive director has provided notice and an opportunity for public comment concerning the determination that criteria in clauses (i) - (iii) of this subparagraph apply and concerning the continued adequacy of any prior LAER, BACT, T-BACT, or state air toxic rule MACT determination;

(v) if any commenter has asserted that a prior LAER, BACT, T-BACT, or state air toxic rule MACT determination is no longer adequate, the executive director has determined that the level of control required by that prior determination remains adequate; and

(vi) any emission limitations, work practice requirements, or other terms and conditions upon which the determinations in clauses (i) - (v) of this subparagraph are predicated will be construed by the executive director as applicable requirements under FCAA, §504(a), and either have been incorporated into any existing permit issued under Chapter 122 of this title (relating to Federal Operating Permits) for the affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) or will be incorporated into such permit upon issuance.

(2) Reconstruct a major source--The replacement of components at an existing process or production unit that in and of itself emits or has the potential to emit ten tons per year of any HAP or 25 tons per year of any combination of HAP, whenever:

(A) the fixed capital cost of the new components exceeds 50% of the fixed capital cost that would be required to construct a comparable process or production unit; and

(B) it is technically and economically feasible for the reconstructed major source to meet the applicable MACT emission limitation for new sources established under this subchapter.

(b) The requirements of this subchapter apply to an owner or operator of an affected source (as defined in §116.15(1) of this title) that constructs or reconstructs, unless the affected source in question has been specifically regulated or exempted from regulation under a standard issued under FCAA, §112(d), (h), or (j) and incorporated in another subpart of 40 CFR Part 63, or the owner or operator of such affected source has received all necessary air quality permits for such construction or reconstruction project.

(c) Affected sources (as defined in §116.15(1) of this title) subject to the requirements of this subchapter are not eligible to use a standard permit under Subchapter F of this chapter (relating to Standard Permits) unless the terms and conditions of the specific standard permit meet the requirements of this subchapter.

§116.402. Exclusions.

(a) The requirements of this subchapter do not apply to electric utility steam generating units unless and until such time as these units are added to the source category list under Federal Clean Air Act, §112(c)(5).

(b) The requirements of this subchapter do not apply to stationary sources that are within a source category that has been deleted from the source category list under Federal Clean Air Act, §112(c)(9).

(c) The requirements of this subchapter do not apply to research and development activities, as defined in 40 Code of Federal Regulations, §63.41.

(d) Nothing in this subchapter shall prevent a state or local agency from imposing more stringent requirements than those contained in this subchapter.

§116.404. Application.

Consistent with the requirements of 40 Code of Federal Regulations §63.43 (concerning maximum achievable control technology determinations for constructed and reconstructed major sources), the owner or operator of a proposed affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) shall submit a permit application as described in §116.110 of this title (relating to Applicability).

§116.406. Public Notice Requirements.

Proposed affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) shall comply with the public notice requirements contained in Chapter 39 of this title (relating to Public Notice).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. EMERGENCY ORDERS

30 TAC §116.410

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The repeal is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the

state's air; and §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air.

The proposed repeal implements THSC, §§382.002, 382.011, and 382.012.

§116.410. Applicability.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. STANDARD PERMITS

30 TAC §116.610, §116.617

STATUTORY AUTHORITY

The amendment and new section are proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment and new section are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC and to issue a standard permit for similar facilities, Chapter 382; §382.0512, concerning Modification of Existing Facility, which establishes a modification and its limits; §382.0518, concerning Preconstruction Permit, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility; and §382.05195, concerning Standard Permit, which authorizes the commission to issue a standard permit for new or existing similar facilities if the standard permit is enforceable, and the commission can adequately monitor compliance with the terms of the standard permit; and FCAA, 42 USC, §§7401 *et seq*., that requires permits for construction and operation of new or modified major stationary sources.

The proposed amendment and new section implement THSC, §§382.002, 382.011, 382.012, 382.051, 382.0512, 382.0518, and 382.05195; and FCAA, 42 USC, §§7401 *et seq*.

§116.610. Applicability.

(a) Under the Texas Clean Air Act [~~TCAA~~], §382.051, a project that [~~which~~] 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 [~~any~~] project that [~~which~~] results in a net increase in emissions of air contaminants from the project other than carbon dioxide, water, nitrogen, methane, ethane, hydrogen, oxygen, or those for which a national ambient air quality standard [~~National Ambient Air Quality Standard~~] has been established must meet the emission limitations of §106.261[~~(3) or (4) or §106.262(3)~~] of this title (relating to Facilities (Emission Limitations) [~~, and Facilities (Emission and Distance Limitations))~~], unless otherwise specified by a particular standard permit. [~~;~~]

(2) Construction [~~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 [~~the~~] proposed project must comply with the applicable provisions of the Federal Clean Air Act (FCAA) [~~FCAA~~], §111 (concerning New Source Performance Standards) as listed under [~~Title~~] 40 Code of Federal Regulations (CFR) Part 60, promulgated by the EPA. [~~;~~]

(4) The [~~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 United States Environmental Protection Agency (EPA). [~~EPA;~~]

(5) The [~~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)). [~~; and~~]

(6) (No change.)

(b) Any project [~~, except those authorized under §116.617 of this title (relating to Standard Permits for Pollution Control Projects),~~] which constitutes a new major source[~~,~~] or major modification under the new source review requirements of the FCAA, Part C (Prevention of Significant Deterioration Review) or Part D (Nonattainment Review) and regulations promulgated thereunder is subject to the requirements of §116.110 of this title (relating to Applicability) rather than this subchapter.

(c) - (d) (No change.)

§116.617. State Pollution Control Project Standard Permit.

(a) Scope and applicability.

(1) This standard permit applies to pollution control projects undertaken voluntarily or as required by any governmental standard, that reduce or maintain currently authorized emission rates for facilities authorized by a permit, standard permit, or permit by rule.

(2) The project may include:

(A) the installation or replacement of emissions control equipment;

(B) the implementation or change to control techniques; or

(C) the substitution of compounds used in manufacturing processes.

(3) This standard permit must not be used to authorize the installation of emission control equipment or the implementation of a control technique that:

(A) constitutes the complete replacement of an existing production facility or reconstruction of a production facility as defined in 40 Code of Federal Regulations (40 CFR) §60.15(b)(1) and (c); or

(B) the executive director determines there are health effects concerns or the potential to exceed a national ambient air quality standard (NAAQS) criteria pollutant or contaminant that results from an increase in emissions of any air contaminant until those concerns are addressed by the registrant to the satisfaction of the executive director; or

(C) returns a facility or group of facilities to compliance with an existing authorization or permit.

(4) Only new or modified pollution control projects must meet the conditions of this standard permit. All previous standard permit registrations under §116.617 of this title (relating to Standard Permits for Pollution Control Projects) that were authorized prior to the effective date of this rule must include the increases and decreases in emissions resulting from those projects in any future netting calculation and all other conditions must be met upon the ten-year anniversary and renewal of the original registration, or until administratively incorporated into the facilities' permit, if applicable.

(b) General requirements.

(1) Any claim under this standard permit must comply with all applicable conditions of:

(A) §116.604(1) and (2) of this title (relating to Duration and Renewal of Registrations to Use Standard Permits);

(B) §116.605(d)(1) and (2) of this title (relating to Standard Permit Amendment and Revocation);

(C) §116.610 of this title (relating to Applicability);

(D) §116.611 of this title (relating to Registration to Use a Standard Permit);

(E) §116.614 of this title (relating to Standard Permit Fees); and

(F) §115.615 of this title (relating to General Conditions).

(2) Construction or implementation of the pollution control project must begin within 180 days of receiving written acceptance of the registration from the executive director and must comply with §116.115(b)(2) of this title and §116.120 of this title (relating to General and Special Conditions and Voiding of Permits). Any changes to allowable emission rates authorized by this section become effective when the project is complete and operation or implementation begins.

(3) The emissions limitations of §116.610(a)(1) of this title do not apply to this standard permit.

(4) Predictable maintenance, startup, and shutdown emissions directly associated with the pollution control projects must be included in the representations of the registration application.

(5) Any increases in actual or allowable emission rates or any increase in production capacity authorized by this section (including increases associated with recovering lost production capacity) must occur solely as a result of the project as represented in the registration application. Any increases of production associated with a pollution control project must not be utilized until an additional authorization is obtained.

(c) Replacement projects.

(1) The replacement of emissions control equipment or control technique under this standard permit is not limited to the method of control currently in place, provided that the control or technique is at least as effective as the current authorized method and all other requirements of this standard permit are met.

(2) The maintenance, startup, and shutdown emissions may be increased above currently authorized levels if the increase is necessary to implement the replacement project and maintenance, startup, and shutdown emissions were authorized for the existing control equipment or technique.

(3) Equipment installed under this section is subject to all applicable testing and recordkeeping requirements of the original control authorization. Alternate, equivalent monitoring, or records may be proposed by the applicant for review and approval of the executive director.

(d) Registration requirements.

(1) A registration application must be submitted in accordance with the following.

(A) If there are no increases in authorized emissions of any air contaminant resulting from a replacement pollution control project, a registration must be submitted no later than 30 days after construction or implementation begins and the registration must be accompanied by a $900 fee.

(B) If a new control device or technique is authorized or if there are increases in authorized emissions of any air contaminant resulting from the pollution control project, a registration must be submitted no later than 30 days prior to construction or implementation. The registration must be accompanied by a $900 fee. Construction or implementation may begin only after:

(i) no written response has been received from the executive director within 30 calendar days of receipt by the Texas Commission on Environmental Quality (TCEQ); or

(ii) written acceptance of the pollution control project has been issued by the executive director.

(C) If there are any changes in representations to a previously authorized pollution control project standard permit for which there are no increases in authorized emissions of any air contaminant, a notification or letter must be submitted no later than 30 days after construction or implementation of the change begins. No fee applies and no response will be sent from the executive director.

(D) If there are any changes in representations to a previously authorized pollution control project standard permit that also increase authorized emissions of any air contaminant resulting from the pollution control project, a registration alteration must be submitted no later than 30 days prior to the start of construction or implementation of the change. The registration must be accompanied by a $450 fee, unless received within 180 days of the original registration approval. Construction or implementation may begin only after:

(i) no written response has been received from the executive director within 30 calendar days of receipt by the TCEQ; or

(ii) written acceptance of the pollution control project has been issued by the executive director.

(2) The registration application must include the following:

(A) a description of process units affected by the project;

(B) a description of the project;

(C) identification of existing permits or registrations affected by the project;

(D) quantification and basis of increases and/or decreases associated with the project, including identification of affected existing or proposed emission points, all air contaminants, and hourly and annual emissions rates;

(E) a description of proposed monitoring and recordkeeping that will demonstrate that the project decreases or maintains emission rates as represented; and

(F) a description of how the standard permit will be administratively incorporated into the existing permit(s).

(e) Operational requirements. Upon installation of the pollution control project, the owner or operator shall comply with the requirements of paragraphs (1) and (2) of this subsection.

(1) General duty. The owner or operator must operate the pollution control project in a manner consistent with good industry and engineering practices and in such a way as to minimize emissions of collateral pollutants, within the physical configuration and operational standards usually associated with the emissions control device, strategy, or technique.

(2) Recordkeeping. The owner or operator must maintain copies on site of monitoring or other emission records to prove that the pollution control project is operated consistent with the requirements in paragraph (1) of this subsection, and the conditions of this standard permit.

(f) Incorporation of the standard permit into the facility authorization.

(1) Any new facilities or changes in method of control or technique authorized by this standard permit at a previously permitted or standard permitted facility must be incorporated into that facility's permit when the permit is amended or renewed. Incorporation during amendments or renewal must meet the following:

(A) authorized changes will be subject to an impacts review based on the Effects Evaluation Flowchart and "Air Quality Modeling Guidelines" except for facilities permitted under another standard permit;

(B) authorized changes will not be subject to best available control technology review;

(C) this standard permit will be voided and the changes and emissions will become authorized by the permit or standard permit; and

(D) any emission increases authorized by this standard permit will not be considered for purposes of triggering public notice for amendments.

(2) All increases in previously authorized emissions, new facilities, or changes in method of control or technique authorized by this standard permit for facilities previously authorized by a permit by rule must comply with §106.4 of this title (relating to Requirements for Permitting by Rule), except §106.4(a)(1) of this title, and §106.8 of this title (relating to Recordkeeping).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 15, 2005.

TRD-200504093
Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 30, 2005
For further information, please call: (512) 239-5017

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30 TAC §116.617

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The repeal is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382.

The proposed repeal implements THSC, §§382.002, 382.011, 382.012, and 382.051.

§116.617. Standard Permits for Pollution Control Projects.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 15, 2005.

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Stephanie Bergeron Perdue
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Texas Commission on Environmental Quality
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For further information, please call: (512) 239-5017

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SUBCHAPTER K. EMERGENCY ORDERS

30 TAC §116.1200

STATUTORY AUTHORITY

The new section is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize

(20) offer of coverage for therapies for children with developmental delays as required by Insurance Code Chapter 1367, Subchapter E;

(21) coverage of certain tests for detection of prostate cancer as required by Insurance Code Chapter 1362;

(22) coverage of acquired brain injury treatment/services as required by Insurance Code Chapter 1352;

(23) coverage of certain tests for detection of colorectal cancer as required by Insurance Code Chapter 1363;

(24) coverage for reconstructive surgery for craniofacial abnormalities in a child as required by Insurance Code §§1367.151 - 1367.154;

(25) coverage of rehabilitation therapies as required by Insurance Code §1271.156;

(26) limitations on the treatment of complications in pregnancy established by §21.405 of this title (relating to Policy Terms and Conditions);

(27) coverage for services related to immunizations and vaccinations under managed care plans as required by Insurance Code Chapter 1353;

(28) limitations or restrictions on copayments and deductibles imposed by §11.506(2)(A) and (B) of this title (relating to Mandatory Contractual Provisions: Group, Individual and Conversion Agreement and Group Certificate);

(29) coverage of a minimum stay for maternity as required by Insurance Code §§1366.051 - 1366.059;

(30) coverage of reconstructive surgery incident to mastectomy as required by Insurance Code §§1357.001 - 1357.007; and

(31) coverage of a minimum stay for mastectomy treatment/services as required by Insurance Code §§1357.051 - 1357.057.

(b) A health benefit plan issued by an HMO through a health group cooperative must provide for the basic health care services as provided in §11.508 or §11.509 of this title (relating to Mandatory Benefit Standards: Group, Individual and Conversion Agreements and Additional Mandatory Benefit Standards, Group Agreement Only):

(c) A health benefit plan offered by an insurer through a health group cooperative is not subject to §3.3704(a)(6) of this title (relating to Freedom of Choice: Availability of Preferred Providers).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 11, 2006.

TRD-200600176
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: January 31, 2006
Proposal publication date: November 18, 2005
For further information, please call: (512) 463-6327

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28 TAC §26.412

The Commissioner of Insurance adopts the repeal of §26.412, concerning the refusal of a health carrier to renew employer health benefit plans delivered or issued to a health group cooperative. The repeal of this section is adopted without changes to the proposal published in the November 18, 2005, issue of the *Texas Register* (30 TexReg 7690).

Section 26.412 regulated a health carrier's election to refuse to renew employer health benefit plans delivered or issued to a health group cooperative. Repeal of §26.412 is necessary because the enactment of SB 805, 79th Legislature, Regular Session, obviates the need for the section. Under SB 805, health carriers issuing employer health benefit plans to health group cooperatives are to treat such cooperatives as either large employers or small employers pursuant to the refusal-to-renew provisions of Insurance Code §1501.063.

The adoption of the repeal will result in consistency between the Chapter 26 administrative rules regulating health care cooperatives with regard to refusal-to-renew provisions and the amendments to Insurance Code Chapter 1501 enacted in SB 805.

The department did not receive any comments on the proposed repeal.

The repeal is adopted pursuant to the Insurance Code §§1501.010, 1501.058, 1501.0581, and 36.001, and SECTION 7 of SB 805 as enacted by the 79th Legislature, Regular Session. Section 1501.010 authorizes the Commissioner of Insurance to adopt rules as necessary to implement Chapter 1501. Section 1501.058 requires compliance with federal laws applicable to cooperatives and health benefit plans issued through cooperatives, to the extent required by state law or rules adopted by the Commissioner. Section 1501.0581 requires a carrier to make an informational filing with the Commissioner concerning intended offers of coverage to a cooperative and requires that the Commissioner by rule prescribe the form and the time of the filing. SECTION 7 of SB 805 directs the Commissioner, not later than January 1, 2006, to adopt rules under §1501.010 as necessary to implement the change in law made by SB 805. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 11, 2006.

TRD-200600175
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: January 31, 2006
Proposal publication date: November 18, 2005
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§116.12, 116.150, 116.151, 116.160, and 116.610; the repeal of §§116.180 - 116.183, 116.410, and 116.617; and new §§116.121, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, 116.400, 116.402, 116.404, 116.406, 116.617, and 116.1200. Sections 116.12, 116.121, 116.150, 116.151, 116.160, 116.180, 116.182, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, 116.400, 116.610, and 116.617 are adopted *with changes* to the proposed text as published in the September 30, 2005, issue of the *Texas Register* (30 TexReg 6183). Sections 116.184, 116.402, 116.404, 116.406, and 116.1200 and the repealed §§116.180 - 116.183, 116.410, and 116.617 are adopted *without changes* to the proposed text as published and the text will not be republished. The amended, repealed, and new sections will be submitted 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 ADOPTED RULES

EPA adopted revisions to 40 Code of Federal Regulations (CFR) §§52.21, 51.165, and 51.166 in the December 31, 2002, publication of the *Federal Register* (67 FR 251), which amended the application of federal new source review (NSR) in air quality permitting. Federal NSR is triggered by a new major source or major modification. If the area in which the source will be located is also classified as nonattainment for a pollutant that will be emitted by the source, the source must offset the emission increase with emission decreases at other facilities or through the purchase and retirement of emission reduction credits. The source would also have to apply control technology that meets the lowest achievable emission rate to the new and modified units.

Federal NSR reform is intended to limit the instances where federal NSR will be required of facilities that undergo modifications. It will streamline plant modifications by allowing small changes to be completed without the delay associated with federal NSR. Currently, most modifications are evaluated to determine the applicability of federal NSR through a netting exercise. Netting is an accounting exercise where, prior to the modification of a facility, the sum of emission increases and decreases over a specified period of time at the plant site is determined. If the total exceeds the major modification threshold, the modification is subject to federal NSR. NSR reform provides an additional path that may be taken to avoid federal NSR applicability (plant-wide applicability limit (PAL)) as well as methods to minimize the emission increase determined in the netting exercise (baseline and actual-to-projected actual emission rates).

The commission's proposal on NSR reform was intended to integrate the federal revisions within an existing state program that addressed similar situations concerning plant-wide emission limits and baseline emission determinations. The commission also solicited comments from affected industries on the relative benefits of an integrated program versus an incorporation of the federal program without substantive changes. It is clear from stakeholder meetings and public comment that a program matching the federal rules is the preferred method of accomplishing federal NSR reform. The commission agrees that it has traditionally approached state NSR permitting separately from federal NSR requirements. Additionally, the commission can continue this approach under federal NSR reform without endangering the attainment of maintenance of national ambient air quality standards (NAAQS) or affecting public health. The commission is adopting rules implementing the federal program on PALs, actual-to-projected actual emissions test, and baseline determination without substantive changes to the federal model for these programs.

The commission currently allows the inclusion of certain maintenance, startup, and shutdown (MSS) emissions in NSR permits. The commission expects to consider rules to prescribe authorization mechanisms and procedures for emissions not historically authorized, including those for MSS activities. The commission will also consider the authorization of emissions that any well maintained, operated, and managed facility cannot eliminate entirely. These emissions are therefore anticipated and quantifiable, yet unscheduled (QUAN). Examples are emissions that may be released intermittently from a pressure relief valve, line switching, compressor blow-downs, or even a burst seal well before the end of its life expectancy. QUAN emissions are arguably different in nature from the most commonly reported emissions events, those incidents resulting from inadequate maintenance, malfunctions, accidents, and disasters, and therefore should be taken out of the classification of "emission event" by providing an authorization mechanism. These actions will enable the commission to authorize MSS and QUAN emissions for inclusion in baseline emissions applicable to the NSR reform program.

The commission is also adopting a new version of the state pollution control project standard permit that includes required federal changes emissions netting. The new standard permit also includes authorization requirements for MSS and is reorganized.

Plant-wide Applicability Limit

The adopted version of the site-wide PAL closely follows the federal model and is established for each pollutant using the baseline emission rate for each facility. A control technology evaluation is required only if a cap increase is sought. The PAL can be reduced at renewal if emissions are less than 80% of the cap. The PAL baseline emissions will include authorized MSS and QUAN.

Baseline

The emission increase associated with a modification is determined by taking the difference, in tons per year, between the proposed emission rate and the actual annual emissions (or baseline emissions) during the baseline period. The baseline period can be any consecutive 24-month period in the previous ten years (typically that period where the emissions from the facility to be modified are the greatest). The baseline period is a 24-month period in the previous five years for electric utility steam generating units.

Actual-to-Projected Actual Emissions Test

Federal NSR reform allows use of a projected actual emission rate to be used to determine a project emission increase with compliance tracked for five to ten years. Additionally, any calculated emission increase can be reduced by the emissions that could have been accommodated in the baseline period.

Federal NSR reform included two other components, the clean unit designations and pollution control projects. As a result of a petition for review of EPA's final action, on June 24, 2005, the District of Columbia Circuit Court of Appeals in *State of New York, et al v. U.S. Environmental Protection Agency*, No. 413 F.3d 3 (D.C. Cir 2005), vacated the clean unit and pollution control project provisions of the rule and remanded recordkeeping provisions to the EPA. As a result of this court decision, the commission has not adopted rules concerning clean unit and federal pollution control projects. The commission is adopting the standard permit for state pollution control projects. The standard permit for state pollution control projects allows projects that will have better or equivalent controls, but increases and decreases for projects qualifying for the standard permit for state pollution control projects requires evaluation for federal permitting applicability, which may include netting calculations. This new requirement for the state pollution control projects is also a result of the June 24, 2005, ruling, which does not allow a federal NSR exemption for incidental emission increases resulting from pollution control projects. In addition, the standard permit for state pollution control projects may be used to authorize emissions reductions and collateral increases for facilities authorized under a permit by rule as long as any collateral increases do not cause emission rates to exceed limits found in 30 TAC §106.4(a), Requirements for Permitting by Rule, or other standard permits as long as any collateral increases do not exceed the limits of §116.610, Applicability.

SECTION BY SECTION DISCUSSION

The commission adopted administrative changes throughout this rulemaking to be consistent with guidance provided in the *Texas Legislative Council Drafting Manual*, November 2004, and to conform with Texas Register requirements and agency guidelines.

§116.12. Federal Permit Definitions.

The commission amended the title of §116.12 to reflect the addition of all definitions associated with federal NSR or prevention of significant deterioration (PSD) permit applicability analysis. In addition to the changes necessary to incorporate NSR reform into the nonattainment permit program, the commission has adopted changes associated with including PSD applicability analysis. These definitions now apply to the revised sections of the PSD rules in Chapter 116, Subchapter B, Division 6, Prevention of Significant Deterioration Review, as well as the new sections associated with PAL permits.

The definition of actual emissions, in paragraph (1), has been amended to exclude this definition from being used in the federal NSR applicability test. In response to public comments, the commission specified that actual emissions are determined over a 24-month period instead of two years. When determining whether the emission increase associated with a project is significant, the baseline actual emissions, defined in new paragraph (3), must be used. Paragraph (3)(A) allows electric utility steam generating units to identify baseline actual emissions as the rate, in tons per year, at which an existing unit emitted the pollutant during any consecutive 24-month period within the five-year period immediately preceding construction. A different time period may be selected if it is shown to be more representative of normal source operations. This is consistent with past guidance provided by EPA for these sources. In response to public comment, the commission deleted the word "average" as a modifier for "emissions" and changed "reviewing authority" references to "executive director." The commission made this change to refer to "executive director" through the definitions added to §116.12 for the implementation of NSR reform.

Paragraph (3)(B) allows other source types to choose 24 consecutive months in the ten years preceding start of construction to establish their baseline emissions. In this case, the source must adjust this emission rate down for any emission limitations that would currently apply to the facility. These limitations include requirements in the SIP, federal rules (with the exception of 40 CFR Part 63), or permit requirements that would apply when the analysis is completed.

Paragraph (3)(C) identifies baseline emissions for new facilities as being zero and also defines baseline emissions for new facilities that have operated for less than two years to be the facility's potential to emit. Paragraph (3)(D) requires that a project affecting all facilities use the same 24-month baseline period for each pollutant. For example, if a project affected five facilities that emitted volatile organic compounds and particulate matter, all five would have to identify the same baseline period for volatile organic compounds; however, a different 24-month period could be chosen for particulate matter. The source must have sufficient records to document the baseline emissions, which cannot have occurred before November 15, 1990.

Paragraph (3)(D) also requires that baseline emission rates be adjusted down to exclude noncompliant emissions. The EPA's reform rule requires that baseline emissions include startup, shutdown, and malfunction emissions. The commission's policy, which has evolved over a number of years, currently allows for permitting of emissions from certain MSS activities. Changes to this policy are being evaluated. The commission has been unsuccessful in getting clarification on the EPA's basis for inclusion of malfunction emissions in the baseline calculation. Given these circumstances, paragraph (3)(E) has been added to allow for the inclusion of those emissions that could currently be authorized to be included in the baseline. The commission deleted the phrase "in a permit action under Chapter 106 of this title (relating to Permits by Rule) and this chapter" because these are types of authorizations and the phrase is redundant. Given that sources would become aware of this change with adoption of this rule amendment, the effort involved in authorizing these types of emissions, and the baseline period having to be within ten years of the project, this method of determining baseline emissions would be available for some time but not beyond ten years from the effective date of this rule amendment. After that date, all baseline emissions will have to have been authorized. Paragraph (3)(D) also requires that fugitive emissions be included in the baseline to the extent they can be quantified.

In response to public comment to adopt a version of NSR reform closer to the federal model and to be consistent with the use of federal terms, the commission had added definitions for "Basic design parameters," "Major facility," "Replacement facility," "Significant facility," and "Small facility." The term "facility" has been substituted for the federal term "emissions unit" in the appropriate definitions. The term "facility" is an established part of the commission's permitting program and is synonymous with "emissions unit." The remaining paragraphs have been renumbered as a result of the added definitions.

Paragraphs (7) and (8), associated with the federal definition of clean coal, have been added as a result of including PSD applicability into the definitions under this section. The definition of *de minimis* threshold test in paragraph (12) has been revised to reference significant levels, including those for PSD as well as nonattainment. In response to public comment, the commission

substituted the term "significant level" for "major modification" in Table 1 in the definition of "Major modification" in §116.12.

The federal definition of electric utility steam generating unit is provided in new paragraph (13). The definition identifies those units that are subject to a different baseline emissions determination than other source types. New paragraph (14) defines federally regulated NSR pollutant, providing a comprehensive list of pollutants that may be subject to federal NSR.

The definition for major stationary source has been renumbered as paragraph (17) and has been modified to remove references to facility for clarity, as well as to include PSD review within the definition. 40 CFR §51.166(b)(1) is referenced to identify the PSD major source thresholds. The "source" identified in this definition is the EPA NSR source that is, in most cases, analogous to "account" as defined in 30 TAC §101.1, General Air Quality Definitions.

A number of changes are adopted for the definition of major modification in renumbered paragraph (18). The commission added language to incorporate PSD review into the definition and references to facility have been removed for clarity. Language has been added to clearly identify the two criteria, a significant project emission increase and a significant net emission increase, that must be met for a modification to be considered major at a major source. In response to public comment concerning the adoption of a PAL program closer to the federal model, the commission substituted the term "significant level" for "major modification" in Table 1, and deleted the proposed expansion of the definition to identify projects performed at facilities within a PAL as being major modifications if the modifications result in emission increases at facilities outside the PAL that are significant.

The commission adopted changes to the definition of net emission increase in renumbered paragraph (20) specifying that baseline actual emissions are to be used to determine emission increases and decreases, adjusting the language to accommodate for PSD applicability, and excluding emission increases at facilities under a PAL from being creditable. Under the amendment, emission decreases cannot be counted in both an attainment demonstration and credit for nonattainment netting because this would be double credit for the same reduction. Emission decreases need only be enforceable rather than federally enforceable. The commission deleted the phrase "enforceable as a practical matter" and will just use "enforceable." The commission also substituted the term "project emissions increase" for "total increase in actual emissions from a particular physical change. . ." because this concept is included within the definition of "Project emissions increase." In response to public comment the commission deleted the proposed revision that stated that emission decrease cannot have been relied upon in the issuance of a PAL. The commission made the same deletion in the definition of "Offset ratio" in paragraph (21).

The commission adopted new paragraphs (22) - (26) to incorporate definitions from NSR reform related to PALs into the commission rules. These new paragraphs include definitions for: PAL; PAL effective date; PAL major modification; PAL permit; and PAL pollutant. In response to public comment, the commission modified the proposed definition of PAL pollutant to restrict its application to major sources. The commission deleted the phrase "enforceable as a practical matter" and will just use "enforceable."

The requirement to use baseline actual emissions has been added to renumbered paragraph (28), in the definition of "Project net." The commission also substituted the term "project emissions increase" for "total increase in actual emissions from a particular physical change. . ." because this concept is included within the definition of "Project emissions increase."

The commission adopted new paragraphs (29) and (30) to define the new concepts of projected actual emissions and projects emissions increase. The project emissions increase may be determined in a different manner than the other emission increases that might be part of a netting exercise (used to determine the net emissions increase). For existing facilities, the emission increase at modified or affected facilities may be determined by using the projected actual emissions rate rather than the potential to emit for the facility. The projected emission rate must be developed using all relevant information including company projections and filings with regulatory authorities. The basis for the projection must be maintained by the source and would be submitted with any documentation required for a state NSR authorization to demonstrate that the project is not subject to federal review. The source would be required to demonstrate compliance with the projected emission rates for ten years if there was a change to the source's potential to emit or increase in capacity. Other affected facilities would be required to demonstrate compliance with projected rates for five years.

The actual-to-projected actual emissions rate test also allows the source to remove from the project increase any emissions increase that could have been accommodated in the baseline period. These must be unrelated to the project and may include demand growth. This federal rule change extends this concept that was developed for the electrical generation industry where traditionally there had been a captured, or limited, customer base that was expected to grow at some rate unrelated to the available capacity of the generator. While this concept appears reasonable for the electric power industry as well as some sources with a limited customer base due to geography (such as gasoline terminals), it is not as useful for industries that have national or international markets served by multiple sources. In these cases, a demonstration is required that the market conditions expected in the future would be significantly different than any time in the past ten years and that if they had occurred in the baseline, they would have resulted in different operations. It is likely that this case would only be made in cases such as a prolonged outage at a major producer or a significant shift in market conditions. The determination of what could have been accommodated is limited to what could have been produced or handled and does not allow for changes in emissions that could have occurred due to a lower emission control device efficiency or the use of a fuel or solvent that might have resulted in greater emissions.

The commission adopted a definition for "Temporary clean coal technology demonstration project" as new paragraph (36) to fully incorporate all of EPA's exclusions to what is considered a major modification under NSR reform.

§116.121. Actual-to-Projected Actual and Emissions Exclusion Test for Emissions Increases.

The commission adopts this new section to require documentation associated with the projected actual emissions rates and records of compliance as identified in the federal rule. New subsection (a) requires a demonstration that federal NSR does not apply be submitted with any permit application or registration. This demonstration must be documented by records that include a project description, the facilities affected, and a description of the applicability test. New subsection (b) requires monitoring of emissions that could increase as a result of the project if pro-

jected actual emissions are used to determine the project emission increase at a facility.

New subsection (c) requires electric utility steam generating units to provide the executive director documentation of emissions for each calendar year that records are required under the actual-to-projected actual test. New subsection (d) requires facilities, other than electric generating units, to submit a report to the executive director if annual emissions exceed the baseline actual emissions by a significant amount. Any other information that the owner or operator wishes to include in the report, such as an explanation as to why the emissions differ from the preconstruction projection, may be included as well. New subsection (e) establishes record retention periods and was modified in response to public comment to allow review by local pollution control programs and the general public of all documentation required under this section.

The commission expects that projected actual emissions will be used extensively in registrations or claims for non-PSD and nonattainment NSR authorizations where a maximum allowable emission rate is not specified in the rule. The use of a projected actual emissions rate for a modified source in these NSR construction permits is expected to be limited because the allowable emission rate would not generally be based on an activity level that would not be reached for more than ten years. The commission is adopting changes in subsections (a), (c), (d), and (e) to make language more concise and to specify the use of a calendar year for the submission of reports.

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

The commission deleted the date (June 15, 2004) in subsection (a), which would apply major modification determination based on the date an application is determined administratively complete. In response to EPA comment, this determination will be made based on the issuance date of the permit. The commission is adopting subsection (a)(1) and (2) that specifies when the requirements of this section will apply to facilities. The section will apply on the effective date of the permit for facilities located in areas that are designated ozone nonattainment on the effective date of this section. For those areas that are designated nonattainment after this section is effective, the section will apply based on the date a permit application is administratively complete.

The amendment to subsection (b) deleted language referring to a modified facility that will be a new major stationary source, which has caused confusion about what constitutes a major modification at an emission source that becomes major after the modification. A minor modification to a minor source that results in a major source does not qualify the modification as major. The commission refers to the definitions of major stationary source and major modification in §116.12 to make this determination. The commission also substituted the term "facility" for "emission unit" in subsection (e)(1) for consistency in use of terms. The amendment to this section added a reference to "significant level" consistent with changes in §116.12 and updated that section's title to Nonattainment and Prevention of Significant Deterioration Review Definitions. In response to public comment, the commission also amended subsections (c)(3) and (d)(2) to indicate that project emission increases must be less than the significant level before and after netting.

In response to public comment, the commission deleted the phrase "aggregated over the contemporaneous period" from subsection (e). This term "contemporaneous period" is included in the definition of "*De minimis* threshold test (netting)" and was redundant.

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

The commission adopted amendments to this section consisting primarily of administrative and formatting changes. The reference to November 15, 1992, has been deleted from subsection (a) because that date is not applicable for application of the section. The commission substituted the term "facility" for "emission unit" in subsection (c)(1) for consistency in use of terms. Subsections (b) and (c) state when netting is required, and subsection (c) was amended to delete the reference to "contemporaneous period" because this term is included in the definition of "*De minimis* threshold test (netting)."

§116.160. Prevention of Significant Deterioration Requirements.

The amendment to this section limits the incorporation by reference of definitions from 40 CFR §52.21 that are used to administer the PSD program, deleting most of the language in subsection (a) and all of the language in existing subsections (b) - (d).

and all of the language in existing subsections (b) - (d).

Amended subsection (a) deleted the federal rule references and replaced them with language that requires a proposed new major source or major modification in an attainment or unclassifiable area to meet the requirements of this section.

The new subsection (b) states that the *de minimis* threshold test (netting) is required for all modifications to existing major sources of federally regulated NSR pollutants, unless the proposed emissions increases associated with a project, without regard to decreases, are less than major modification thresholds for the pollutant.

New subsection (c) incorporated by reference the following definitions and requirements located in 40 CFR §52.21: baseline concentrations, baseline dates, baseline areas, innovative control technology, federal land manager, terrain, Indian reservations/governing bodies, increments, ambient air ceilings, restrictions on area classifications, exclusions from increment consumption, redesignation, stack heights, exemptions, source impact analysis, air quality analysis, source information, additional impact analysis, sources impacting federal Class I areas, and innovative technology. Other definitions used for the PSD program or visibility in Class I areas program are currently in the commission's rules. The term "aggregated over the contemporaneous period" was deleted from subsection (c) because the term is included within the term "*De minimis* threshold test (netting)." The amendment also substituted the term "facility" for "emissions unit" in the definitions incorporated from the CFR because the commission's permitting actions are based on the individual facility or groups of facilities as defined in the commission's rules. The term "executive director" also replaces "administrator" in portions of 40 CFR §52.21(g) and (v). In response to public comment, the requirement to issue a PSD permit within a year of receipt of a completed application has been deleted from subsection (c)(4).

Existing subsection (d) has been re-designated as subsection (e).

In addition to renaming Subchapter C, the commission also adopted a new Division 1, Plant-wide Applicability Limits.

§116.180. Applicability.

This adopted section limits a PAL to one pollutant as required by the EPA and a site to one PAL permit in subsection (a). The commission is deleting the reference to state or federal permit and will use the term "NSR permit." A PAL permit may contain separate PALs for several pollutants and will likely be consolidated with an NSR construction or flexible permit at the site. Subsections (b) and (c) identify the administrative procedure for changes in ownership, as well as responsibility for the PAL permit application. The commission is changing the phrase "new owners of facilities, group of facilities, or account" to "new owner of a major stationary source" as a more inclusive term.

§116.182. Plant-wide Applicability Limit Permit Application.

This new section identifies the information necessary for a PAL permit application. Paragraph (1) requires the facilities that would be included in the PAL to be identified with their design capacities and potential to emit and NSR authorizations. Paragraph (2) requires that the baseline emissions for those facilities be identified so that they may be used to set the PAL. Paragraphs (3) and (5) require the applicant to identify how plans to monitor and use that information will be used to demonstrate compliance with the PAL. This information will serve as a starting point to develop PAL permit conditions.

The commission did not adopt the proposed new paragraphs (4) and (6) requiring that best available control technology (BACT), on average, be implemented on all existing facilities to be included in the PAL over a period of time (typically less than five years). This is consistent with the commission's decision to implement NSR reform in a form closer to the federal model. Paragraph (6) would have required an implementation schedule for BACT if control technology required upgrading.

§116.184. Application Review Schedule.

This new section requires that PAL applications be reviewed on a schedule similar to other air permits as provided for in §116.114, Application Review Schedule.

§116.186. General and Special Conditions.

This new section identifies the PAL as an annual emission rate for a federally regulated NSR pollutant covering all facilities identified in the application in subsection (a). Emissions from all facilities must be determined and compliance with the PAL must be documented monthly. The commission is deleting the unnecessary phrase "enforceable as a practical matter" and will just use "enforceable." The commission is also substituting the word "demonstrate" for "show."

Subsection (b) identifies the general conditions applicable to every PAL. Paragraph (1) emphasizes that the PAL is not an authorization to construct but only sets an emission rate, below which federal NSR is not required. Paragraphs (2) and (3) identify sampling procedures and how a permit holder might obtain approval for an equivalent method. These requirements ensure consistency between various types of the commission's air permits. The commission has substituted the word "are" for "will be" to more accurately indicate the applicability of the section.

Subsection (b)(4) integrates common recordkeeping and reporting requirements for most other air permits with the much more extensive requirements identified in the EPA rule. Paragraph (4)(A) and (B) require that the PAL permit application and records associated with demonstrating cap compliance be maintained on site. Subsection (b)(4) includes the reporting requirements from the EPA rule. Consistent with its decision to adopt a PAL program equivalent with the federal model, the commission determined that the semiannual and deviation reporting requirements proposed in subsection (b)(4) were not sufficiently consistent with the federal rule requirements and added subsection (b)(4)(C) and (D) to incorporate federal requirements. Proposed subsection (b)(5) was not adopted for consistency with the federal rules.

Renumbered paragraphs (5) and (6) contain language common to air permits identifying what facilities are covered by the PAL, and requiring proper operation of control equipment and compliance with all rules. The PAL life of ten years is identified in paragraph (7). Paragraphs (8) and (9) incorporate requirements from the EPA rule requiring facility emissions to be reported as the potential to emit if monitoring data is not available, and that all data used to establish the PAL be revalidated at least every five years. The commission also added subsection (b)(10) allowing the extension of a PAL while an application for renewal is being considered.

Subsection (c) identifies those EPA requirements that must be incorporated into the permit through special conditions. All facilities in a PAL must be monitored using one of the following four methods: mass balance; continuous emission monitoring system, continuous parameter monitoring system, or predictive emission monitoring system; or emission factors. An alternate approach may be approved by the executive director. Performance standards for each type of monitoring are specified. The special conditions will also require a BACT implementation schedule, if applicable. For consistency with the federal rule, the commission deleted subsection (c)(4), which had required an implementation schedule for BACT.

§116.188. Plant-wide Applicability Limit.

This new section identifies how the PAL is to be determined. The commission is substituting "is " for "will be established as" in the opening paragraph to more clearly define a PAL. In response to public comment, the commission added a specification requiring reduction of the PAL baseline emissions resulting from permanent shutdown of facilities. Paragraph (1) allows the inclusion of emissions, up to the significance level, in addition to baseline emissions. For consistency with the federal rule, the commission did not adopt the provision requiring addition of the significance level to project emission increases. Paragraph (2) limits all facilities to the same baseline period for a given pollutant. For consistency with the federal rule, proposed paragraph (3) that addressed determination of the PAL if there is a major modification involved was not adopted. Paragraph (4), renumbered as paragraph (3), requires that the PAL be reduced for any effective rules that have a future compliance date.

§116.190. Federal Nonattainment and Prevention of Significant Deterioration Review.

This new section identifies that any changes that occur under a PAL are not considered federal modifications unless the PAL will be exceeded. Subsection (b) restricts the generation of offsets from facilities under a PAL to cases where the PAL is lowered and such a decrease would be creditable without the PAL. For consistency with the federal rule, the commission added subsection (c), which states that a physical or operational change not causing an exceedence of a PAL is not subject to federal NSR review.

§116.192. Amendments and Alterations.

Consistent with its decision to adopt a PAL equivalent to the federal model, the commission made extensive revisions to

§116.192, which include the requirements for reopening a PAL permit and increasing a PAL.

The commission retained the requirement that would allow increases to a PAL only through amendment in subsection (a). The commission deleted the requirement that the new or modified facilities causing the need for the PAL increase be reviewed under the appropriate federal NSR program. The amended PAL remains subject to public notice, and the PAL increases are effective when the new and modified units become operational. The commission added subsection (a)(1), which would require the considered application of BACT or equivalent technology where a facility proposes to add or modify units in such a way as to equal or cause an exceedance of the PAL. Such an increase would be authorized only if the source would not be able to maintain emissions below the PAL assuming application of BACT or BACT-equivalent controls. The commission added subsection (a)(2), which requires federal NSR permits for all facilities that equal or exceed a PAL. The new PAL would be the sum of the allowable emissions for each new or modified source after the application of BACT. Subsection (a)(3) requires any new PAL to be effective on the day any new unit that is part of the PAL begins operation. Subsection (a)(4) states that the PAL shall be the sum of the allowable emissions for each modified or new facility, plus the sum of the baseline actual emissions of the significant and major emissions units after the application of BACT-equivalent controls as identified in subsection (a)(1) of this section, plus the sum of the baseline actual emissions of the small emissions units.

The commission did not adopt proposed subsection (b), which limited reconsideration of controls associated with a PAL to amendments, but allows for changes in the implementation schedule to be requested through alteration. The commission adopted a new subsection (b), which identifies other changes that may be completed by alteration. These include changes to the special conditions that do not increase the emission cap.

§116.194. Public Notice and Comment.

The commission adopted a revised version of this section to require notification of intent to issue a permit allowing for public comment and an executive director response. These public notice requirements are similar to what the commission currently uses for permitting grandfathered facilities, and the commission has determined that they are equivalent to federal notice requirements for PALs. The public notice requirements for the issuance of a PAL permit does not exempt applicants for an NSR permit from meeting the requirements of Chapter 116, Subchapter B.

§116.196. Renewal of a Plant-wide Applicability Limit Permit.

This new section requires that a PAL renewal application be submitted within six to 18 months of the PAL expiration date in subsection (a). Submittal within that time period ensures that the PAL will not expire. Subsection (b) makes all PALs issued with flexible permits under past guidance subject to renewal under this proposed rule. Any PAL that has been in place for more than ten years must be submitted for renewal by December 31, 2006, or within the time specified, whichever is later.

Subsection (c) identifies the information necessary for a renewal application. This information includes the proposed PAL level and any other information that the executive director may require to determine at what level to renew the PAL. For consistency with the federal rule, the commission did not adopt provisions that would have required identification of and justification for those qualified facilities to be included in the PAL and the potential to emit for qualified facilities and highest consecutive 12-month emissions in the last ten years for those that are not qualified.

Subsection (d) would require public notice for the renewed PAL. For consistency with the federal rule, the commission did not adopt the proposed language of subsection (e) that would have required the summation of the potential to emit for qualified facilities and the greatest rolling 12-month emissions for the facilities that are not qualified. The commission adopted revised language in subsection (e) allowing adjustment to a PAL if emission levels are greater than or equal to 80% of the PAL and if the executive director determines that a new PAL is more representative considering technology, economic factors, or the facility's prior voluntary reductions.

To be consistent with the federal rule, the commission adopted a new subsection (f) allowing for adjustment of a PAL affected by new state or federal requirements during the PAL effective period at the time of PAL or federal operating permit renewal, whichever occurs first.

§116.198. Expiration or Voidance.

To be consistent with the federal rule, the commission adopted language in this section significantly different than language that was proposed. The commission did not adopt the requirement for technology upgrades prior to PAL expiration or voidance. The adopted language in subsection (a) specifies the ten-year term of PAL permits. Subsection (b) addresses PALs that will not be renewed and allows owners of PAL sites to propose allowable emissions for each facility that was covered under the PAL. The executive director will decide on the allowable emissions distribution and issue revised permits.

§116.400. Applicability; §116.402. Exclusions; §116.404. Application; and §116.406. Public Notice Requirements.

These new sections contain identical language to that found in the current §§116.180 - 116.183. These sections apply to the regulation of sources of hazardous air pollutants. The new sections are adopted as a reorganization of this chapter in order to accommodate new sections concerning NSR reform and do not contain any substantive changes. The commission adopted administrative changes to be consistent with previously mentioned guidelines and to remove dates that are no longer applicable.

The commission adopts the repeal of §116.410, Applicability.

§116.610. Applicability.

The adopted amendment to this section removes references in subsection (a)(1) to specific paragraphs within 30 TAC §106.261 because the paragraph numbering of §106.261 has changed. The reference to §106.262 is deleted because §106.261 refers to the use of §106.262, when applicable. The adopted change to subsection (b) deletes the exemption from NSR requirements for projects authorized under proposed new §116.617. As discussed earlier, this change is based on the June 24, 2005, decision that vacated EPA rules exempting incidental emission increases from NSR. In response to public comment, the commission adopted language referring to §116.12 for definitions of "major stationary source" and "major modification."

The commission adopted the repeal of §116.617, Standard Permits for Pollution Control Projects.

§116.617. State Pollution Control Project Standard Permit.

This adopted new section incorporates existing requirements listed throughout the current rule, while clarifying the language

in new subsection (a). Subsection (a) is organized into paragraphs (1) - (4) , which include scope and applicability conditions currently found in existing §116.617. Proposed new subsection (a)(1) lists the three types of existing authorizations that may be modified by a state pollution control project standard permit. New subsection (a)(2) clarifies the types of projects that may be authorized by a state pollution control project standard permit, reorganized from the existing §116.617 requirements.

New subsection (a)(3) outlines the prohibitions for use of the state pollution control projects standard permit, clarifying the existing intent and requirements of current §116.617. Specifically, subsection (a)(3) does not allow production facilities to be replaced or modified in any way under this authorization since these types of changes need to be reviewed for BACT and potential harmful effects to health and property in accordance with Texas Health and Safety Code (THSC), Chapter 382, the Texas Clean Air Act (TCAA), §382.0518 and §116.610, unless the conditions of a standard permit or permit by rule are met. Subsection (a)(3)(A) states that the standard permit will not be used to authorize complete replacement of an existing facility or reconstruction of a production facility.

New subsection (a)(3)(B) states that any collateral emission increase associated with the state pollution control project standard permit must not cause or contribute to any exceedance of an NAAQS or cause adverse health effects. The commission clarified subsection (a)(3)(C) to prohibit the use of the state pollution control project standard permit for the purpose of bringing a facility or group of facilities into compliance with an existing authorization or permit, unless approved by the executive director.

New subsection (a)(4) addresses how projects that have been registered under the previous version of §116.617 may continue to be authorized and subsequently meet the conditions of new 116.617. Projects authorized prior to the effective date of this rulemaking may defer the inclusion of emission increases or decreases resulting from the project until future netting calculations. Paragraph (4) allows currently authorized control projects to continue operation uninterrupted until the ten-year renewal anniversary of the original registration or until otherwise incorporated into a permit or standard permit. The review period of 30 days is extended to 45 days to allow evaluation of netting, which would be required under the state pollution control projects standard permit.

New subsection (b) is organized into paragraphs (1) - (5) and includes the general requirements dispersed throughout current §116.617. Subsection (b)(1) requires compliance with the specific conditions of §116.604, Duration and Renewal of Registrations to Use Standard Permits; §116.605, Standard Permit Amendment and Revocation; §116.610, Applicability; §116.611, Registration to Use a Standard Permit; §116.614, Standard Permit Fees; and §116.615, General Conditions. While these requirements are not new, they are reorganized to emphasize and remind applicants of these conditions to ensure submittal of more complete registration information.

New subsection (b)(2) was proposed containing a new requirement specifying that construction or implementation of the state pollution control projects standard permit must begin within 180 days of receiving written acceptance of the registration from the executive director, and that changes to maximum allowable emission rates are effective only upon completion or implementation of the project. In response to public comment, the commission retained the traditional 18-month start of construction window with one 18-month extension consistent with §116.120, Voiding of Permits.

New subsection (b)(3) exempts for state pollution control projects standard permits from the emission limits and distance requirements of permit by rule, §106.261, as referenced in §116.610(a)(1). Pollution control projects are considered environmentally beneficial so any emission increases associated with these projects do not require further authorization.

New subsection (b)(4) contains a new requirement that predictable MSS emissions directly associated with the state pollution control projects standard permit be included in the maximum emissions represented in the registration application, consistent with the ongoing efforts of the commission to authorize all aspects of normal operations.

New subsection (b)(5) contains the same requirements as the previous §116.617(5) and (6) and limits emission increases to only those directly as a result of the pollution control project. Any incidental production capacity cannot be authorized by the state pollution control projects standard permit, but requires some other preconstruction authorization. In response to public comment, the commission included a provision allowing the recovery of lost capacity due to a derate.

New subsection (c) includes the same requirements as in current §116.617(4), as well as two new requirements. Subsection (c) is organized into paragraphs (1) - (3) and pertains to requirements specific to replacement projects. Subsection (c)(1) repeats language from §116.617(4) and allows replacement controls or techniques to be different than those currently authorized as long as the new project is at least as effective in controlling emissions. Subsection (c)(2) allows for increases in MSS emissions if these emissions were reviewed as part of the original authorization for the existing control equipment or technique, and if the increases are necessary to implement the replacement project. Subsection (c)(3) is intended to clarify that the applicable testing and recordkeeping requirements associated with the currently permitted control or technique apply to the replacement to ensure continuing compliance with associated emission limits. If the control or technique is substantially different than an existing control or technique, applicants may also propose equivalent alternatives for review by the executive director.

New subsection (d) clarifies the requirements of current §116.617(4)(C), adds varying fees for different project types, and clearly specifies documentation required in a state pollution control projects standard permit registration application. New subsection (d)(1) includes existing language found in current §116.617(4)(C), but changes the required fees based on whether the project or change in representation results in an increase in the maximum authorized emission rates. Changes to fee requirements are adopted to encourage the installation and use of pollution control projects, especially where there is no increase in emissions or the changes require minimal review. This subsection also describes when a registration should be submitted and when construction or implementation may begin. Various deadlines are proposed to provide flexibility and encourage the use of pollution control projects. Regardless of these deadlines, all projects must meet all requirements of the state pollution control projects standard permit and the responsibility to do so remains with the applicant at all times. New subsection (d)(2) clarifies registration requirements. These include a process and project description, a list of affected permits and emission points, calculated emission rates, the basis of those emission rates, proposed monitoring and recordkeeping, and

the proposed method for incorporating the state pollution control projects standard permit into existing permits. In response to public comment, the commission deleted the term "registration application" and replaced it with "registration."

New subsection (e) incorporates requirements found in §116.615, General Conditions, but expands, clarifies, and focuses those requirements specifically for the state pollution control projects standard permit. New subsection (e)(1) emphasizes that a project should be constructed and operated in accordance with good engineering practices to minimize emissions. New subsection (e)(2) specifically requires copies of documentation to be kept demonstrating compliance with this standard permit.

New subsection (f) provides clarification of the procedures for, and under what conditions, a state pollution control projects standard permit should be incorporated or administratively referenced into a facility's NSR authorization. New subsection (f)(1) applies to facilities authorized by a permit or standard permit. New subsection (f)(1) also applies to those state pollution control projects standard permits that authorize new facilities or changes in method of control and would require incorporation upon the next amendment or renewal of the facility's authorization. The commission is not adopting the proposed requirement for effects review in this rulemaking and will continue to examine the issue during the consideration of additional rulemaking concerning, among other topics, the incorporation of standard permit and permit by rule authorizations (Rule Project No. 2005-016-106-PR, proposed by the commission in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8789, 8808).

New subsection (f)(2) applies to facilities authorized under a permit by rule and requires that all increases in previously authorized emissions, new facilities, or changes in method of control or technique authorized by this standard permit comply with §106.4, except for the emission limitations in §106.4(a)(1) and §106.8.

§116.1200. Applicability.

This new section contains the identical language found previously §116.410 and allows facility owners or operators to apply to the commission for a suspension of permit conditions for the addition, repair, or replacement of control equipment in the event of a catastrophe. This new section is adopted in order to reorganize this chapter to accommodate new sections associated with NSR reform and does not contain substantive changes.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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." Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). 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 rulemaking revises the rules regarding federal permitting applicability, including adding additional options under federal air quality permitting applicability and plant-wide applicability limit options. The commission modified the rule since proposal to be consistent with the federal rule concerning baseline emission determination, actual-to-projected actual emissions test, and plant-wide applicability limits. The rulemaking revises the existing pollution control projects standard permit. In addition, the rulemaking modifies and adds definitions and changes some general formatting of this chapter. The rules do not 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.

In addition, Texas Government Code, §2001.0225, only applies 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 rules do not exceed a standard set by federal law or exceed an express requirement of state law. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. Rather, the federal permitting applicability rules are adopted to incorporate new federal requirements to maintain SIP approval from EPA for the commission's federal air quality permitting program. The remaining changes implement specific state law requirements or are administrative changes. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of the THSC and the Texas Water Code (TWC) that are cited in the STATUTORY AUTHORITY section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rules do not meet any of the four applicability requirements.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the proposed rules. The specific purpose of this rulemaking is to revise the rules regarding federal permitting applicability, including adding additional options under federal air quality permitting applicability and plant-wide applicability limit options. The rulemaking revises the existing pollution control projects standard permit, modifies and adds definitions, and changes some general formatting of this chapter. Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking because they do not affect private real property. Specifically, the rules do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Therefore, the rules do not constitute 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's 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, the commission's rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency

with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action 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)). No new sources of air contaminants are authorized and the adopted revisions will maintain the same level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is the policy that the commission's rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (§501.14(q)). This rulemaking action complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The new and amended sections in this adoption are applicable requirements under Chapter 122, Federal Operating Permits Program. Upon the effective date of this rulemaking, owners or operators subject to the Federal Operating Permit Program that modify any NSR authorized sources at their sites will be subject to the amended requirements of these sections.

PUBLIC COMMENT

The commission held a public hearing on the proposal in Austin on October 27, 2005. During the public comment period, which closed on October 31, 2005, the commission received 17 written comments. All of the commenters opposed the proposal.

RESPONSE TO COMMENTS

EPA, Baker Botts on behalf of the Texas Industry Project (TIP), Dow Chemical Company (Dow), Association of Electric Companies of Texas, Inc. (AECT), Texas Pipeline Association (TPA), Texas Chemical Council (TCC), ExxonMobil Refining and Supply (ExxonMobil), City of Houston, Department of Health and Human Services (HDH), TexasGenco, Sempra Texas Services, LP (Sempra), Texas Instruments (TI), BP Products North America, Inc. (BP), Calpine, Entergy Services, Inc. (Entergy), International Paper, JD Consulting, L.P. (JDC), Celanese Chemicals (Celanese), and the Lone Star Chapter of the Solid Waste Association of North America (TxWANA) submitted written comments during the public comment period. All of the commenters opposed the proposal.

TIP, AECT, TPA, TCC, TexasGenco, TI, BP, Calpine, Entergy, International Paper, Celanese, and Dow commented that substantial departures from federal NSR rules introduce confusion and inconsistencies particularly for companies with multi-state operations, and the introduction of less flexible triggers for federal NSR generates a competitive disadvantage for affected industries. They also commented that TCEQ has traditionally kept federal NSR review separate from permitting procedures under the TCAA and that changes in federal review do not affect the established TCEQ permitting program. They also mentioned the decision of the United States District Court that upheld EPA's rules on actual-to-projected actual emissions and plant-wide applicability limits as further reason not to adopt substantial differences with the federal NSR reform rules.

TIP, AECT, TPA, TCC, ExxonMobil, TI, BP, Calpine, Entergy, International Paper, JDC, Celanese, and Dow commented further that the commission proposal for PALs defeats the purpose of a federal PAL by introducing the BACT criterion. PAL applicants currently holding flexible permits could use ten-year old BACT, while those applicants without a flexible permit would require current BACT, causing an inequity. Plant units not under a PAL would be subject to traditional NSR evaluation. They believe there is not a sound legal basis for applying NSR review to a portion of a plant or project and is inconsistent with federal rules. The commenters noted the operational flexibility and stakeholder vetting that are part of the federal rule. TPA also stated that there were insufficient details on the concept of an east/west split of the state for the implementation of PALs and stated the federal plan should be offered statewide. JDC also suggested adding a provision allowing the conversion of existing flexible permits to PALs.

The commission's proposal on NSR reform was intended to integrate the federal revisions within an existing state program that addressed similar situations concerning plant-wide emission limits and baseline emission determinations. The commission also solicited comments from affected industries on the relative benefits of an integrated program versus an incorporation of the federal program without substantive changes. It is clear from stakeholder meetings and public comment that a program matching the federal rules is the preferred method of accomplishing federal NSR reform. The commission agrees that it has traditionally approached state NSR permitting separately from federal NSR requirements. Additionally, the commission determined that it can continue this approach under federal NSR reform without endangering the attainment of maintenance of NAAQS or affecting public health. The commission is changing the proposal accordingly to adopt rules implementing the federal program on plant-wide applicability limits, actual to projected actual emissions test, and baseline determination without substantive changes to the federal model for these programs.

In summary, PALs may now be considered without specific BACT application to each facility covered under the PAL with a site-wide PAL established as a sum of each facility's baseline emissions. Federal NSR will be required only if there is an increase sought in the PAL. The rules will allow the use of a projected actual emission increase instead of potential to emit in determining project emission increases. Project emission increases may also be reduced by an amount equal to what may have been accommodated within a facility's baseline period.

TIP commented that the proposed rule lacked a regulatory impact analysis. This analysis is required when a major environmental rule exceeds a standard set by federal law unless specifically required under state law. The significant departures from federal law regarding PALs and exclusion of compliant emissions exceeds requirements of federal law.

The commission is adopting rules without substantive difference from federal rules concerning NSR reform and determined that additional regulatory impact analysis is not required.

EPA commented that the definition of actual emissions uses a two-year period where the federal rule uses a 24-month period and requested clarification as the two terms are not necessarily identical.

The commission agrees with this comment, and the rule has been revised by replacing two-year period with 24 months.

TIP and TPA commented that the definition of baseline actual emissions should use the phrase "rate of emissions" instead of "average rate of emissions" as it is closer to federal language.

The commission agrees with the comment, and the phrase "average rate of actual emissions" has been replaced with "rate of emissions."

AECT questioned if the term "facility" has the same meaning in §116.10, and 116.12. Additionally, the term "reviewing authority" should be replaced with "executive director" throughout the new language in §116.12.

The term "facility" is based on the TCAA and has the same meaning throughout Chapter 116 unless stated otherwise. The commission agrees that the term "reviewing authority" could be confusing, and it has been replaced with the term "executive director" in the definitions for baseline actual emissions and net emission increase.

TIP, AECT, TPA, TCC, ExxonMobil, Sempra, TI, BP, Calpine, Entergy, International Paper, Celanese, and Dow expressed concern that the current rule language will exclude malfunction emissions from any baseline consideration. The commenters stated that the preamble indicates that the rule language is intended to include MSS emissions, but it does not clearly accomplish this and appears to cut off inclusion in 2016. They also stated that malfunction emissions, if compliant with federal and state rules, should not be excluded from baseline emissions. They believe issues associated with the authorization of compliant emissions should be addressed in upcoming commission rulemakings in Chapter 101, General Air Quality Rules, and Chapter 116. TIP also commented that it is not necessary to depart from using actual emissions as representative of the first two years of new source operation. AECT commented that specific language authorizing MSS and emission events should be included in the definition of baseline actual emissions. TPA suggested adding a definition of noncompliant emissions.

The federal rule requires that baseline emissions include startup, shutdown, and malfunctions. EPA requested confirmation that the commission's proposal would include these emissions in determining compliance with SIP-approved permit limits. EPA questioned whether the commission intended to retroactively authorize past excess emissions and how baseline emissions will be determined for sources whose startup, shutdown, and malfunction emissions have not been previously authorized. EPA also stated that emissions from startup, shutdown, and malfunctions are not included in the proposed definition of projected actual emissions or in the baseline determination of facilities included under a PAL.

The commission is not changing the rule in response to this comment. The definition of baseline actual emissions requires the exclusion of "noncompliant" emissions from baseline calculations. Baseline MSS emissions may not currently be authorized but future MSS emissions from the modified or affected facilities must be authorized.

TIP, TPA, and Dow commented that the proposed definition of net emissions increase is inconsistent with TCEQ's recent adoption of eight-hour ozone NSR standards, which allows reductions made under mass emissions cap and trade programs to be creditable for netting. The proposed definition disallows decreases that have been relied on in SIPs. AECT and TPA commented that this definition should refer to the definition of baseline actual emissions and the inclusion of MSS and malfunction emissions when calculating a net emission increase. AECT and TPA made the same comment concerning the definition of project net.

The commission is changing the definitions of net emissions increase and project net in response to this comment. Baseline actual emissions are referenced in these definitions. Cap and trade reductions are allowed in netting calculations. The commission does not rely on any facility or site-specific emission decrease to demonstrate attainment or reasonable further progress when using cap and trade programs to provide for emission reductions. A cap and trade program ensures that there must be a real emission decease somewhere in the air shed if there is an emission increase. The five-year netting window ensures that any emission decreases at a site are contemporaneous with proposed increases.

TPA requested a clarification of the term "enforceable as a practical matter," as used in the preamble, when assigning credits for emission reductions.

The commission is changing the rule language in response to this comment and will use the term "enforceable." Limits that are enforceable require demonstration through such measures as documentation, inspection, and monitoring.

AECT commented that the second sentence of §116.12(28)(A) in the definition of project emission increase concerning calculation of emission increases should be moved to §116.12(27), the definition of projected actual emissions. AECT also commented that the use of "modified" and "affected" are undefined and the phrase "at the stationary source" should be added after "facility" in the introductory phrase.

The commission is not changing the rule in response to these comments. The commission determined that the language concerning calculation of emissions is properly located because the consideration of what emissions could have been accommodated in the baseline period is part of determining the project emissions increase, not the projected actual emissions. The terms "modified" and "affected" are used in the EPA rule and guidance, are consistent with everyday usage, and consistent with commission practice, and do not require a definition in the rule. The commenter's suggestion of adding the phrase "at the stationary source" would be inconsistent with EPA rules, which do not limit the project emission increase to facilities at the stationary source.

AECT commented that the definition of *de minimis* threshold test contains the term "major modification threshold" that should be defined in §116.12.

The commission agrees with this comment and is modifying the definitions for more consistent and accurate use of terms that are consistent with federal use. The term "major modification threshold" has been replaced with "significant level" in the definition for major modification (including Table I) and the definition of *de minimis* threshold test. The significant level is identified in the definition for major modification.

AECT commented that the term "federally regulated new source review pollutant" in §116.12(13) differs significantly from the same definition in the federal NSR reform rules. AECT questioned the basis for the difference.

The commission is changing the rule in response to this comment to add a cited definition containing references to federal definitions for the determination of a federally regulated NSR pollutant.

AECT commented that the definition of major stationary source in §116.12(15) contains a sentence stating "a source that is major for one PSD pollutant is considered major for all PSD pollutants." AECT stated that there is no support for the sentence in EPA rules or guidance.

The commission disagrees that this concept requires change. The commission modified this sentence to clearly indicate that a source that has emissions of any federally regulated NSR pollutant greater than the major source level is a major stationary source for all PSD pollutants. This policy is consistent with the EPA definition of major stationary source and federal guidance.

AECT commented that the definition of major modification in §116.12(16) should be changed to indicate that a project emission increase and the net emission increase must be at or above the major source threshold for the modification to be considered major. This concept should also be applied at non-PAL facilities.

The commission is not changing the rule in response to this comment. At major stationary sources, the project emission increase and the net emission increase must be greater than the significant level (or threshold) for the modification to be major. If the source is not major, the project emissions increase must exceed the major source threshold for the modification to be major. This is consistent with federal applications.

TxWANA requested clarification that provisions in the definition of major source in §116.12 exempting the use of alternate fuels from being considered a major modification would apply to landfill-generated gas.

The commission agrees with this comment. The use of landfill gas as an alternate fuel, if that is the only change, would not constitute a major modification.

EPA questioned whether a significant emission increase determination would yield the same result under state and federal rules.

The commission is not changing the rule in response to this comment. A significant emission increase would be the same under the commission's rule as it would be under the federal language. Emissions that deviate from those authorized are considered noncompliant and the treatment of the associated emissions would vary, depending on the circumstances. For example, if a unit's annual operating hours were limited to 2,000, the allowable emission rate associated with operating beyond 2,000 hours would be considered zero, regardless of whether the tons per year limit had been exceeded by the source. If the hourly emission rate had been exceeded, emissions above the hourly emissions rate would be considered noncompliant and would not be in the baseline.

EPA requested clarification that the commission consider municipal incinerators capable of charging 50 tons of refuse per day as major sources.

The commission considers these municipal incinerators as major sources.

EPA requested clarification of the provision in the definition of major modification that allows a change in a facility in a PAL that causes a significant increase for a pollutant at a non-PAL facility to be considered a major modification.

Consistent with its decision to adopt rules equivalent with the federal PAL, the commission removed this language. Emission increases will be included in PAL and will constitute a major modification only if the PAL is exceeded by a significant level.

EPA requested clarification of the term "federal permit of the same type" as used in §116.12(18)(A)(ii). Further, there is no provision stating that an increase or decrease in sulfur dioxide, particulate matter, or nitrogen oxides occurring before a minor source baseline date is creditable only if it is required in calculating the amount of maximum increases that remain available.

The commission is changing the rule in response to these comments, for clarity, and substituted the term "NSR permit" for permit of the "same type." The commission is also adding the EPA-recommended change concerning increases or decreases in sulfur dioxide, particulate matter, or nitrogen oxides for consistency with federal rules.

EPA questioned why the commission is not allowing credit for emission decreases in §116.12(18)(C)(iii) if it is relied upon for issuing a PAL. EPA also questioned why reduction credits cannot be used in determining an offset ratio if the reduction was used in issuing a PAL.

Consistent with its decision to adopt rules equivalent with the federal PAL, the commission removed this language.

EPA commented that the following definitions were not proposed for the commission's PAL program and should be added or an equivalency demonstration provided: allowable emissions, small emissions unit, major emissions unit, major facility, PAL effective period, and significant emissions unit.

Allowable emissions are defined in §116.10. The PAL is being incorporated into the commission rules in the same manner as state NSR permits. The PAL permits will have the same ten-year renewal requirement, and it has not been necessary to define an effective period. Consistent with its decision to adopt rules equivalent with the federal PAL, the definitions for major facility, small facility, and significant facility have been added. The commission used the term "facility" as a substitute for "emissions unit" for consistency with its use of terms. The term "facility" is synonymous with "emissions unit."

EPA commented that the definition of PAL major modification lacked the federal definitions of major modification and net emissions increase and requested an equivalency demonstration based on their exclusion.

The commission is not changing the rule in response to the comment. The EPA definition for PAL major modification contains language that states "notwithstanding the definitions for major modification and net emissions increase." These definitions already exempt PAL facilities so the additional language is unnecessary.

EPA commented that the definition of PAL pollutant does not require that the PAL be established at a major source.

Consistent with its decision to adopt a PAL program equivalent with the federal model, the commission added the suggested language to the definition.

EPA commented that §116.121(e) differs from the federal rule and only requires that information documenting projected actual emissions and any excluded emissions be available for review by the executive director and the general public. For equivalency with the federal rule, all information required under §116.121 must be made available to the executive director and the general public.

Consistent with its decision to adopt a PAL equivalent with the federal model, the commission added the necessary language in this section.

AECT suggested revising the first sentence in §116.121(a) to refer to a "project emission increase" because that is a defined term. A similar change should be made in §116.151.

The commission did not change §116.121(a) in response to this comment. The project emission increase must be determined for every project and is compared to the significance level. It may be determined using projected actual emissions and/or excluding emissions that could have been accommodated in the baseline and will therefore be subject to the requirements of §116.121. If it were determined using the potential to emit, these requirements would not apply.

EPA commented that §116.150 makes nonattainment review in relation to a change in an area's attainment status contingent on the date that a complete permit application is received. This differs from federal guidance, which bases nonattainment review on the issuance date of a permit.

In order to remain consistent with federal rules, the commission removed the date from the rule.

EPA, TIP, and Dow commented that the commission should modify §116.150(c)(3) to state that any increase in volatile organic compounds or nitrogen oxides that exceeds the major modification threshold in the definition of major modification will be subject to a netting test. Dow stated that the concept could also be incorporated by adding to the definition of project net in §116.12.

The commission agreed with the comment, and §116.150(c)(3) has been revised to clarify when a netting test will be required.

AECT commented that the terms "facility" and "facilities" in §116.151 should be replaced with "stationary source(s)" and that the term "modification" is undefined. In subsection (c), the term "aggregated over the contemporaneous period" is superfluous as the concept is included in the defined term "net emissions increase." AECT made similar comments about the use of these terms in §116.160 and also suggested that the term "major source" be replaced with "major stationary source."

The commission disagrees with AECT about the use of the term "facility." The commission's current NSR permitting program is based on the authorization of facilities and the term is defined in THSC, TCAA, Chapter 382, §382.002(6) and in the commission's rules. The use of the term is well-established and causes no significant difference in the issuance of PAL permits. The commission determined that the term is used appropriately in §116.151 and 116.160. The term "modification" has not been defined by EPA for NSR and the commission determined that a Texas definition is not appropriate or necessary because the term has an accepted meaning, and the term "modification of existing facility" is defined in TCAA, §382.002(9). The commission agrees with AECT concerning the use of the term "aggregated over the contemporaneous period" and the term has been removed from §§116.150, 116.151, and 116.160. The terms "major source" and "major stationary source" have the same meaning, and the commission has not made the suggested change.

EPA commented that the commission should confirm that "replacement units" as referenced in §116.151 and §116.160 will be treated as existing units for purposes of federal NSR and emission reductions from the shutdown of a replaced unit will not be used for netting or offsets.

The commission agrees with this comment and added definitions to §116.12 for "Replacement facility" and "Basic design parameters" to address EPA concerns.

AECT commented that the understanding is that the date July 1, 1999, in §116.160(c)(1) refers only to the phrase "the definitions for protection of visibility and promulgated in 40 CFR §51.301" and does not apply to 40 CFR §52.21. If this is not the case, the commission will have failed to incorporate 40 CFR §52.21 and the NSR reform rule adopted in December 2002.

AECT's understanding is correct; the July 1, 1999, date does not apply to 40 CFR §52.21.

Dow, Calpine, International Paper, Celanese, and TI commented that the provision in §116.160(c)(4) requiring a determination to issue a PSD permit within one year after receipt of a completed application should be deleted. The commenters agreed that most permits can be issued within that time frame, but permit timing should not be added to regulations so as to allow maximum flexibility to resolve complex technical issues.

The commission agrees with this comment and removed the one-year requirement.

TxWANA commented that the commission should create an alternative permitting process for landfill gas-to-energy projects that would allow for quicker authorization of those projects that qualify as major sources or major modifications. The commenter's specific suggestion is that the municipal solid waste landfill air standard permit currently proposed as an amendment to 30 TAC Chapter 330, Municipal Solid Waste, be used as the base authorization mechanism. Landfill gas projects that would qualify as major would, by rule, be directed into case-by-case permit review under Chapter 116 but would be exempt from contested case hearings. TxWANA stated that this abbreviated process would help promote these environmentally beneficial projects.

The commission did not change the rule in response to this comment. The subject of an abbreviated permitting process for major source landfill gas energy projects was not in the proposal and thus unavailable for public comment. The commission staff is evaluating TxWANA's proposal for a possible future rulemaking.

EPA requested that the commission explain how its permitting process allowing the establishment of a separate PAL permit works with the federal requirement to establish a PAL within an existing permit. The commenter also requested an explanation of how a partial PAL (one not covering all facilities at a site) will determine NSR applicability, including netting procedures, for non-PAL facilities. EPA also requested an explanation of how conditions in individual permits remain in effect after issuance of a PAL permit.

The commission is unaware of any requirement to establish the PAL in an existing NSR permit and expects that most PALs will be consolidated with an existing state NSR permit. The commission sees no reason to limit the option of establishing a separate PAL permit for a site. The commission decided to adopt a PAL closer to the EPA model so the partial PAL has been removed as an option. A PAL permit contains the conditions necessary to satisfy PAL requirements and has no effect on the requirements associated with any state NSR authorization.

EPA commented that §116.186 requires that each PAL contain all the requirements of a PAL as listed in 40 CFR §51.165 and §51.166. It is not clear that the commission's rule contains this requirement or the requirement that PAL facilities use a monitoring system meeting the requirements of 40 CFR §51.165(f) and §51.166(w).

The commission is adopting language consistent with the federal requirements. To simplify use of this rule, the commission is including the necessary language in §116.186 rather than adopt the federal requirements by reference. The language concerning

monitoring was added as §116.186(b)(4)(C) and (D). The commission also added subsection (b)(10) allowing the extension of a PAL while an application for renewal is being considered.

TIP commented that language in §116.186(b)(1) - (4) and §116.186(b)(6) and (7) is not found in the federal PAL rule and that the commission should deviate from the federal requirements only when necessary to integrate PAL into the commission rules. It made the same comment on §116.186(c)(2)(E), concerning alternative monitoring approach and subsection (c)(4), concerning implementation schedules for installation of BACT or BACT-equivalent controls.

The commission is retaining §116.186(b)(1) - (4) and §116.186(6) and (7) in this adoption. These paragraphs identify procedures and requirements for sampling and recordkeeping that ensure proper communication with the commission and compliance with the permit and do not conflict with the federal PAL rule. The commission is also retaining §116.186(c)(2)(E) because it determined alternative monitoring is a part of the federal PAL rule. The commission did not adopt §116.186(c)(4) because it was inconsistent with the federal PAL rule.

EPA requested that the commission clarify whether its rule will establish a PAL based on the application of BACT or baseline actual emissions of included facilities. It also requested that the commission explain the use of allowable emissions in place of potential to emit when considering addition of facilities to a PAL. EPA commented that the commission's rules do not contain the provision requiring subtraction of emission level from a PAL for permanently shut down facilities.

Consistent with its decision to adopt a PAL equivalent with the federal model, the commission set the PAL based on baseline emissions. Facilities in the PAL are still subject to state permitting requirements, including any allowable emissions rate authorized by state law that effectively limits the potential to emit of that facility. The provision requiring subtraction of emission level from a PAL for permanently shut down facilities has been added to §116.188, Plant-wide Applicability Limit.

TIP commented that language in §116.188(1) - (3), concerning addition of significance levels to PALs and use of potential to emit for new facilities added to a PAL is not comparable to the federal rule and that the commission should deviate from the federal requirements only when necessary to integrate PAL into the commission rules.

The commission disagrees with the comment. The federal language addresses significance levels in PALs and the use of potential to emit in 40 CFR §51.165(f)(6) and §51.166(w)(6). The commission is retaining the language in §116.188(1) and (2). The commission agrees that §116.188(3) is not necessary and it has been removed from the rule.

EPA stated that §116.188 has no provisions corresponding to federal rules for requesting an increase in a PAL and it is unaware of a federal requirement to remove baseline emissions of new or modified facilities from the PAL. EPA also commented that §116.188(4) discusses regulatory requirements that have a future compliance date but closes the provision by referring to requirements that are effective prior to PAL issuance. The commenter requested that the commission clarify this provision and demonstrate how it meets federal requirements.

Consistent with its decision to adopt a version of PAL closer to the federal model, the commission removed the noted language that is not required under the federal rules.

EPA stated that §116.190 does not contain a federally equivalent provision that a physical or operational change not causing an exceedance of a PAL is not subject to federal restrictions on relaxing enforceable emission limitations to avoid NSR review.

Consistent with its decision to adopt a version of PAL equivalent to the federal model, the commission added the federally equivalent language as a new subsection (c).

EPA and TIP commented that the federal PAL requirements allow the permitting authority to consider the application of BACT or equivalent technology where a facility proposes to add or modify units in such a way as to cause an exceedance of the PAL. Such an increase would be authorized only if the source would not be able to maintain emissions below the PAL, assuming application of BACT or BACT-equivalent controls. EPA requested an explanation of how the commission's requirement to install BACT compares with the federal rule. The commenter also requested that the commission explain how its requirements to increase the PAL compare to the federal rule. TIP stated that the term "major modification" is used rather than "PAL major modification" and that a control technology implementation schedule for BACT went beyond federal requirements.

Consistent with its decision to adopt a PAL equivalent to the federal model, the commission added §116.192(a)(1) addressing the issue of potential BACT application when a PAL permit holder seeks an amendment or alteration.

EPA stated that the commission has not addressed these areas in its proposed PAL rules: contents of a PAL permit; reopening a PAL permit; increasing a PAL; revalidation of data used to establish a PAL; and recordkeeping.

Consistent with its decision to adopt a PAL equivalent to the federal model, the commission made extensive revisions to §116.192 that include the requirements for reopening a PAL permit and increasing a PAL. Additionally, the commission expanded the recordkeeping requirements in §116.186(b)(4) to incorporate all the requirements in the EPA rule. Section 116.186 specifies the contents of a PAL permit and includes EPA requirements with the addition of §116.186(b)(10). The revalidation of data used to establish the PAL was in the proposed rule and is found in §116.186(b)(9) of the adopted rule.

EPA commented that the permit alteration and amendment of provisions in §116.192 must be consistent with the SIP-approved provisions of §116.116, Changes to Facilities.

The commission disagrees with this comment. Section 116.116 identifies requirements associated with the authorization of facilities that emit air contaminants. A PAL permit does not authorize facilities that emit air contaminants and is not subject to those requirements.

EPA commented that the commission appears to rely on 30 TAC Chapter 39, Public Notice, to meet the public notice requirements for PALs and noted that a second public notice prior to permit issuance is not required for all air permits and may not be consistent with federal requirements to notify the public of the agency's approval of a permit. EPA also commented that Chapter 39 has not been approved into the Texas SIP. EPA also stated that PALs are not referenced in Chapter 39 and requested a summary of Chapter 39 requirements for initial, renewed, or amended PALs.

The commission modified §116.194, Public Notice and Comment, to require notification of intent to issue a permit allowing for public comment and an executive director response. The

commission determined that they are equivalent to federal notice requirements for PALs. Although Chapter 39 has not been approved by EPA as a revision to the SIP, the commission treats the rules, first submitted in 1999, as SIP requirements. A reference to PALs in Chapter 39 is not necessary and could not be added at this adoption because the applicable sections were not opened for public notice.

EPA commented that the requirements in §116.196 to identify qualified facilities under §116.10 and to include rolling 12-month emission rates for non-qualified facilities are not in federal rules and requested a demonstration that such inclusions result in a program at least as stringent as the federal PAL. TIP also noted this difference between the proposal and the federal rule and urged the commission to adopt the federal PAL without substantive differences.

Consistent with its decision to adopt a PAL equivalent to the federal model, the commission removed the reference language in the adopted rule.

EPA commented that §116.196(e)(B) would be clearer if the commission stated that the PAL is being set at a higher level in accordance with §116.188(3) and §116.192(a).

The commission agrees with this comment and §116.192(a) has been referenced as suggested.

EPA commented that §116.198 is not clear on whether a PAL that is not renewed expires at the end of the PAL effective period in 40 CFR §51.165(f)(9)(B). It also commented that the section does not have a requirement to include proposed allowable emission limits for each emission unit within the federal time frame for PAL renewals or to adjust emissions. The requirement in the section that requires documentation of technology upgrades is not found in federal rules.

Consistent with its decision to adopt a PAL equivalent to the federal model, the commission is adopting EPA's recommended additions. The commission removed the language concerning the documentation of technology upgrades because this requirement is not in the federal rule.

AECT commented that §116.610(b) should be revised to refer to major stationary sources, rather than "major source or major modification," and also reference §116.12 as the location of the definition of major modification.

For consistency in the use of terms, the commission is modifying the appropriate term to refer to major stationary sources and included a reference to §116.12 as the location for the definitions rather than a federal rule reference.

HDH commented that the public comment period was too short and should be extended with additional hearings in Dallas, Houston, and Beaumont.

The commission disagrees that the chance for public participation in development of this proposal was too short. The commission met its legal obligation for length of the public comment period and conducted two stakeholder meetings during the development of this proposal. Representatives of industry and environmental organizations were invited on both occasions.

HDH commented that it encourages state rules that are more stringent than the federal. The City of Houston, along with several urban areas within the state, is currently classified as nonattainment and it views the more stringent rules as aids toward achieving attainment, or at least maintaining the severity of the nonattainment designations.

The commission did not change the rule in response to the comment. Neither state permitting law nor the federal NSR permitting program are designed to be control measures for specific nonattainment areas. The commission adopted specific rules regarding control of nitrogen oxide and volatile organic compound emissions from facilities in Houston and other nonattainment areas in its efforts to attain the NAAQS. The commission will consider more stringent rules if air quality goals are not achieved.

TIP, Entergy, Calpine, BP, TI, Celanese, and AECT commented that beyond the netting change required in response to the District of Columbia Circuit Court decision in *State of New York, et al. v. United States Environmental Protection Agency*, the proposed changes to the existing state Pollution Control Project Standard Permit are unnecessary and inappropriate.

The commission is not changing the rule language in response to this comment. In addition to the change concerning netting on pollution control projects required as a result of this court decision concerning NSR reform, the commission is adopting changes to §116.617, which are intended to clarify language and improve organization and readability. These changes include grouping similar or related requirements together and ordering those groups in a logical progression. To better organize general requirements for standard permits, the applicable conditions of Chapter 116, Subchapter F, Standard Permits, were added in subsection (b), and a list of registration requirements were added to subsection (d) to ensure that all registration information is submitted. Similarly, subsection (e) incorporates requirements found in §116.615, General Conditions, and expands, clarifies, and focuses them specifically for the state pollution control project standard permit.

TIP requested confirmation that the standard permit still authorizes collateral emission increases for state NSR purposes. TIP commented that §116.617(9) should be retained.

TIP is correct that the pollution control project standard permit will authorize collateral emission increases. The commission determined that §116.617(9) is redundant in this adopted version of the pollution control project. Projects authorized under this standard permit will be evaluated through netting for significance. Any project qualifying as a significant change will be referred into the appropriate authorization methods of Chapter 116. Projects remaining below the significant level are not affected.

EPA commented that it does not consider this a good time for the commission to adopt any kind of pollution control regulation because of pending litigation concerning the District of Columbia Circuit Court decision, which vacated the federal pollution control project rule.

The commission is not changing the rule in response to this comment. The state pollution control project rule being amended is independent of the federal pollution control project rule vacated by the court. The federal rule addressed the issue of exclusion of pollution control project emissions from federal NSR or PSD review, a subject not addressed in the state rule. Litigation, appeals, and interpretation of court decisions may not be resolved for some time, and the commission desires to continue authorizing beneficial projects that reduce the quantity and severity of pollutants emitted to the atmosphere.

EPA requested the commission's rationale for qualifying the substitution of compounds as a pollution control project under §116.617(a)(2)(C).

The commission determined that substituting compounds used in manufacturing can reduce or control the amount of pollution emitted to the atmosphere and is therefore within the original scope and intent of the pollution control project. This substitution must be approved by the executive director.

TIP, TPA, TCC, and AECT all commented on §116.617(a)(4), which requires that past increases authorized under a standard permit be included in netting. The commenters claim that the retroactive nature of this requirement is unnecessary and impractical and request that the requirement only be applied prospectively.

The commission is not changing the rule in response to this comment and disagrees that the requirement is unnecessary. The commission determined that pollution control projects, even those with incidental emission increases in other contaminants, are beneficial to the environment, and wants to encourage them. However, in order to remain consistent with the previous rule, the emission increases and decreases from the pollution control project must be shown in subsequent site netting exercises. The requirement for immediate netting on new projects was added as a result of the District of Columbia Circuit Court decision.

TIP and EPA commented that they will review the pollution control project for consistency with 40 CFR §51.160 and §51.161. They asked the commission for a determination of whether the incidental emission increases resulting from projects could interfere with attainment or maintenance of NAAQS. In addition, EPA asked how the pollution control project complies with the public participation requirements of 40 CFR §51.161, particularly concerning §116.617(d)(1)(B), which allows for increases in emissions without public notice.

The commission is not changing the rule in response to these comments. The new pollution control project contains language prohibiting incidental emission increases that would prevent achievement of an NAAQS. Specifically, under §116.617(a)(4), all increases and decreases must be included in netting calculations. If the project emission increases are not below significance thresholds for PSD or nonattainment review, the standard permit cannot be used. For projects under PSD or nonattainment thresholds, the maximum emission rates identified in the standard permit registration serve as an enforceable emission limit.

The executive director uses the 30-day period prior to start of construction to verify that the collateral emissions are properly quantified and that there is not a significant net emission increase associated with the proposed project. Incidental increases associated with a pollution control project must have no harmful off-property effects, and the commission determined that the emission decreases are of benefit to the environment. Based on these conditions, the commission further determined that a public review of each individual application of the pollution control project was not necessary and would slow beneficial projects. This is not a new condition of the pollution control project, and the provision was available for public comment at the original adoption of the pollution control project and during this amendment.

TIP, AECT, and Dow commented that the proposed §116.617(f) requires impacts review upon a mandatory incorporation of the standard permit into an existing NSR permit. The TCAA does not require a re-review of project effects on incorporation.

The pollution control project standard permit can be used to make physical or operational changes at a facility instead of a permit amendment under §116.110, Applicability, and no effects review is required for initial construction. An effects review will be required at the incorporation of the pollution control project into the NSR permit. The commission is not adopting the proposed requirement for effects review in this rulemaking and will continue to examine the issue during the consideration of additional rulemaking concerning, among other topics, the incorporation of standard permit and permit by rule authorizations (Rule Project No. 2005-016-106-PR, proposed by the commission in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8789, 8808).

TIP, AECT, and Dow commented regarding the requirement in §116.617(b)(2) limiting the start of construction to within 180 days of registration. They stated that the commission traditionally allows up to 18 months to start construction, and reducing the time allowed is unnecessary and unreasonable. They suggested that the time allowed be increased to 18 months with an automatic 18-month extension to be consistent with other state and federal rules and guidance. Dow also requested that the commission remove the requirement to notify upon the start of construction and the start of operation.

The commission agrees with the comment and is modifying the rule language. The commission is retaining the start of construction and operation notification in order to track construction progress.

TIP, AECT, and Dow commented that the proposed requirement that MSS emissions associated with replacement projects can only be authorized if necessary to the control project and authorized originally is contrary to the initiative to authorize MSS emissions and has no relationship to NSR reform. They also commented that provisions requiring the permitting of predictable emissions appear to be out of context in this rulemaking and there was no public notice on the potential scope of such an authorization. This issue should be deferred to the subsequent rulemaking on this subject. Dow commented that MSS should not be addressed in the standard permit.

The commission has not changed the rule in response to this comment. The commission requires the authorization of MSS emissions for new pollution control projects. Authorizing MSS for a replacement project when an initial authorization has not been made allows the MSS emissions to be included within the NSR permit without an effects evaluation. Because some pollution control projects can constitute facilities, the commission determined that the authorization of MSS emissions within the standard permit is necessary to an accurate review of project emissions.

TIP, TexasGenco, Sempra, and AECT opposed the deletion of the provision in §116.617(5), which allows the recovery of lost capacity caused by a derate resulting from the installation of control equipment or the implementation of a control technique. They stated that the language resulted from extensive input from stakeholders during a previous rulemaking, and asked that the commission provide a basis for its proposed removal. In addition, EPA requested that the authorizations be identified that are referred to as "additional authorizations" in the proposed rule. TIP specifically requested that the standard permit continue to authorize collateral increases if associated with the replacement of a control.

The commission agrees with the commenters and is retaining the language authorizing the recovery and utilization of capacity lost due to a pollution control project. All production increases

associated with a pollution control project, not including capacity recovered, must qualify for and be authorized under §116.110 or §116.116 prior to the use of the increased capacity. Additional authorization means a permit amendment under §116.110 or the use of a permit by rule. The commission agrees that the standard permit will continue to authorize collateral increases associated with control replacement.

EPA asked how the commission would address a situation under subsection (d)(1)(B) - (D) where it is determined a pollution control project results in a control strategy violation or interferes with an NAAQS after construction has begun. It asked for a demonstration of how the provisions of subparagraphs (B) - (D) meet the requirements of 40 CFR §51.160(a) and (b). EPA questioned whether a pollution control project could begin operation prior to the commission completing an evaluation under 40 CFR §51.160(a) and how the commission would prevent construction of a project. It stated that the subparagraph is not clear that construction of the pollution control project is solely at the risk of the owner if the commission does not find the project meets 40 CFR §51.160(a). EPA had similar comments concerning §116.617(f)(1)(A).

Because netting is required to show that a project does not trigger PSD or nonattainment reviews, the application of 40 CFR §51.160(a) should not be necessary. If a project is not constructed as represented, the commission has the authority to take enforcement action if any standard permit conditions are violated. The commission notes that it is always the responsibility of the owner or operator to evaluate applicability and determine compliance with all federal and state rules and regulations.

AECT recommended that the term "registration application" in §116.617(d)(1) be replaced by "registration" since no application is required under the standard permit process.

The commission agrees with the comment and made the necessary substitution. The commission further notes that evaluation of the proposed project requires the submittal of appropriate documentation.

TIP and AECT commented that the proposed language in §116.617(d)(1)(B) requiring notification of changes causing emission increases be submitted 30 days prior to construction should be deleted. They stated that the commission has not provided justification for the proposed change and that it is contrary to the streamlining intent of NSR reform.

The commission is not changing the rule in response to these comments. Those changes, which include revisions to construction and increased emissions, should be reported 30 days prior to implementation to allow time for review and approval of the revised project.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.12

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.0512, concerning Modification of Existing Facility, which establishes a modification and its limits; §382.0518, concerning Preconstruction Permit, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility; and Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq*., which requires permits for construction and operation of new or modified major stationary sources.

The amendment implements THSC, §§382.002, 382.011, 382.012, 382.051, 382.0512, and 382.0518; 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 title (relating to Nonattainment Review and Prevention of Significant Deterioration Review); and Chapter 116, Subchapter C, Division 1 of this 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 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 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 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 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 emissions rate shall include fugitive emissions to the extent quantifiable. Until March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under Chapter 101 of this title (relating to General Air Quality Rules) may 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) 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.

(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.

(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.

(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.

(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.

(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.

(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.

(14) Federally regulated new source review pollutant--As defined in subparagraphs (A) - (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.

(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.

(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.

(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). 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).

(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.
Figure: 30 TAC §116.12(18)(A)

(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.

(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.

(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 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.

(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 or 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.

(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).

(23) Plant-wide applicability limit effective date--The date of issuance of the plant-wide applicability limit permit. The plant-wide applicability limit effective date for a plant-wide applicability limit established in an existing flexible permit is the date that the flexible permit was issued.

(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.

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

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

(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.

(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.

(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 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.

(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.

(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.

(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.

(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.

(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.

(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*.

(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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Commission on Environmental Quality
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SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.121

STATUTORY AUTHORITY

The new section is adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new section is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning

(2) Limit the requirements pertaining to emission control actions in Priority I regions to—

(i) Urbanized areas as identified in the most recent United States Census, and

(ii) Major emitting facilities, as defined by section 169(1) of the Act, outside the urbanized areas.

§ 51.153 Reevaluation of episode plans.

(a) States should periodically reevaluate priority classifications of all Regions or portion of Regions within their borders. The reevaluation must consider the three most recent years of air quality data. If the evaluation indicates a change to a higher priority classification, appropriate changes in the episode plan must be made as expeditiously as practicable.

(b) [Reserved]

Subpart I—Review of New Sources and Modifications

SOURCE: 51 FR 40669, Nov. 7, 1986, unless otherwise noted.

§ 51.160 Legally enforceable procedures.

(a) Each plan must set forth legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure or installation, or combination of these will result in—

(1) A violation of applicable portions of the control strategy; or

(2) Interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

(b) Such procedures must include means by which the State or local agency responsible for final decisionmaking on an application for approval to construct or modify will prevent such construction or modification if—

(1) It will result in a violation of applicable portions of the control strategy; or

(2) It will interfere with the attainment or maintenance of a national standard.

(c) The procedures must provide for the submission, by the owner or operator of the building, facility, structure, or installation to be constructed or modified, of such information on—

(1) The nature and amounts of emissions to be emitted by it or emitted by associated mobile sources;

(2) The location, design, construction, and operation of such facility, building, structure, or installation as may be necessary to permit the State or local agency to make the determination referred to in paragraph (a) of this section.

(d) The procedures must provide that approval of any construction or modification must not affect the responsibility to the owner or operator to comply with applicable portions of the control strategy.

(e) The procedures must identify types and sizes of facilities, buildings, structures, or installations which will be subject to review under this section. The plan must discuss the basis for determining which facilities will be subject to review.

(f) The procedures must discuss the air quality data and the dispersion or other air quality modeling used to meet the requirements of this subpart.

(1) All applications of air quality modeling involved in this subpart shall be based on the applicable models, data bases, and other requirements specified in appendix W of this part (Guideline on Air Quality Models).

(2) Where an air quality model specified in appendix W of this part (Guideline on Air Quality Models) is inappropriate, the model may be modified or another model substituted. Such a modification or substitution of a model may be made on a case-by-case basis or, where appropriate, on a generic basis for a specific State program. Written approval of the Administrator must be obtained for any modification or substitution. In addition, use of a modified or substituted model must be subject to notice and opportunity for public comment under procedures set forth in § 51.102.

[51 FR 40669, Nov. 7, 1986, as amended at 58 FR 38822, July 20, 1993; 60 FR 40468, Aug. 9, 1995; 61 FR 41840, Aug. 12, 1996]

§ 51.161 Public availability of information.

(a) The legally enforceable procedures in § 51.160 must also require the State or local agency to provide opportunity for public comment on information submitted by owners and operators. The public information must include the agency's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval.

(b) For purposes of paragraph (a) of this section, opportunity for public comment shall include, as a minimum—

(1) Availability for public inspection in at least one location in the area affected of the information submitted by the owner or operator and of the State or local agency's analysis of the effect on air quality;

(2) A 30-day period for submittal of public comment; and

(3) A notice by prominent advertisement in the area affected of the location of the source information and analysis specified in paragraph (b)(1) of this section.

(c) Where the 30-day comment period required in paragraph (b) of this section would conflict with existing requirements for acting on requests for permission to construct or modify, the State may submit for approval a comment period which is consistent with such existing requirements.

(d) A copy of the notice required by paragraph (b) of this section must also be sent to the Administrator through the appropriate Regional Office, and to all other State and local air pollution control agencies having jurisdiction in the region in which such new or modified installation will be located. The notice also must be sent to any other agency in the region having responsibility for implementing the procedures required under this subpart. For lead, a copy of the notice is required for all point sources. The definition of point for lead is given in § 51.100(k)(2).

§ 51.162 Identification of responsible agency.

Each plan must identify the State or local agency which will be responsible for meeting the requirements of this subpart in each area of the State. Where such responsibility rests with an agency other than an air pollution control agency, such agency will consult with the appropriate State or local air pollution control agency in carrying out the provisions of this subpart.

§ 51.163 Administrative procedures.

The plan must include the administrative procedures, which will be followed in making the determination specified in paragraph (a) of § 51.160.

§ 51.164 Stack height procedures.

Such procedures must provide that the degree of emission limitation required of any source for control of any air pollutant must not be affected by so much of any source's stack height that exceeds good engineering practice or by any other dispersion technique, except as provided in § 51.118(b). Such procedures must provide that before a State issues a permit to a source based on a good engineering practice stack height that exceeds the height allowed by § 51.100(ii) (1) or (2), the State must notify the public of the availability of the demonstration study and must provide opportunity for public hearing on it. This section does not require such procedures to restrict in any manner the actual stack height of any source.

§ 51.165 Permit requirements.

(a) State Implementation Plan and Tribal Implementation Plan provisions satisfying sections 172(c)(5) and 173 of the Act shall meet the following conditions:

(1) All such plans shall use the specific definitions. Deviations from the following wording will be approved only if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition below:

(i) *Stationary source* means any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.

(ii) *Building, structure, facility, or installation* means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of

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30 TAC § 116.601 (2011)

§ 116.601. Types of Standard Permits

(a) For the purposes of this chapter a standard permit is either:

(1) one that was adopted by the commission in accordance with Texas Government Code, Chapter 2001, Subchapter B, into §§ 116.617, 116.620, and 116.621 of this title (relating to Standard Permits for Pollution Control Projects; Installation and/or Modification of Oil and Gas Facilities; and Municipal Solid Waste Landfills); or

(2) one that is issued by the commission in accordance with § 116.603 of this title (relating to Public Participation in Issuance of Standard Permits).

(b) Any standard permit in this subchapter adopted by the commission shall remain in effect until it is repealed under the APA. If any adopted standard permit is repealed and replaced, facilities may continue to be authorized until the date of registration required by subsection (e) of this section.

(c) A registration to use a standard permit adopted by the commission in this subchapter shall be renewed by the applicant under the requirements of § 116.604 of this title (relating to Duration and Renewal of Registrations to use Standard Permits) by the tenth anniversary of the date of the original registration.

(d) If a standard permit in this subchapter adopted by the commission is repealed and replaced, with no changes, by a standard permit issued by the commission, any existing registration to use the repealed standard permit will be automatically converted to a registration to use the new standard permit, if the facility continues to meet the requirements. An automatically converted registration to use a standard permit shall be renewed by the applicant under the requirements of § 116.604 of this title by the tenth anniversary of the date of the new registration.

(e) If a standard permit adopted by the commission in this subchapter is repealed and replaced with a standard permit issued by the commission, and the requirements of the standard permit are changed in the process, persons registered to use the repealed standard permit shall register to use the issued standard permit by the later of either the deadline established in the issued standard permit, or the tenth anniversary of the original registration. The commission shall notify, in writing, all persons registered to use the repealed standard permit of the date by which a new registration must be submitted. Persons not wishing to register for the issued standard permit shall have the option of applying for or qualifying for other applicable authorizations in this chapter or in Chapter 106 of this title (relating to Exemptions from Permitting).

SOURCE: The provisions of this § 116.601 adopted to be effective January 11, 2000, 25 TexReg 150

NOTES:

CROSS-REFERENCES: This Chapter cited in 30 TAC § 116.911, (relating to Electric Generating Facility Permit Application).

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30 TAC § 116.602 (2011)

§ 116.602. Issuance of Standard Permits

(a) The commission may issue a standard permit under the procedures in § 116.603 of this title (relating to Public Participation in Issuance of Standard Permits) if the commission finds that:

(1) the standard permit is enforceable; and

(2) the commission can adequately monitor compliance with the terms of the standard permit.

(b) The commission may issue standard permits for:

(1) grandfathered facilities. Standard permits for use by grandfathered facilities before September 1, 2001 are not required to meet best available control technology;

(2) the installation of emission control equipment that constitutes a modification or a new facility under TCAA, § 382.057.

(c) Other than the standard permits issued for use under subsection (b)(1) and (2) of this section, all standard permits issued by the commission under this chapter shall require best available control technology.

SOURCE: The provisions of this § 116.602 adopted to be effective January 11, 2000, 25 TexReg 150

NOTES:

CROSS-REFERENCES: This Chapter cited in 30 TAC § 116.911, (relating to Electric Generating Facility Permit Application).

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30 TAC § 116.603 (2011)

§ 116.603. Public Participation in Issuance of Standard Permits

(a) The commission will publish notice of a proposed standard permit in a daily or weekly newspaper of general circulation in the area affected by the activity that is the subject of the proposed standard permit. If the proposed standard permit will have statewide applicability, notice will be published in the daily newspaper of largest general circulation within each of the following metropolitan areas: Austin, Dallas, and Houston and any other regional newspapers designated by the executive director on a case-by-case basis. In all cases, the commission will publish notice in the Texas Register and issue a press release. Electronic means may be used to transmit notice to selected state and local officials.

(b) The contents of a public notice of a proposed standard permit shall be in accordance with § 122.506 of this title (relating to Public Notice for General Operating Permits) except where clearly not applicable. Each notice will include an invitation for written comments by the public regarding the proposed standard permit. The public notice will specify a comment period of at least 30 days and the public notice will be published not later than the 30th day before the commission issues a standard permit.

(c) The commission will hold a public meeting to provide an additional opportunity for public comment. The commission will give notice of a public meeting under this subsection as part of the notice described in subsection (b) of this section not later than the 30th day before the date of the meeting. The public comment period shall automatically be extended to the close of any public meeting.

(d) If the commission receives public comment related to the issuance of a standard permit, the commission will issue a written response to the comments at the same time the commission issues or denies the permit. The commission will make the response available to the public, and shall mail the response to each commenter.

(e) The commission will publish notice of its final action on the proposed standard permit and the text of its response to comments in the Texas Register.

(f) The commission will make a copy of any issued standard permit and response to comments available to the public for inspection at the commission's Office of Permitting, Remediation, and Registration in its Austin office, and also in the appropriate regional offices.

SOURCE: The provisions of this § 116.603 adopted to be effective January 11, 2000, 25 TexReg 150; amended to be effective September 4, 2000, 25 TexReg 8668; amended to be effective October 12, 2006, 31 TexReg 8380

NOTES:

CROSS-REFERENCES: This Chapter cited in 30 TAC § 39.1, (relating to Applicability); 30 TAC § 39.201, (relating to Application for a Preconstruction Permit); 30 TAC § 50.31, (relating to Purpose and Applicability); 30 TAC § 50.131, (relating to Purpose and Applicability); 30 TAC § 55.1, (relating to Applicability); 30 TAC § 55.21, (relating to Requests for Contested Case Hearings, Public Comment); 30 TAC § 55.101, (relating to Applicability); 30 TAC § 55.152, (relating to Public Comment Period); 30 TAC § 106.352, (relating to Oil and Gas Production Facilities (Previously SE 66)); 30 TAC § 106.353, (relating to Temporary Oil and Gas Facilities (Previously SE 67)); 30 TAC § 106.493, (relating to Direct Flame Incinerators (Previously SE 88)); 30 TAC § 115.432, (relating to Control Requirements); 30 TAC § 117.105, (relating to Emission Specifications); 30 TAC § 117.205, (relating to Emission Specifications); 30 TAC § 122.10, (relating to General Definitions); 30 TAC § 122.122, (relating to Potential To Emit); 30 TAC § 122.213, (relating to Procedures for Administrative Permit Revisions); 30 TAC § 122.217, (relating to Procedures for Minor Permit

Revisions); 30 TAC § 122.221, (relating to Procedures for Significant Permit Revisions); 30 TAC § 122.503, (relating to Application Revisions for Changes at a Site); 30 TAC § 122.504, (relating to Application Revisions When a General Operating Permit is Revised or Rescinded); 30 TAC § 122.511, (relating to Oil and Gas General Operating Permit--Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties); 30 TAC § 122.512, (relating to Oil and Gas General Operating Permit--Gregg, Nueces, and Victoria Counties); 30 TAC § 122.513, (relating to Oil and Gas General Operating Permit--Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties); 30 TAC § 122.514, (relating to Oil and Gas General Operating Permit--All Texas Counties Except for Aransas, Bexar, Brazoria, Calhoun, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Matagorda, Montgomery, San Patricio, Tarrant, Travis, Victoria, and Waller Counties); 30 TAC § 122.515, (relating to Bulk Fuel Storage Terminal General Operating Permit); 30 TAC § 321.33, (relating to Applicability); 30 TAC § 321.34, (relating to Procedures for Making Application for an Individual Permit); 30 TAC § 321.35, (relating to Procedures for Making Application for Registration); 30 TAC § 321.46, (relating to Air Standard Permit Authorization); 30 TAC § 321.183, (relating to Applicability); 30 TAC § 321.184, (relating to Application Requirements); 30 TAC § 330.4, (relating to Permit Required); 30 TAC § 330.71, (relating to Registration for Municipal Solid Waste Facilities That Process Grease Trap Waste, Grit Trap Waste, or Septage); 30 TAC § 330.72, (relating to Registration for Mobile Liquid Waste Processing Units); 30 TAC § 330.73, (relating to Registration of Demonstration Projects for Liquid Waste Processing Facilities); 30 TAC § 330.406, (relating to Air Quality Requirements); 30 TAC § 332.8, (relating to Air Quality Requirements); 30 TAC § 335.362, (relating to Applicability); 30 TAC § 335.366, (relating to General Air Emissions Requirements for Hazardous or Solid Waste Management Facilities); 30 TAC § 335.367, (relating to Specific Air Emissions Requirements for Hazardous or Solid Waste Management Facilities); 30 TAC § 117.105, (relating to Emission Specifications for Reasonably Available Control Technology (RACT)); 30 TAC § 117.205, (relating to Emission Specifications for Reasonably Available Control Technology (RACT)); 30 TAC § 101.27, (relating to Emissions Fees); 30 TAC § 122.504, (relating to Application Revisions When an Applicable Requirement or State-Only Requirement is Promulgated or Adopted or a General Operating Permit is Revised or Rescinded); 30 TAC § 101.360, (relating to Level of Activity Certification); 30 TAC § 117.210, (relating to System Cap); 30 TAC § 321.34, (relating to Permit Applications); 30 TAC § 321.43, (relating to Air Standard Permit for Animal Feeding Operations (AFOs)); 30 TAC § 101.399, (relating to Allowance Banking and Trading); 30 TAC § 91.20, (relating to Applicability); 30 TAC § 330.7, (relating to Permit Required); 30 TAC § 330.13, (relating to Waste Management Activities Exempt from Permitting, Registration, or Notification); 30 TAC § 330.245, (relating to Ventilation and Air Pollution Control); 30 TAC § 330.607, (relating to Air Quality Requirements); 30 TAC § 330.985, (relating to Applicability and Exceptions); 30 TAC § 101.306, (relating to Emission Credit Use).

This Subchapter cited in 30 TAC § 39.403, (relating to Applicability); 30 TAC § 116.14, (relating to Standard Permit Definitions); 30 TAC § 116.110, (relating to Applicability); 30 TAC § 116.115, (relating to General and Special Conditions); 30 TAC § 116.180, (relating to Applicability); 30 TAC § 80.128, (relating to Specific Admissibility of Evidence for Concrete Batch Plants); 30 TAC § 116.1422, (relating to General and Special Conditions); 30 TAC § 330.987, (relating to Certification Requirements); 30 TAC § 330.991, (relating to Technical and Operational Requirements for all Municipal Solid Waste Landfill Sites).

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30 TAC § 116.604 (2011)

§ 116.604. Duration and Renewal of Registrations to Use Standard Permits

An owner or operator who chooses to use a standard permit shall register to use a standard permit in accordance with § 116.611 of this title (relating to Registration to Use a Standard Permit), unless otherwise specified in a specific standard permit.

(1) The registration to use a standard permit is valid for a term not to exceed ten years.

(2) The holder of a standard permit shall be required to renew the registration to use a standard permit by the date the registration expires. Any registration renewal shall include the requirements, as applicable, of § 116.611 of this title (relating to Registration to Use a Standard Permit) and shall provide information determined by the commission to be necessary to demonstrate compliance with the requirements and conditions of the standard permit and with applicable state and federal regulations.

(3) The commission will provide written notice to registrants of the renewal deadline at least 180 days prior to the expiration of the registration.

(4) The commission may choose to renew registrations to use specific standard permits automatically, and, in such cases, will provide written notice to registrants.

SOURCE: The provisions of this § 116.604 adopted to be effective January 11, 2000, 25 TexReg 150

NOTES:

CROSS-REFERENCES: This Section cited in 30 TAC § 116.601, (relating to Types of Standard Permits).

This Chapter cited in 30 TAC § 116.911, (relating to Electric Generating Facility Permit Application).

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30 TAC § 116.605 (2011)

§ 116.605. Standard Permit Amendment and Revocation

(a) A standard permit remains in effect until amended or revoked by the commission.

(b) After notice and comment as provided by subsection (c) of this section and § 116.603(b)-(f) of this title (relating to Public Participation in Issuance of Standard Permits), a standard permit may be amended or revoked by the commission.

(c) The commission will publish notice of its intent to amend or revoke a standard permit in a daily or weekly newspaper of general circulation in the area affected by the activity that is the subject of the standard permit. If the standard permit has statewide applicability, then the requirement for newspaper notice shall be accomplished by publishing notice in the daily newspaper of largest general circulation within each of the following major metropolitan areas: Austin, Dallas, and Houston. The commission will also provide written notice to registrants and any persons requesting to be on a mailing list concerning a specific standard permit. In both cases, the commission will publish notice in the Texas Register.

(d) The commission may, through amendment of a standard permit, add or delete requirements or limitations to the permit.

(1) To remain authorized under the standard permit, a facility shall comply with an amendment to the standard permit on the later of either the deadline the commission provides in the amendment or the date the facility's registration to use the standard permit is required to be renewed. The commission may not require compliance with an amended standard permit within 24 months of its amendment unless it is necessary to protect public health.

(2) Before the date the facility is required to comply with the amendment, the standard permit, as it read before the amendment, applies to the facility.

(3) The commission will consider the following when determining whether to amend or revoke a standard permit:

(A) whether a condition of air pollution exists;

(B) the applicability of other state or federal standards that apply or will apply to the types of facilities covered by the standard permit;

(C) requests from the regulated community or the public to amend or revoke a standard permit consistent with the requirements of the TCAA; and

(D) whether the standard permit requires best available control technology.

(e) The commission may require, upon issuance of an amended standard permit, or on a date otherwise provided, the owner or operator of a facility to submit a registration to use the amended standard permit in accordance with the requirements of § 116.611 of this title (relating to Registration to Use a Standard Permit).

(f) If the commission revokes a standard permit, it will provide written notice to affected registrants prior to the revocation of the standard permit. The notice will advise registrants that they must apply for a permit under this chapter or qualify for an authorization under Chapter 106 of this title (relating to Exemptions from Permitting).

(g) The issuance, amendment, or revocation of a standard permit or the issuance, renewal, or revocation of a registration to use a standard permit is not subject to Texas Government Code, Chapter 2001.

SOURCE: The provisions of this § 116.605 adopted to be effective January 11, 2000, 25 TexReg 150

NOTES:

CROSS-REFERENCES: This Chapter cited in 30 TAC § 116.911, (relating to Electric Generating Facility Permit Application).

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30 TAC § 116.610 (2011)

§ 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 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) is subject to the requirements of § 116.110 of this title (relating to Applicability) rather than this subchapter.

(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.

SOURCE: The provisions of this § 116.610 adopted to be effective May 4, 1994, 19 TexReg 3055; amended to be effective September 1, 1995, 20 TexReg 6324; amended to be effective April 19, 1996, 21 TexReg 3192; amended to be effective May 22, 1997, 22 TexReg 4242; amended to be effective July 8, 1998, 23 TexReg 6973; amended to be effective January 11, 2000, 25 TexReg 150; amended to be effective March 29, 2001, 26 TexReg 2398; amended to be effective February 1, 2006, 31 TexReg 515

NOTES:

CROSS-REFERENCES: This Section cited in 30 TAC § 116.617, (relating to State Pollution Control Project Standard Permit).

This Chapter cited in 30 TAC § 117.206, (relating to Emission Specifications for Attainment Demonstrations); 30 TAC § 337.20, (relating to Performance Standards).

This Subchapter cited in 30 TAC § 116.400, (relating to Applicability).

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30 TAC § 116.611 (2011)

§ 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.

(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 the effective date of this rule shall be submitted on or before February 3, 2003.

(2) Certified registrations established on or after the effective date of this rule shall be submitted no later than the date of operation.

SOURCE: The provisions of this § 116.611 adopted to be effective May 4, 1994, 19 TexReg 3055; amended to be effective May 22, 1997, 22 TexReg 4242; amended to be effective July 8, 1998, 23 TexReg 6973; amended to be effective January 11, 2000, 25 TexReg 150; amended to be effective December 11, 2002, 27 TexReg 11574

NOTES:

CROSS-REFERENCES: This Section cited in 30 TAC § 116.610, (relating to Applicability); 30 TAC § 116.617, (relating to Standard Permits for Pollution Control Projects); 30 TAC § 116.621, (relating to Municipal Solid Waste Landfills); 30 TAC § 116.115, (relating to General and Special Conditions); 30 TAC § 122.10, (relating to General Definitions).

This Chapter cited in 30 TAC § 39.1, (relating to Applicability); 30 TAC § 39.201, (relating to Application for a Preconstruction Permit); 30 TAC § 50.31, (relating to Purpose and Applicability); 30 TAC § 50.131, (relating to Purpose and Applicability); 30 TAC § 55.1, (relating to Applicability); 30 TAC § 55.21, (relating to Requests for Contested Case Hearings, Public Comment); 30 TAC § 55.101, (relating to Applicability); 30 TAC § 55.152, (relating to Public Comment Period); 30 TAC § 106.352, (relating to Oil and Gas Production Facilities (Previously SE 66)); 30 TAC § 106.353, (relating to Temporary Oil and Gas Facilities (Previously SE 67)); 30 TAC § 106.493, (relating to Direct Flame Incinerators (Previously SE 88)); 30 TAC § 115.432, (relating to Control Requirements); 30 TAC § 117.105, (relating to Emission Specifications); 30 TAC § 117.205, (relating to Emission Specifications); 30 TAC § 122.10, (relating to General Definitions); 30 TAC § 122.122, (relating to Potential To Emit); 30 TAC § 122.213, (relating to Procedures for Administrative Permit Revisions); 30 TAC § 122.217, (relating to Procedures for Minor Permit Revisions); 30 TAC § 122.221, (relating to Procedures for Significant Permit Revisions); 30 TAC § 122.503, (relating to Application Revisions for Changes at a Site); 30 TAC § 122.504, (relating to Application Revisions When a General Operating Permit is Revised or Rescinded); 30 TAC § 122.511, (relating to Oil and Gas General Operating Permit--Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties); 30 TAC § 122.512, (relating to Oil and Gas General Operating Permit--Gregg, Nueces, and Victoria Counties); 30 TAC § 122.513, (relating to Oil and Gas General Operating Permit--Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties); 30 TAC § 122.514, (relating to Oil and Gas General Operating Permit--All Texas Counties Except for Aransas, Bexar, Brazoria, Calhoun, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Matagorda, Montgomery, San Patricio, Tarrant, Travis, Victoria, and Waller Counties); 30 TAC § 122.515, (relating to Bulk Fuel Storage Terminal General Operating Permit); 30 TAC § 321.33, (relating to Applicability); 30 TAC § 321.34, (relating to Procedures for Making Application for an Individual Permit); 30 TAC § 321.35, (relating to Procedures for Making Application for Registration); 30 TAC § 321.46, (relating to Air Standard Permit Authorization); 30 TAC § 321.183, (relating to Applicability); 30 TAC § 321.184, (relating to Application Requirements); 30 TAC § 330.4, (relating to Permit Required); 30 TAC § 330.71, (relating to Registration for Municipal Solid Waste Facilities That Process Grease Trap Waste, Grit Trap Waste, or Septage); 30 TAC § 330.72, (relating to Registration for Mobile Liquid Waste Processing Units); 30 TAC § 330.73, (relating to Registration of Demonstration Projects for Liquid Waste Processing Facilities); 30 TAC § 330.406, (relating to Air Quality Requirements); 30 TAC § 332.8, (relating to Air Quality Requirements); 30 TAC § 335.362, (relating to Applicability); 30 TAC § 335.366, (relating to General Air Emissions Requirements for Hazardous or Solid Waste Management Facilities); 30 TAC § 335.367, (relating to Specific Air Emissions Requirements for Hazardous or Solid Waste Management Facilities); 30 TAC § 117.105, (relating to Emission Specifications for Reasonably Available Control Technology (RACT)); 30 TAC § 117.205, (relating to Emission Specifications for Reasonably Available Control Technology (RACT)); 30 TAC § 101.27, (relating to Emissions Fees); 30 TAC § 122.504, (relating to Application Revisions When an Applicable Requirement or State-Only Requirement is Promulgated or Adopted or a General Operating Permit is Revised or Rescinded); 30 TAC § 101.360, (relating to Level of Activity Certification); 30 TAC § 117.210, (relating to System Cap); 30 TAC § 122.122, (relating to Potential to Emit).

This Subchapter cited in 30 TAC § 39.403, (relating to Applicability); 30 TAC § 116.14, (relating to Standard Permit Definitions); 30 TAC § 116.110, (relating to Applicability); 30 TAC § 116.115, (relating to General and Special Conditions); 30 TAC § 116.180, (relating to Applicability); 30 TAC § 80.128, (relating to Specific Admissibility of Evidence for Concrete Batch Plants).

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TITLE 30. ENVIRONMENTAL QUALITY
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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION
SUBCHAPTER F. STANDARD PERMITS

30 TAC § 116.614 (2011)

§ 116.614. Standard Permit Fees

Any person who registers to use a standard permit or an amended standard permit, or to renew a registration to use a standard permit shall remit, at the time of registration, a flat fee of $ 900 for each standard permit being registered, unless otherwise specified in a particular standard permit. No fee is required if a registration is automatically renewed by the commission. All standard permit fees will be remitted in the form of a check, certified check, electronic funds transfer, or money order made payable to the Texas Commission on Environmental Quality (TCEQ) and delivered with the permit registration to the TCEQ, P.O. Box 13088, MC 214, Austin, Texas 78711-3087. No fees will be refunded.

SOURCE: The provisions of this § 116.614 adopted to be effective May 4, 1994, 19 TexReg 3055; amended to be effective July 8, 1998, 23 TexReg 6973; amended to be effective January 11, 2000, 25 TexReg 150; amended to be effective October 20, 2002, 27 TexReg 9616

NOTES:

CROSS-REFERENCES: This Section cited in 30 TAC § 116.621, (relating to Municipal Solid Waste Landfills).

This Chapter cited in 30 TAC § 39.1, (relating to Applicability); 30 TAC § 39.201, (relating to Application for a Preconstruction Permit); 30 TAC § 50.31, (relating to Purpose and Applicability); 30 TAC § 50.131, (relating to Purpose and Applicability); 30 TAC § 55.1, (relating to Applicability); 30 TAC § 55.21, (relating to Requests for Contested Case Hearings, Public Comment); 30 TAC § 55.101, (relating to Applicability); 30 TAC § 55.152, (relating to Public Comment Period); 30 TAC § 106.352, (relating to Oil and Gas Production Facilities (Previously SE 66)); 30 TAC § 106.353, (relating to Temporary Oil and Gas Facilities (Previously SE 67)); 30 TAC § 106.493, (relating to Direct Flame Incinerators (Previously SE 88)); 30 TAC § 115.432, (relating to Control Requirements); 30 TAC § 117.105, (relating to Emission Specifications); 30 TAC § 117.205, (relating to Emission Specifications); 30 TAC § 122.10, (relating to General Definitions); 30 TAC § 122.122, (relating to Potential To Emit); 30 TAC § 122.213, (relating to Procedures for Administrative Permit Revisions); 30 TAC § 122.217, (relating to Procedures for Minor Permit Revisions); 30 TAC § 122.221, (relating to Procedures for Significant Permit Revisions); 30 TAC § 122.503, (relating to Application Revisions for Changes at a Site); 30 TAC § 122.504, (relating to Application Revisions When a General Operating Permit is Revised or Rescinded); 30 TAC § 122.511, (relating to Oil and Gas General Operating Permit--Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Or-

ange, Tarrant, and Waller Counties); 30 TAC § 122.512, (relating to Oil and Gas General Operating Permit--Gregg, Nueces, and Victoria Counties); 30 TAC § 122.513, (relating to Oil and Gas General Operating Permit--Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties); 30 TAC § 122.514, (relating to Oil and Gas General Operating Permit--All Texas Counties Except for Aransas, Bexar, Brazoria, Calhoun, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Matagorda, Montgomery, San Patricio, Tarrant, Travis, Victoria, and Waller Counties); 30 TAC § 122.515, (relating to Bulk Fuel Storage Terminal General Operating Permit); 30 TAC § 321.33, (relating to Applicability); 30 TAC § 321.34, (relating to Procedures for Making Application for an Individual Permit); 30 TAC § 321.35, (relating to Procedures for Making Application for Registration); 30 TAC § 321.46, (relating to Air Standard Permit Authorization); 30 TAC § 321.183, (relating to Applicability); 30 TAC § 321.184, (relating to Application Requirements); 30 TAC § 330.4, (relating to Permit Required); 30 TAC § 330.71, (relating to Registration for Municipal Solid Waste Facilities That Process Grease Trap Waste, Grit Trap Waste, or Septage); 30 TAC § 330.72, (relating to Registration for Mobile Liquid Waste Processing Units); 30 TAC § 330.73, (relating to Registration of Demonstration Projects for Liquid Waste Processing Facilities); 30 TAC § 330.406, (relating to Air Quality Requirements); 30 TAC § 332.8, (relating to Air Quality Requirements); 30 TAC § 335.362, (relating to Applicability); 30 TAC § 335.366, (relating to General Air Emissions Requirements for Hazardous or Solid Waste Management Facilities); 30 TAC § 335.367, (relating to Specific Air Emissions Requirements for Hazardous or Solid Waste Management Facilities); 30 TAC § 117.105, (relating to Emission Specifications for Reasonably Available Control Technology (RACT)); 30 TAC § 117.205, (relating to Emission Specifications for Reasonably Available Control Technology (RACT)); 30 TAC § 101.27, (relating to Emissions Fees); 30 TAC § 122.504, (relating to Application Revisions When an Applicable Requirement or State-Only Requirement is Promulgated or Adopted or a General Operating Permit is Revised or Rescinded); 30 TAC § 101.360, (relating to Level of Activity Certification); 30 TAC § 117.210, (relating to System Cap).

This Subchapter cited in 30 TAC § 39.403, (relating to Applicability); 30 TAC § 116.14, (relating to Standard Permit Definitions); 30 TAC § 116.110, (relating to Applicability); 30 TAC § 116.115, (relating to General and Special Conditions); 30 TAC § 116.180, (relating to Applicability); 30 TAC § 80.128, (relating to Specific Admissibility of Evidence for Concrete Batch Plants).

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION
SUBCHAPTER F. STANDARD PERMITS

30 TAC § 116.615 (2011)

§ 116.615. General Conditions

The following general conditions are applicable to holders of standard permits, but will not necessarily be specifically stated within the standard permit document.

(1) Protection of public health and welfare. The emissions from the facility, including dockside vessel emissions, must comply with all applicable rules and regulations of the commission adopted under Texas Health and Safety Code, Chapter 382, and with the intent of the Texas Clean Air Act (TCAA), including protection of health and property of the public.

(2) Standard permit representations. All representations with regard to construction plans, operating procedures, and maximum emission rates in any registration for a standard permit become conditions upon which the facility or changes thereto, must be constructed and operated. It is unlawful for any person to vary from such representations if the change will affect that person's right to claim a standard permit under this section. Any change in condition such that a person is no longer eligible to claim a standard permit under this section requires proper authorization under § 116.110 of this title (relating to Applicability). If the facility remains eligible for a standard permit, the owner or operator of the facility shall notify the executive director of any change in conditions which will result in a change in the method of control of emissions, a change in the character of the emissions, or an increase in the discharge of the various emissions as compared to the representations in the original registration or any previous notification of a change in representations. Notice of changes in representations must be received by the executive director no later than 30 days after the change.

(3) Standard permit in lieu of permit amendment. All changes authorized by standard permit to a facility previously permitted under § 116.110 of this title shall be administratively incorporated into that facility's permit at such time as the permit is amended or renewed.

(4) Construction progress. Start of construction, construction interruptions exceeding 45 days, and completion of construction shall be reported to the appropriate regional office not later than 15 working days after occurrence of the event, except where a different time period is specified for a particular standard permit.

(5) Start-up notification.

(A) The appropriate air program regional office of the commission and any other air pollution control agency having jurisdiction shall be notified prior to the commencement of operations of the facilities authorized by a standard permit in such a manner that a representative of the executive director may be present.

(B) For phased construction, which may involve a series of units commencing operations at different times, the owner or operator of the facility shall provide separate notification for the commencement of operations for each unit.

(C) Prior to beginning operations of the facilities authorized by the permit, the permit holder shall identify to the Office of Permitting, Remediation, and Registration, the source or sources of allowances to be utilized for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(D) A particular standard permit may modify start-up notification requirements.

(6) Sampling requirements. If sampling of stacks or process vents is required, the standard permit holder shall contact the commission's appropriate regional office and any other air pollution control agency having jurisdiction prior to sampling to obtain the proper data forms and procedures. All sampling and testing procedures must be approved by the executive director and coordinated with the regional representatives of the commission. The standard permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(7) Equivalency of methods. The standard permit holder shall demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the standard permit. Alternative methods must be applied for in writing and must be reviewed and approved by the executive director prior to their use in fulfilling any requirements of the standard permit.

(8) Recordkeeping. A copy of the standard permit along with information and data sufficient to demonstrate applicability of and compliance with the standard permit shall be maintained in a file at the plant site and made available at the request of representatives of the executive director, the United States Environmental Protection Agency, or any air pollution control agency having jurisdiction. For facilities that normally operate unattended, this information shall be maintained at the nearest staffed location within Texas specified by the standard permit holder in the standard permit registration. This information must include, but is not limited to, production records and operating hours. Additional recordkeeping requirements may be specified in the conditions of the standard permit. Information and data sufficient to demonstrate applicability of and compliance with the standard permit must be retained for at least two years following the date that the information or data is obtained. The copy of the standard permit must be maintained as a permanent record.

(9) Maintenance of emission control. The facilities covered by the standard permit may not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations. Notification for emissions events and scheduled maintenance shall be made in accordance with § 101.201 and § 101.211 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; and Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements).

(10) Compliance with rules. Registration of a standard permit by a standard permit applicant constitutes an acknowledgment and agreement that the holder will comply with all rules, regulations, and orders of the commission issued in conformity with the TCAA and the conditions precedent to the claiming of the standard permit. If more than one state or federal rule or regulation or permit condition are applicable, the most stringent limit or condition shall govern. Acceptance includes consent to the entrance of commission employees and designated representatives of any air pollution control agency having jurisdiction into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the standard permit.

(11) Distance limitations, setbacks, and buffer zones. Notwithstanding any requirement in any standard permit, if a standard permit for a facility requires a distance, setback, or buffer from other property or structures as a condition of the permit, the determination of whether the distance, setback, or buffer is satisfied shall be made on the basis of conditions existing at the earlier of:

(A) the date new construction, expansion, or modification of a facility begins; or

(B) the date any application or notice of intent is first filed with the commission to obtain approval for the construction or operation of the facility.

SOURCE: The provisions of this § 116.615 adopted to be effective September 1, 1995, 20 TexReg 6324; amended to be effective May 22, 1997, 22 TexReg 4242; amended to be effective July 8, 1998, 23 TexReg 6973; amended to be effective March 29, 2001, 26 TexReg 2398; amended to be effective September 12, 2002, 27 TexReg 8546; amended to be effective March 15, 2007, 32 TexReg 1320

NOTES:

CROSS-REFERENCES: This Section cited in 30 TAC § 116.621, (relating to Municipal Solid Waste Landfills); 30 TAC § 321.43, (relating to Air Standard Permit for Animal Feeding Operations (AFOs)).

This Chapter cited in 30 TAC § 39.1, (relating to Applicability); 30 TAC § 39.201, (relating to Application for a Preconstruction Permit); 30 TAC § 50.31, (relating to Purpose and Applicability); 30 TAC § 50.131, (relating to Purpose and Applicability); 30 TAC § 55.1, (relating to Applicability); 30 TAC § 55.21, (relating to Requests for Contested Case Hearings, Public Comment); 30 TAC § 55.101, (relating to Applicability); 30 TAC § 55.152, (relating to Public Comment Period); 30 TAC § 106.352, (relating to Oil and Gas Production Facilities (Previously SE 66)); 30 TAC § 106.353, (relating to Temporary Oil and Gas Facilities (Previously SE 67)); 30 TAC § 106.493, (relating to Direct Flame Incinerators (Previously SE 88)); 30 TAC § 115.432, (relating to Control Requirements); 30 TAC § 117.105, (relating to Emission Specifications); 30 TAC § 117.205, (relating to Emission Specifications); 30 TAC § 122.10, (relating to General Definitions); 30 TAC § 122.122, (relating to Potential To Emit); 30 TAC § 122.213, (relating to Procedures for Administrative Permit Revisions); 30 TAC § 122.217, (relating to Procedures for Minor Permit Revisions); 30 TAC § 122.221, (relating to Procedures for Significant Permit Revisions); 30 TAC § 122.503, (relating to Application Revisions for Changes at a Site); 30 TAC § 122.504, (relating to Application Revisions When a General Operating Permit is Revised or Rescinded); 30 TAC § 122.511, (relating to Oil and Gas General Operating Permit--Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties); 30 TAC § 122.512, (relating to Oil and Gas General Operating Permit--Gregg, Nueces, and Victoria Counties); 30 TAC § 122.513, (relating to Oil and Gas General Operating Permit--Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties); 30 TAC § 122.514, (relating to Oil and Gas General Operating Permit--All Texas Counties Except for Aransas, Bexar, Brazoria, Calhoun, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Matagorda, Montgomery, San Patricio, Tarrant, Travis, Victoria, and Waller Counties); 30 TAC § 122.515, (relating to Bulk Fuel Storage Terminal General Operating Permit); 30 TAC § 321.33, (relating to Applicability); 30 TAC § 321.34, (relating to Procedures for Making Application for an Individual Permit); 30 TAC § 321.35, (relating to Procedures for Making Application for Registration); 30 TAC § 321.46, (relating to Air Standard Permit Authorization); 30 TAC § 321.183, (relating to Applicability); 30 TAC §

321.184, (relating to Application Requirements); 30 TAC § 330.4, (relating to Permit Required); 30 TAC § 330.71, (relating to Registration for Municipal Solid Waste Facilities That Process Grease Trap Waste, Grit Trap Waste, or Septage); 30 TAC § 330.72, (relating to Registration for Mobile Liquid Waste Processing Units); 30 TAC § 330.73, (relating to Registration of Demonstration Projects for Liquid Waste Processing Facilities); 30 TAC § 330.406, (relating to Air Quality Requirements); 30 TAC § 332.8, (relating to Air Quality Requirements); 30 TAC § 335.362, (relating to Applicability); 30 TAC § 335.366, (relating to General Air Emissions Requirements for Hazardous or Solid Waste Management Facilities); 30 TAC § 335.367, (relating to Specific Air Emissions Requirements for Hazardous or Solid Waste Management Facilities); 30 TAC § 117.105, (relating to Emission Specifications for Reasonably Available Control Technology (RACT)); 30 TAC § 117.205, (relating to Emission Specifications for Reasonably Available Control Technology (RACT)); 30 TAC § 101.27, (relating to Emissions Fees); 30 TAC § 122.504, (relating to Application Revisions When an Applicable Requirement or State-Only Requirement is Promulgated or Adopted or a General Operating Permit is Revised or Rescinded); 30 TAC § 101.360, (relating to Level of Activity Certification); 30 TAC § 117.210, (relating to System Cap); 30 TAC § 321.34, (relating to Permit Applications); 30 TAC § 321.43, (relating to Air Standard Permit for Animal Feeding Operations (AFOs)); 30 TAC § 101.399, (relating to Allowance Banking and Trading); 30 TAC § 91.20, (relating to Applicability); 30 TAC § 330.7, (relating to Permit Required); 30 TAC § 330.13, (relating to Waste Management Activities Exempt from Permitting, Registration, or Notification); 30 TAC § 330.245, (relating to Ventilation and Air Pollution Control); 30 TAC § 330.607, (relating to Air Quality Requirements); 30 TAC § 330.985, (relating to Applicability and Exceptions); 30 TAC § 101.306, (relating to Emission Credit Use).

This Subchapter cited in 30 TAC § 39.403, (relating to Applicability); 30 TAC § 116.14, (relating to Standard Permit Definitions); 30 TAC § 116.110, (relating to Applicability); 30 TAC § 116.115, (relating to General and Special Conditions); 30 TAC § 116.180, (relating to Applicability); 30 TAC § 80.128, (relating to Specific Admissibility of Evidence for Concrete Batch Plants); 30 TAC § 116.1422, (relating to General and Special Conditions); 30 TAC § 330.987, (relating to Certification Requirements); 30 TAC § 330.991, (relating to Technical and Operational Requirements for all Municipal Solid Waste Landfill Sites); 30 TAC § 116.1530, (relating to Best Available Retrofit Technology (BART) Control Implementation).

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SUBCHAPTER F. STANDARD PERMITS

30 TAC § 116.617 (2011)

§ 116.617. State Pollution Control Project Standard Permit

(a) Scope and applicability.

(1) This standard permit applies to pollution control projects undertaken voluntarily or as required by any governmental standard, that reduce or maintain currently authorized emission rates for facilities authorized by a permit, standard permit, or permit by rule.

(2) The project may include:

(A) the installation or replacement of emissions control equipment;

(B) the implementation or change to control techniques; or

(C) the substitution of compounds used in manufacturing processes.

(3) This standard permit must not be used to authorize the installation of emission control equipment or the implementation of a control technique that:

(A) constitutes the complete replacement of an existing production facility or reconstruction of a production facility as defined in 40 Code of Federal Regulations § 60.15(b)(1) and (c); or

(B) the executive director determines there are health effects concerns or the potential to exceed a national ambient air quality standard criteria pollutant or contaminant that results from an increase in emissions of any air contaminant until those concerns are addressed by the registrant to the satisfaction of the executive director; or

(C) returns a facility or group of facilities to compliance with an existing authorization or permit unless authorized by the executive director.

(4) Only new or modified pollution control projects must meet the conditions of this standard permit. All previous standard permit registrations under this section that were authorized prior to the effective date of this rule must include the increases and decreases in emissions resulting from those projects in any future netting calculation and all other conditions must be met upon the ten-year anniversary and renewal of the original registration, or until administratively incorporated into the facilities' permit, if applicable.

(b) General requirements.

(1) Any claim under this standard permit must comply with all applicable conditions of:

(A) § 116.604(1) and (2) of this title (relating to Duration and Renewal of Registrations to Use Standard Permits);

(B) § 116.605(d)(1) and (2) of this title (relating to Standard Permit Amendment and Revocation);

(C) § 116.610 of this title (relating to Applicability);

(D) § 116.611 of this title (relating to Registration to Use a Standard Permit);

(E) § 116.614 of this title (relating to Standard Permit Fees); and

(F) § 116.615 of this title (relating to General Conditions).

(2) Construction or implementation of the pollution control project must begin within 18 months of receiving written acceptance of the registration from the executive director, with one 18-month extension available, and must comply with § 116.115(b)(2) and § 116.120 of this title (relating to General and Special Conditions and Voiding of Permits). Any changes to allowable emission rates authorized by this section become effective when the project is complete and operation or implementation begins.

(3) The emissions limitations of § 116.610(a)(1) of this title do not apply to this standard permit.

(4) Predictable maintenance, startup, and shutdown emissions directly associated with the pollution control projects must be included in the representations of the registration application.

(5) Any increases in actual or allowable emission rates or any increase in production capacity authorized by this section (including increases associated with recovering lost production capacity) must occur solely as a result of the project as represented in the registration application. Any increases of production associated with a pollution control project must not be utilized until an additional authorization is obtained. This paragraph is not intended to limit the owner or operator's ability to recover lost capacity caused by a derate, which may be recovered and used without any additional authorization.

(c) Replacement projects.

(1) The replacement of emissions control equipment or control technique under this standard permit is not limited to the method of control currently in place, provided that the control or technique is at least as effective as the current authorized method and all other requirements of this standard permit are met.

(2) The maintenance, startup, and shutdown emissions may be increased above currently authorized levels if the increase is necessary to implement the replacement project and maintenance, startup, and shutdown emissions were authorized for the existing control equipment or technique.

(3) Equipment installed under this section is subject to all applicable testing and recordkeeping requirements of the original control authorization. Alternate, equivalent monitoring, or records may be proposed by the applicant for review and approval of the executive director.

(d) Registration requirements.

(1) A registration must be submitted in accordance with the following.

(A) If there are no increases in authorized emissions of any air contaminant resulting from a replacement pollution control project, a registration must be submitted no later than 30 days after construction or implementation begins and the registration must be accompanied by a $ 900 fee.

(B) If a new control device or technique is authorized or if there are increases in authorized emissions of any air contaminant resulting from the pollution control project, a registration must be submitted no later than 30 days prior to construction or implementation. The registration must be accompanied by a $ 900 fee. Construction or implementation may begin only after:

(i) no written response has been received from the executive director within 30 calendar days of receipt by the Texas Commission on Environmental Quality (TCEQ); or

(ii) written acceptance of the pollution control project has been issued by the executive director.

(C) If there are any changes in representations to a previously authorized pollution control project standard permit for which there are no increases in authorized emissions of any air contaminant, a notification or letter must be submitted no later than 30 days after construction or implementation of the change begins. No fee applies and no response will be sent from the executive director.

(D) If there are any changes in representations to a previously authorized pollution control project standard permit that also increase authorized emissions of any air contaminant resulting from the pollution control project, a registration alteration must be submitted no later than 30 days prior to the start of construction or implementation of the change. The registration must be accompanied by a $ 450 fee, unless received within 180 days of the original registration approval. Construction or implementation may begin only after:

(i) no written response has been received from the executive director within 30 calendar days of receipt by the TCEQ; or

(ii) written acceptance of the pollution control project has been issued by the executive director.

(2) The registration must include the following:

(A) a description of process units affected by the project;

(B) a description of the project;

(C) identification of existing permits or registrations affected by the project;

(D) quantification and basis of increases and/or decreases associated with the project, including identification of affected existing or proposed emission points, all air contaminants, and hourly and annual emissions rates;

(E) a description of proposed monitoring and recordkeeping that will demonstrate that the project decreases or maintains emission rates as represented; and

(F) a description of how the standard permit will be administratively incorporated into the existing permit(s).

(e) Operational requirements. Upon installation of the pollution control project, the owner or operator shall comply with the requirements of paragraphs (1) and (2) of this subsection.

(1) General duty. The owner or operator must operate the pollution control project in a manner consistent with good industry and engineering practices and in such a way as to minimize emissions of collateral pollutants, within the physical configuration and operational standards usually associated with the emissions control device, strategy, or technique.

(2) Recordkeeping. The owner or operator must maintain copies on site of monitoring or other emission records to prove that the pollution control project is operated consistent with the requirements in paragraph (1) of this subsection, and the conditions of this standard permit.

(f) Incorporation of the standard permit into the facility authorization.

(1) Any new facilities or changes in method of control or technique authorized by this standard permit instead of a permit amendment under § 116.110 of this title (relating to Applicability) at a previously permitted or standard permitted facility must be incorporated into that facility's permit when the permit is amended or renewed.

(2) All increases in previously authorized emissions, new facilities, or changes in method of control or technique authorized by this standard permit for facilities previously authorized by a permit by rule must comply with § 106.4 of this title (relating to Requirements for Permitting by Rule), except § 106.4(a)(1) of this title, and § 106.8 of this title (relating to Recordkeeping).

SOURCE: The provisions of this § 116.617 adopted to be effective February 1, 2006, 31 TexReg 515

NOTES:

CROSS-REFERENCES: This Chapter cited in 30 TAC § 117.206, (relating to Emission Specifications for Attainment Demonstrations); 30 TAC § 337.20, (relating to Performance Standards).

This Subchapter cited in 30 TAC § 116.400, (relating to Applicability).