

grounds. *Union Electric Co., v. U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 (“Unfunded Mandates Act”), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to State, local, or tribal governments in the aggregate; or to private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves 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.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Oxides of nitrogen, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401–7671q.

Dated: January 7, 2000.

Felicia Marcus,

Regional Administrator, Region IX.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–100–7390; FRL–6524–4]

Approval and Promulgation of Implementation Plans; Texas; Permitting of New and Modified Sources in Nonattainment Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to approve revisions to the Texas State Implementation Plan (SIP). The revisions concern the permitting of new major sources and major modifications in areas which do not meet the national ambient air quality standards (NAAQS) promulgated by EPA (nonattainment areas). The EPA proposes to approve these revisions to satisfy the provisions of the Clean Air Act (Act) which relate to the permitting of new and modified sources which are located in nonattainment areas.

DATES: Comments must be received on or before February 17, 2000.

ADDRESSES: Written comments should be addressed to Ms. Jole C. Luehrs, Chief, Air Permits Section, at the EPA Region 6 Office listed below. 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 make an appointment with the appropriate office at least two working days in advance.

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

Texas Natural Resource Conservation Commission, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Stanley M. Spruiell of EPA Region 6 Air Permits Section at (214) 665–7212 at the address above, or at spruiell.stanley@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, wherever we, us, or our are used, we mean EPA.

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I. General Overview of The Texas Nonattainment Permitting Regulations

We propose to approve the recodification of and revisions to the Texas SIP relating to revisions to Title 30, Texas Administrative Code (TAC) Chapter 116, “Control of Air Pollution by Permits for New Construction or Modification,” as indicated in Table 1 below:

TABLE 1.—SIP REGULATIONS SUBMITTED BY TEXAS TO EPA

Section in 30 TAC chapter 116	Title/(Subject)
116.12	Nonattainment Review Definitions.
116.150	New Major Source or Major Modification in Ozone Nonattainment Area.
116.151	New Major Source or Major Modification in Nonattainment Area Other than Ozone.
116.170	Applicability for Reduction Credits.
116.170(1)	(Emission reductions not required by State Implementation Plan or other Federal requirements).

TABLE 1.—SIP REGULATIONS SUBMITTED BY TEXAS TO EPA—Continued

Section in 30 TAC chapter 116	Title/(Subject)
116.170(3)	(Offset provisions for emission increases from rocket engine or motor firing).

This proposal includes portions of revisions submitted by the Governor of Texas to EPA on the following dates:

- August 31, 1993
- November 1, 1995
- July 18, 1996
- April 13, 1998
- March 16, 1999

We are taking this rulemaking action under sections 110, 301 and part D of

the Act. As explained in the following section, we are acting only on those parts of these submittals which relate to permitting sources in nonattainment areas.

A. What Are We Proposing To Approve in This Action?

We propose to approve regulations submitted by Texas that satisfy

provisions of the Act that pertain to permitting major sources and major modifications in areas in Texas that do not meet the ambient air quality standards adopted by EPA.

Table 2 below identifies the regulations that we propose to approve:

TABLE 2.—REGULATIONS THAT EPA PROPOSES TO APPROVE

Recodified 30 TAC chapter 116	Submittal dates of recodified section	Title or description	Former rule
116.12	August 31, 1993	Nonattainment Review Definitions	101.1.
	July 18, 1996		
	April 13, 1998		
	March 16, 1999		
116.150	August 31, 1993	New Major Source or Major Modification in Ozone Nonattainment Areas	116.3(a)(7) and (8).
	November 1, 1995		
	April 13, 1998		
116.151	August 31, 1993	New Major Source or Major Modification in Nonattainment Area Other than Ozone.	116.3(a)(10).
	April 13, 1998		
116.170	August 31, 1993	Applicability for Reduction Credits	116.3(c).

We propose to approve only those provisions of the individual SIP submittals which relate to the permitting sources in nonattainment areas. We will act on the remaining provisions in a separate action.

B. Who Is Affected by This Action?

These State regulations apply to each owner and/or operator who constructs or modifies a stationary source in a nonattainment area in Texas if the stationary source is major for the air

pollutant for which the area is nonattainment. A stationary source is major if it emits, or has the potential to emit, the nonattaining pollutant, or precursor thereto, in amounts greater than the major source threshold for the nonattaining pollutant.

C. What Are the Major Source Thresholds for Nonattainment Pollutants?

The major source threshold varies, depending on the pollutant and the

classification of the nonattainment area. Any owner or operator who proposes to construct a major stationary source must obtain a permit which complies with the regulations that we are proposing to approve herein. Table 3 below lists the major source threshold for each pollutant.

TABLE 3.—MAJOR SOURCE THRESHOLDS

Pollutant: Classification	Major source threshold	Where specified in the Act
Ozone:		
marginal	100 TPY	Section 302(j)
moderate	100 TPY	Section 302(j)
serious	50 TPY	Section 182(c)
severe	25 TPY	Section 182(d)
CO:		
Moderate	100 TPY	Section 302(j)
Serious	50 TPY	Section 187(c)(1)
PM-10:		
Moderate	100 TPY	Section 302(j)
Serious	70 TPY	Section 189(b)(3)
SO ₂	100 TPY	Section 302(j)
NO _x	100 TPY	Section 302(j)
Lead	100 TPY	Section 302(j)

Table 3 refers to classifications for areas designated nonattainment for ozone, carbon monoxide (CO), and particulate matter less than 10 micrometers (PM-10). These nonattainment classifications are defined in the Act as follows:

- Section 181(a) defines five area classifications for ozone. These five classifications are marginal, moderate, serious, severe, and extreme. Texas has no extreme ozone nonattainment areas and does not address such areas in its regulations.

- Section 186(a) defines two area classifications for CO. These two classifications are moderate and serious.

- Section 188 defines two area classifications for PM-10. These two classifications are moderate and serious. A detailed description of the individual area classifications for ozone, CO, and PM-10 nonattainment areas is contained in EPA's General Preamble for the Implementation of Title I of the 1990 Amendments, 57 FR 13498 (April 16, 1992).

D. What is a Major Modification?

A major modification is any physical change, or change in the method of

operating a major stationary source which significantly increases net emissions of the air pollutant, or precursor, for which the area is nonattainment and which the source is a major source before the modification.

Any owner or operator who proposes a major modification must obtain a permit that complies with the regulations that we are proposing to approve. Table 4 below lists the significance level for each pollutant which is used in determining whether a net emissions increase is a major modification.

TABLE 4.—SIGNIFICANCE LEVELS FOR MAJOR MODIFICATIONS

Pollutant: Classification	Significance level	Where specified in the Act or Regulations
Ozone:		
Marginal	40 tons per year (TPY)	40 CFR 51.165(a)(x)
Moderate	40 TPY	40 CFR 51.165(a)(x)
Serious	25 TPY	Section 182(c)(6) of the Act
Severe	25 TPY	Section 182(c)(6) of the Act
CO:		
Moderate	100 TPY	40 CFR 51.165(a)(x)
Serious	50 TPY	(a)
PM-10:		
Moderate	15 TPY	(a)
Serious	15 TPY	(a)
SO ₂	40 TPY	40 CFR 51.165(a)(x)
NO _x	40 TPY	40 CFR 51.165(a)(x)
Lead	0.6 TPY	40 CFR 51.165(a)(x)

^aNo significance level is specified in the Act nor in the regulations. The significance levels specified in Table 3 are the significance levels the we approved for Texas on September 27, 1995 (60 FR 49781).

E. What Are the Requirements for Permitting New and Modified Sources in Nonattainment Areas?

The Act sets out the air quality planning requirements for

nonattainment NSR in part D of title I. We have issued a "General Preamble" which describes our preliminary views for reviewing SIPs and SIP revisions submitted under part D.¹ This includes SIP submittals with nonattainment area

permitting requirements in section 173 of the Act. Table 5 below identifies these requirements and how Texas addresses the requirements in its revised regulations.

TABLE 5.—SUMMARY OF REQUIREMENTS FOR PERMITTING MAJOR SOURCES AND MAJOR MODIFICATIONS IN NONATTAINMENT AREAS

The Act Citation and description of requirement	Where addressed in recodified State Regulation	Former State regulation before recodification ^a
§ 173(a)(1)(A). Base emissions offsets on the same emissions baseline used in the demonstration of reasonable further progress.	§ 116.150(a)(4); § 116.151(3)	§ 116.3(a)(7)(C); § 116.3(a)(10)(D)
§ 173(a)(2). Apply Lowest Achievable Emission Rate (LAER)	§ 116.150(a)(1); § 116.151(1)	§ 116.3(a)(7)(A); § 116.3(a)(10)(A)
§ 173(a)(3). Demonstrate that all other major stationary sources under the same ownership or operation in the State are complying with the Act.	§ 116.150(a)(2); § 116.151(2)	§ 116.3(a)(7)(B); § 116.3(a)(10)(B)
§ 173(a)(4). State cannot issue a permit if the EPA Administrator finds that the State is not adequately enforcing the provisions of the applicable implementation plan for the nonattainment area in which the source proposes to construct or modify.	The EPA has made no such determination for Texas. If EPA makes this determination in the future, EPA will address this matter with Texas at that time.	
§ 173(a)(5):		

¹ See 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992).

TABLE 5.—SUMMARY OF REQUIREMENTS FOR PERMITTING MAJOR SOURCES AND MAJOR MODIFICATIONS IN NONATTAINMENT AREAS—Continued

The Act Citation and description of requirement	Where addressed in recodified State Regulation	Former State regulation before recodification ^a
<ul style="list-style-type: none"> Analyze alternative sites, sizes, production processes, and environmental control techniques for proposed sources Demonstrate that the benefits of the proposed source significantly outweigh the environmental and social costs associated with its location, construction, or modification 	§ 116.150(a)(4); § 116.151(4)	§ 116.3(a)(7)(D); § 116.3(a)(10)(E)
§ 173(b) Prohibits use of growth allowance included in a SIP prior to the Act Amendments of 1990 in an area which receives notice that such plan is substantially inadequate.	Not Applicable	Not Applicable
§ 173(c)(1). A sources may obtain offsets in another nonattainment area under the following conditions: <ul style="list-style-type: none"> The area in which the offsetting reductions originate has an equal or higher nonattainment classification, and The emissions from the nonattainment area where the offsetting reductions originate will contribute to a National Ambient Air Quality Standards (NAAQS) violation in the area in which the source would construct. 	§ 116.150(a)(3); § 116.151(3)	§ 116.3(a)(7)(C); § 116.3(a)(10)(D)
§ 173(c)(1). A new or modified major stationary source must offset a proposed emissions increase with real reductions in actual emissions.	§ 116.150(a)(3); § 116.151(3); § 116.12(14)—Definition of "Offset ratio".	§ 116.3(a)(7)(C); § 116.3(a)(10)(D)
§ 173(c)(2). Must not use emission reductions otherwise required by the Act	§ 116.170(1)	§ 116.3(c)(1)
§ 173(e). A State may allow any existing or modified source that tests rocket engines or motors to use alternative or innovative means to offset emissions increases from firing and related cleaning. ^b .	§ 116.170(3)	§ 116.3(c)(3)

^aAll Sections cited in this column are Sections that EPA approved on September 27, 1995 (60 FR 49781).

^bThis type of source may use alternative or innovative offsetting if it satisfies the following conditions:

- (a) the proposed modification is for expansion of a facility already permitted for such purposes as of November 15, 1990;
- (b) the source has used all available offsets and all reasonable means to obtain offsets and sufficient offsets are not available;
- (c) the source has obtained a written finding by the appropriate, sponsoring Federal agency that the testing is essential to national security; and
- (d) the source will comply with an alternative measure designed to offset any emissions increases not directly offset by the source.

The Act further provides an alternative to the above. The permitting authority may require an emission fee amounting to no more than 1.5 times the average cost of stationary control measures adopted in that area during the previous three years.

II. Review of Texas' Regulations for Permitting Major Sources and Major Modifications in Ozone Nonattainment Areas

A. What Does the Current Texas SIP Require?

We approved the Texas SIP for permitting major sources and major modifications in ozone nonattainment areas on September 27, 1995 (60 FR 49781). We approved the regulations after we determined that they meet the

requirements of title I, part D, subpart 2 of the Act.

The current SIP addresses ozone nonattainment area permitting in section 116.3(a)(7). This section includes the provisions described in Table 5 of this preamble and meets the requirements of sections 173 and 182 of the Act.

Section 182 of the Act provides special provisions for ozone nonattainment areas. This section

specifies individual major source thresholds for marginal, moderate, serious, severe and extreme ozone nonattainment areas. See Table 3 in section I.C of this preamble for a list of the individual major source thresholds.

Section 182 also specifies the offset ratios that are required for marginal, moderate, serious, severe and extreme ozone nonattainment areas. Table 6 below lists the applicable offset ratio for each type of ozone nonattainment area.

TABLE 6.—OFFSET RATIOS FOR EACH TYPE OF OZONE NONATTAINMENT AREA

Ozone nonattainment classification	Offset ratio	Clean Air Act citation for offset ratio
marginal	1.10 to 1	Section 182(a)(4).
moderate	1.15 to 1	Section 182(b)(5).
serious	1.20 to 1	Section 182(c)(10).
severe	1.30 to 1	Section 182(d)(2).
Extreme	1.50 to 1	Section 182(e)(1).

The current SIP includes major source thresholds and the offset ratios in Table I of Section 116.12. In Table I, the applicable offset ratio of volatile organic compounds (VOC) or NO_x is the same as required by the above stated sections of the Act.

Finally, the current SIP includes provisions pertaining to the use of emission reduction credits as offsets and special provisions for offsetting emissions increases at facilities which test rocket engines and motors in section 116.3(c)(1) and (3).

B. What SIP revisions did Texas submit?

Texas recodified Chapter 116 and submitted the recodified regulation to EPA in August 31, 1993. The recodified regulation also revised Texas' provisions for implementing section 182(c)(6) of the Act.

Subsequent to the recodification, Texas submitted revisions to waive the requirement to address NO_x as a precursor to ozone on November 1, 1995; July 18, 1996; and April 13, 1998. On April 13, 1998, Texas submitted a revision to further modify its provisions for implementing section 182(c)(6) and to incorporate the provisions of sections 182(c)(7) and (8) of the Act.

Texas also submitted revised definitions of “major modification,” “net emissions increase,” and “potential to emit”; and submitted new definitions for “*de minimis threshold test*,” “offset ratio,” “project net,” and “stationary source”

We will discuss the Texas nonattainment permitting provisions as outlined below:

- Section C discusses Texas’ plan to implement the NO_x waivers approved by EPA under section 182(f) of the Act,
- Section D discusses Texas’ regulation for implementing section 182(c)(6), (7) and (8) of the Act, and
- Section E discusses the new and revised nonattainment permitting definitions.

C. Summary of Texas 182(f) NO_x Waivers

1. What Does Section 182(f) of the Act Require?

Section 182(f) sets forth the presumption that NO_x is an ozone precursor unless the Administrator makes a finding of nonapplicability or grants a waiver pursuant to criteria contained therein. Specifically, section 182(f) provides that requirements applicable for major stationary sources of VOC shall apply to major stationary sources of NO_x, unless otherwise determined by the Administrator, based upon certain determinations related to the benefits or contribution of NO_x control to air quality, ozone attainment, or ozone air quality.

2. Did We Approve NO_x waivers in Texas?

We approved petitions submitted by Texas under section 182(f) to waive NO_x provisions in Texas, as follows:

- On November 28, 1994, we conditionally approved two petitions from Texas, each dated June 17, 1994. This action exempted Dallas-Fort Worth (DFW)² and El Paso (ELP)³ ozone nonattainment areas from NO_x control

² Includes the following Texas counties: Collin, Dallas, Denton, and Tarrant Counties in Texas

³ Includes El Paso County in Texas.

requirements of section 182(f) of the Act. See 59 FR 60709.

- On April 19, 1995, we approved a petition from Texas dated August 17, 1994. This action temporarily exempted the Houston-Galveston (HGA)⁴ and Beaumont-Port Arthur (BPA)⁵ ozone nonattainment areas from the NO_x control requirements of section 182(f) of the Act. These temporary exemptions expired December 31, 1996. See 60 FR 19515.

- On May 23, 1997, we approved a petition from Texas dated March 8, 1996, to extend the NO_x waiver in HGA and BPA until December 31, 1997. See 62 FR 28344.

- On April 20, 1999, we approved a petition from Texas dated November 13, 1998, to rescind the conditional NO_x exemption for the DFW ozone nonattainment area. Texas petitioned for rescission of the exemption after EPA reclassified DFW from a moderate ozone nonattainment area to a serious ozone nonattainment area. The modeling for this serious ozone nonattainment area SIP shows that control of NO_x sources will help the area to attain the air quality standard for ozone. See 64 FR 19283.

3. What Is the Current Status of Texas NO_x Waivers?

On December 31, 1997, the NO_x waiver in HGA and BPA expired. On February 12, 1998, we published a document in the **Federal Register** concerning Texas’ decision not to petition for further extension of the NO_x exemption in the HGA and BPA areas. See 63 FR 7071. Since the extension of the temporary exemption expired on December 31, 1997, the State must implement the numerous requirements relating to NO_x in the HGA and BPA areas. Accordingly, any NSR permits that Texas had not deemed to be complete prior to January 1, 1998, must comply with the NO_x NSR requirements, consistent with the policy set forth in the EPA’s NSR Supplemental Guidance memorandum dated September 3, 1992, from John Seitz, Director, EPA’s Office of Air Quality Planning and Standards.

On February 18, 1998, we published our finding that the DFW nonattainment area has not attained the 1-hour ozone NAAQS by the applicable attainment date in the Act for moderate ozone nonattainment areas, November 15, 1996. We based the finding on the review of monitored air quality data

⁴ Includes the following Texas counties: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller.

⁵ Includes the following Texas counties: Hardin, Jefferson, and Orange Counties.

from 1994 through 1996 for compliance with the 1-hour ozone NAAQS. As a result of this finding, the DFW ozone nonattainment area was reclassified by operation of law as a serious ozone nonattainment area, effective March 20, 1998. Texas was required to submit a new SIP, no later than March 20, 1999, addressing attainment of that standard by November 15, 1999. Texas submitted a revised plan on March 16, 1999, in satisfaction of this requirement.

In its revised plan, Texas again recognizes NO_x as an ozone precursor in the DFW nonattainment area. Texas also forwarded a petition to us on November 13, 1998, requesting that we withdraw the waiver for NO_x that we had approved on November 28, 1994, for the DFW nonattainment area. On April 20, 1999, we approved this petition and reinstated NO_x as an ozone precursor in the DFW nonattainment area.

4. Texas Rule Changes To Accommodate Section 182(f) NO_x Waivers

Texas submitted the following SIP revisions to incorporate the section 182(f) NO_x waivers and subsequent reinstatement for NO_x as an ozone precursor:

- On November 1, 1995, Texas submitted revisions to section 116.150 to implement the NO_x waivers approved for the DAL, ELP, HGA, and BPA ozone nonattainment areas. On July 18, 1996, Texas, submitted revisions to Table I in section 116.12⁶ to remove NO_x as an ozone precursor, consistent with EPA’s approval of the NO_x waivers.

- On April 13, 1998, Texas submitted revisions to sections 116.12 (Table I) and 116.150(c), to reinstate NO_x as an ozone precursor in the HGA and BPA areas following the expiration of the temporary waivers for those areas on December 31, 1997.

- On March 16, 1999, Texas submitted revisions to sections 116.12 (definition of “major modification” and Table I) and 116.150(b), to reinstate NO_x as an ozone precursor in the DFW area.

The above described revisions to section 116.150 are discussed in the following paragraphs.

a. What are Texas’ provisions for addressing NO_x Waivers in DFW and ELP? Texas addresses the NO_x waivers for DFW and ELP in section 116.150(b) submitted November 1, 1995. Section 116.150(b) is consistent with the NO_x

⁶ Table I of section 116.12 specifies the various classifications of nonattainment along with the associated emission levels which designate a major modification for those areas. A detailed discussion of the changes to Table I is included in section of the preamble describing the submitted definition of “major modification.”

waiver approved by EPA on November 28, 1994. Following the redesignation of DFW to a serious ozone nonattainment area, Texas revised section 116.150(b) to revoke applicability of the NO_x waiver in DFW. As revised, section 116.150(b) now only identifies ELP as the only area in Texas where a section 182(f) waiver continues to apply. Texas submitted these revisions to section 116.150(b) on March 16, 1999.

b. What are Texas' provisions for addressing NO_x Waivers in HGA and BPA? Texas addresses the NO_x waivers for HGA and BPA in section 116.150(c) submitted November 1, 1995. This Section temporarily removes the requirements relating to NO_x emissions (as an ozone precursor) in these areas.

Section 116.150(c) exempts NO_x from otherwise applicable nonattainment area permitting requirements⁷ (except for NO_x offsets). The requirements for obtaining NO_x offsets continue to apply, and will be included in the source's permit. However, the requirement to obtain such offsets is held in abeyance until January 1, 1998.

Section 116.150(c) further requires a source to document any proposed increase of NO_x equal to or greater than 40 TPY and submit documentation of netting calculations associated with the proposed increase, and the source must otherwise comply with the requirements of sections 116.150(a)(1)–(4). The requirements of sections 116.150(a)(1)–(4) are discussed in sections I.C and II.D of this preamble.

Texas submitted further revisions to section 116.150(c) on April 13, 1998. This submittal reinstates the NSR requirements for NO_x in HGA and BPA, effective January 1, 1998. The submittal further provides that sources with NO_x offsets in the HGA and BPA areas held in abeyance shall obtain the required NO_x offsets no later than January 1, 2000.

The provisions of section 116.150(b) and (c), submitted November 1, 1995; and revisions submitted April 13, 1998, and March 16, 1999; are consistent with the NO_x waivers approved by EPA for DFW, ELP, HGA, and BPA on November 28, 1994; April 19, 1995; and May 23, 1997; pursuant to section 182(f) of the Act. The revisions submitted April 13, 1998, reinstate the NO_x requirements in HGA and BPA consistent with the December 31, 1997, expiration of the NO_x waiver in those areas. The

⁷ Section 116.150(c) exempts NO_x from the application of lowest achievable emission rate, statewide compliance by all sources under common control with the applicant, and alternate site analysis, which are otherwise required by section 116.150(a)(1), (2), and (4), respectively.

revisions submitted March 16, 1999, reinstate the NO_x requirements in DFW.

D. Texas' NSR Provisions for Implementing Special Provisions for Ozone Nonattainment Area Permitting Under Sections 182(c)(6), (7), and (8).

Sections 182(c)(6), (7), and (8) of the Act apply in serious and severe ozone nonattainment areas.⁸ Section 182(c)(6) sets forth procedures for determining whether a physical or operational change at an existing major stationary source would be subject to the nonattainment area permit requirements. Section 182(c)(7) and (8) establish special provisions for permitting sources if the source internally offsets its proposed increase resulting from a major modification. Following is a discussion of how Texas' regulations meet the provisions of sections 182(c)(6), (7), and (8) of the Act.

Section 1 below addresses the *de minimis* rule in section 182(c)(6) of the Act. Section 2 addresses the special provisions in sections 182(c)(7) and (8) of the Act.

1. The *De Minimis* Rule in Section 182(c)(6) of the Act

a. *What is the de minimis rule?* Section 182(c)(6) of the Act applies in serious and severe ozone nonattainment areas. It specifies an approach for determining whether a proposed modification is subject to nonattainment NSR.¹⁰ It states that increased emissions of VOC (and presumably NO_x) resulting from any modification of a major stationary source:

“. . . shall not be considered *de minimis* for purposes of determining the applicability of the permit requirements established by this chapter unless the increase in net emissions of such air pollutant from such source does not exceed 25 tons when aggregated with all other net increases in emissions from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred . . .”

⁸ Section 181(a) defines five area classifications for ozone based on ambient ozone concentrations (ozone design values). These five classifications (in ascending order of severity) are marginal, moderate, serious, severe, and extreme.

A detailed description of the individual area classifications for ozone nonattainment areas is contained in the EPA's General Preamble for the Implementation of Title I of the 1990 Amendments.

⁹ Subsection 182(c) of the Act, including paragraphs (6), (7), and (8) therein, sets forth special provisions applicable in serious ozone nonattainment areas. Subsection 182(d) of the Act incorporates the provisions of subsection 182(c) as applicable requirements for severe ozone nonattainment areas.

¹⁰ A thorough analysis of the *de minimis* rule in section 182(c)(6) and EPA's interpretations of this section is contained in the proposed NSR reform rulemaking published July 23, 1996 (61 FR 38298).

This provision changes the process for determining applicability at existing major sources as follows:

- It changes the significance level for VOC emissions from 40 TPY to “greater than 25 TPY,” i.e., 25 TPY or less is *de minimis*.

- It specifies a slightly different “contemporaneous” period, and

- It departs from the “non-aggregation” policy¹¹ to require netting over the contemporaneous period in all instances where there is a net increase in emissions from the proposed modification standing alone.

Neither the Act itself nor the current Federal regulation defines what constitutes a “net increase” as provided in the *de minimis* rule. However, in the proposed NSR reform rulemaking (see footnote 10), we proposed a procedure for determining the net increase in emissions under section 182(c)(6) and applicability of the *de minimis* rule. Under this proposal, a source determines applicability of nonattainment new source review (NNSR) as follows:

(1) It determines the “increase in net emissions” from the proposed modification. The net emissions from the proposed modification (referred to here as the “project net”) is the sum of all proposed creditable emissions increases and decreases proposed at the source between: (A) the date of application for the modification and (B) the date the modification begins emitting. An increase or decrease is creditable if it meets the criteria described in 40 CFR 51.165(a)(1)(vi).

(2) If the project net is an emissions increase, then the source aggregates the project net emissions increase with all other “net increases in emissions from the source” over a period of five consecutive calendar years which includes the year in which the source increase occurs. We refer to this aggregation as the contemporaneous net. If the contemporaneous net increase is greater than 25 TPY, then the proposed modification is subject to NNSR. (The

¹¹ EPA's nonaggregation policy provides that a proposed modification resulting in a *de minimis* increase is not major. This applies when the proposed increase in emissions standing alone without considering any decreases associated with the proposed modification is less than the applicable significance threshold. See Table 4 for a list of the significance thresholds. In such case, a source does not consider previous contemporaneous emission increases and decreases to determine if its proposed project is major. This policy is discussed in detail in an EPA memorandum dated June 3, 1983 entitled “Net Emission Increase Under PSD” from Sheldon Myers, Director, Office of Air Quality Planning and Standards. Section 182(c)(6) of the Act is a departure from this interpretation.

“contemporaneous period” is discussed in greater detail in section II.D.3.)

b. *How does the current Texas SIP address the de minimis rule?* On September 27, 1995 (60 FR 49781), we approved revisions to Texas Chapter 116—“Control of Air Pollution by Permits for New Construction or Modification” which included provisions pertaining to permitting major sources and major modifications in nonattainment areas. We approved these revisions based upon our determination that they satisfy the provisions of title I, part D of the Act.

The Texas SIP currently incorporates the *de minimis* rule as codified in the Act. As approved, the *de minimis* rule applies in moderate, serious, and severe ozone nonattainment areas in Texas. Under the current SIP-approved rule when a source proposes a physical or operational change at an existing major source it must determine the contemporaneous net emissions increase. The source makes this determination by aggregating the proposed increase with all other creditable increases and decreases during the previous five calendar years, including the calendar year of the proposed change.

A source must currently undergo NNSR if the contemporaneous net increase in VOC or NO_x equals or exceeds 40 TPY in moderate ozone nonattainment areas or 25 TPY of VOC or NO_x in serious and severe ozone nonattainment areas. See 30 TAC section 101.1 (definition of “*de minimis* threshold”), section 116.3(a)(7), and Table I in section 116.12.

c. *What changes did Texas make to its de minimis rule?* On August 31, 1993, Texas submitted a recodification of and revisions to Chapter 116 to EPA. The recodification and revisions submitted April 13, 1998, include provisions which implement the *de minimis* rule.

As submitted, Texas made two changes to section 116.150 (formerly section 116.3a(7)) which relate to the *de minimis* rule in section 182(c)(6) of the Act. These changes are:

(1) The proposed project triggers contemporaneous netting (the “netting trigger”) unless at least one of the following conditions are met:
—the proposed increase is less than five TPY without consideration of other decreases at the source, or
—the “project net”¹² is zero or less.

(2) Texas specifies a different contemporaneous time period over which a source may aggregate creditable

increases and decreases to determine its contemporaneous net emission increase.

On the basis of information gathered in 1995, we believe that the submitted regulation meets the *de minimis* requirements of section 182(c)(6) of the Act, even with provisions that are not verbatim to the Act. The basis for this conclusion is discussed in the following sections of this preamble. Section 2 addresses the five TPY netting trigger and section 3 addresses the contemporaneous period.

2. Texas Five TPY Netting Trigger

a. *How does a source trigger contemporaneous netting under Texas’ regulations?* As submitted August 31, 1993, section 116.150(a) requires the *de minimis* threshold test (which includes contemporaneous netting) for all proposed VOC and NO_x emission increases that equal or exceed five TPY in moderate, serious, and severe ozone nonattainment areas. On April 13, 1998, Texas submitted revisions to sections 116.12 and 116.150 to include a second netting trigger based upon the “project net.” The April 13, 1998, submittal also revised section 116.12 to add a new definition of “project net” (section 116.12(16)) consistent with EPA’s policy as described in the NSR reform proposal. This revision provides a second netting trigger. A source may trigger contemporaneous netting on the basis of any increase in the “project net.” Texas defines the project net as the total increase in emissions resulting from a proposed physical or operational change at a stationary source minus any creditable source wide decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. If the project net is an increase, then the source aggregates the project net with all other creditable increases and decreases in emissions from the source over the contemporaneous period to determine the “contemporaneous net.” As revised, section 116.150 now provides that a proposed project triggers contemporaneous netting unless the project results in either: (1) less than five TPY increase from the proposed project or (2) no increase in project net.

b. *Does the five TPY netting trigger meet the Act?* As adopted by Texas, the five TPY netting trigger is the sum of all increases which occur as the result of the proposed project without consideration (unlike the Federal counterpart) of any decreases. If these project increases equal or exceed five TPY, the source must perform contemporaneous netting, unless the project net is zero or less. For reasons

below, we conclude that the Texas five TPY netting trigger meets the Act.

Under *Alabama Power Company v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), the court held that we have the authority to recognize and exempt inconsequential or trivial increases except where Congress has unambiguously expressed an intention to preclude them. As discussed in the proposed NSR reform rulemaking, we have determined that the term “net increase” in this context is ambiguous. We believe that Texas has met its burden of demonstrating that the netting trigger of a five TPY increase irrespective of decreases would “yield a gain on trivial or no value,” *id.* at 357 and is appropriate to exempt as *de minimis*. As explained below, the particular circumstances of this case demonstrate why this increase meets the Act’s *de minimis* rule.

In June 1995, we reviewed several permits issued by Texas in the Houston/Galveston area (a severe ozone nonattainment area) to assess Texas’ five TPY netting trigger comparing it to the project net which triggers the requirement to perform contemporaneous netting. In this study, we evaluated which projects triggered contemporaneous netting under Texas’ five TPY trigger to those which triggered contemporaneous netting based upon the project net increase. The study revealed that all projects which triggered contemporaneous netting under the project net would have triggered contemporaneous netting under the five TPY increase.

The data reviewed in 1995 indicate that the five TPY netting trigger meets the *Alabama Power* test and thus the statutory project net. Facts which indicate this conclusion are discussed below.

- The data show that it is unlikely that a source will be able to indefinitely schedule projects with less than five TPY increases. A project with a five TPY increase is an extremely small project. It would be impractical for a source to indefinitely avoid nonattainment NSR by constructing a series of projects less than five TPY.

- If a source triggers the requirement to perform contemporaneous netting, it must include all creditable increases and decreases in the calculation of the contemporaneous net emissions increase. This includes any emission increases less than five TPY which did not undergo nonattainment NSR.

- The increases are inherently conservative. This is evident when one examines the procedure for calculating the creditable increases of a particular change. This creditable increase is the change:

¹² Texas submitted a revision on April 13, 1998, to include a provision to trigger contemporaneous netting on the basis of any increase in “project net.”

—From the old level of actual emissions
 —To the new potential to emit (PTE) or the new allowable emission rate, whichever is lower.

This is known as the “actual to potential” method for determining the creditable increase. Typically, an emissions unit’s actual emissions is less than its PTE because the unit does not actually operate at maximum production rate for an entire year. Thus the actual increase is less than the creditable increase. The creditable increase consequently represents a “worst case” scenario which the source cannot exceed without violating its permit.

No matter how insignificant, the structure of the Texas program necessarily requires the State to quantify and track these increases for they remain perpetually within the contemporaneous window. Thus the State assures compliance with the NAAQS. Further, these increases are counted as minor source growth under section 173(a)(1)(A) of the Act.

• Finally, we have approved a similar five TPY netting trigger in Louisiana’s nonattainment SIP. Louisiana’s nonattainment regulations apply in the Baton Rouge Area, a serious ozone nonattainment area. The *de minimis* provisions of section 182(c)(6) of the Act apply to this area. Louisiana’s regulations likewise trigger contemporaneous netting whenever a major source of VOC equals or exceeds five TPY. We approved this regulation after careful consideration of all aspects

of its regulations, including the five TPY netting trigger. See 62 FR 52948, published October 10, 1997.

These facts form the basis for the conclusion that the five TPY netting trigger adopted by Texas is equivalent to and satisfies the requirement of section 182(c)(6) of the Act and therefore meets the Act.

3. Texas Definition of “Contemporaneous Period” under Section 182(c)(6) of the Act

a. What is the contemporaneous period in section 182(c)(6) of the Act? Section 182(c)(6) of the Act provides that a particular physical change or change in the method of operation is *de minimis* only if the increase in net emissions of VOC or NO_x resulting from such project does not exceed 25 TPY when aggregated with all other net increases in emissions of VOC or NO_x from the source over any period of five consecutive calendar years which includes the calendar year in which such increase occurred.

b. What is the contemporaneous period in the current Texas SIP? The currently approved SIP addresses the applicable contemporaneous period in the definition of “*de minimis* threshold” in section 101.1 of the General Rules, Table I of section 116.12, and in section 116.3(a)(7) of Chapter 116. The SIP requires the following:

—Section 101.1 defines the term “*de minimis* threshold” as an emission level determined by aggregating the proposed increase with all other creditable increases and decreases during the

previous five calendar years, including the calendar year of the proposed change. The total of this aggregation is *de minimis* if it is less than the applicable major modification level (in TPY) for the specific nonattainment area.

—Section 116.3(a)(7) requires —a source to apply the *de minimis* threshold test to any proposed increase of VOC or NO_x in moderate, serious, and severe ozone nonattainment areas.

—The *de minimis* test thresholds are the same as the major modification levels stated in Table I, but aggregated over the applicable five-year netting period.

—The source must evaluate past net increases even when the proposed increase is below the major modification level.

—Table I of section 116.12 specifies the various classifications of nonattainment along with the associated emission levels which designate a major modification for those areas. Table I specifies the *de minimis* thresholds as 40 TPY of VOC in marginal and moderate ozone nonattainment areas and 25 TPY of VOC in serious and severe ozone nonattainment areas. We approved these provisions on September 27, 1995.

c. What changes did Texas make to its contemporaneous period? As submitted August 31, 1993, Texas defined the term “contemporaneous period” as described in the Table 7 below:

TABLE 7. DESCRIPTION OF TEXAS’ CONTEMPORANEOUS PERIODS

Pollutant	Contemporaneous period begins	Contemporaneous period ends
If source has PTE less than 250 TPY		
VOC	Five years before commencement of construction	Date that new or modified source begins operation.
NO _x	Latter of	Date that new or modified source begins operation.
	—November 15, 1992, or	
	—Five years before commencement of construction	
If source has PTE equal to or greater than 250 TPY		
VOC	The earlier of	Date that new or modified source begins operation.
	—Five years before commencement of construction	
	—November 15, 1992	
NO _x	November 15, 1992	Date that new or modified source begins operation.

On April 13, 1998, Texas submitted a revision to definition of “contemporaneous period.” Texas revised the definition to delete the start of the contemporaneous period at five years prior to commencement of construction for a source with a PTE of 250 TPY or greater. This change is

administrative in that it recognizes that as of the date of the adoption of the revision (March 18, 1998), all permit applications would be submitted after November 15, 1997, and the applicable contemporaneous period would begin on November 15, 1992. This change does not affect applications which were

submitted prior to November 15, 1997, which must consider all creditable increases and decreases which occur five years prior to the commencement of construction.

d. Does Texas’ contemporaneous period meet the requirements of the Act? The Texas definition of

“contemporaneous period” does not track but meets the Act. To determine whether Texas’ definition “contemporaneous period” meets the Act, we reviewed several permit files for sources permitted with increases of VOC in Harris County, Texas (within the Houston/Galveston region, a severe ozone nonattainment area). Following a thorough review of the data, we have concluded that Texas’ definition of “contemporaneous period” requires the same netting period established in section 182(c)(6) of the Act and more.

A source with a PTE greater than or equal to 250 TPY performs contemporaneous netting over a period which begins on the earlier of the date five years prior to commencement of construction or November 15, 1992. The contemporaneous period ends when the proposed increase in emission actually occurs. After November 15, 1997, the beginning date of the contemporaneous period is “tagged” at November 15, 1992, for all complete permit applications submitted after November 15, 1997. Thus, after November 15, 1997, a proposed modification considers all creditable increases and decreases which occur between November 15, 1992, and the date that the proposed increase in emissions occurs. This will result in a longer contemporaneous period than specified in section 182(c)(6) of the Act. This means that sources must demonstrate that the contemporaneous net is satisfied over an even longer period than that required by the Act.

For sources greater than 250 TPY, the tagged netting window simplifies the netting process and facilitates a source’s ability to plan for the future by providing stability in the increases and decreases that are creditable for netting. Such sources have numerous options available for expansion by shutting down older, inefficient, units or adding emission controls to the units. Furthermore, these sources undertake numerous modifications each year. These numerous modifications, combined with a “moving” five year contemporaneous period would make the netting exercise difficult because increases and decreases are continually moving in and out of the netting window.

The 1995 evaluation indicated a trend towards reductions in net emissions as time passes. The data further indicate that all physical and operational changes which we reviewed would have netted out of review under both Texas’ tagged contemporaneous period and under the five year contemporaneous period specified in section 182(c)(6) of the Act.

This trend towards achieving lower net emissions indicates that the netting mechanism used by Texas is achieving beneficial results inherent in reducing emissions. The reductions occur as a result of lowering the significance threshold from 40 TPY to 25 TPY¹³ and from lowering the netting trigger (which triggers the requirement for a source to perform contemporaneous netting), from 40 TPY to five TPY.

In addition, the tagged contemporaneous period used by Texas is more conservative than the five year period in the Act. The following information illustrates the conservative nature of the tagged contemporaneous period:

- The tagged contemporaneous period benefits the environment by encouraging emission reductions that would not otherwise occur. Whenever a source proposes a physical or operational change, it must demonstrate that its net emissions increase in emissions of VOC on NO_x are below the applicable modification level in Table I of section 116.12. Otherwise it must undergo nonattainment review. A major source which undergoes several projects whose contemporaneous net emissions increase is less than 25 TPY does not undergo nonattainment review. Over time such source must demonstrate, with each physical or operational change, that the net emissions increase is less than the applicable modification level (Table I of section 116.12) over an expanding contemporaneous period which begins November 15, 1992. By retaining increases in the tagged contemporaneous period (which would otherwise drop out after five years) a source must continue to account for increases that did not undergo nonattainment review and were not offset through the nonattainment review permitting process. This growing data base of increases will necessarily provide incentive for a source to achieve additional reductions to net against these increases. This results in greater environmental benefits than would otherwise occur in the five year moving contemporaneous period required by the Act.

- Decreases are more likely to be removed from the contemporaneous

period than increases. There are many ways that decreases may be removed from creditability for netting. Examples of decreases which will drop out of the contemporaneous period, because they are no longer “creditable” are:

- A decrease that is subsequently used as reasonably available control technology.
- decreases used to offset increases which undergo NNSR
- decreases used in the demonstration of attainment of the national ambient air quality standard or in the demonstration of reasonable further progress. See 30 TAC 116.12(13) in Texas’ rules and 40 CFR 51.165(a)(1)(vi)(C)(3).

Increases, however, may only be removed from consideration in subsequent netting if: (1) they undergo nonattainment permitting and (2) are offset at the appropriate ratio specified in Table I of section 116.12.

Consistent with the above discussion, we believe that the tagged contemporaneous period adopted by Texas meets the requirements of the Act. We request comments on this proposal to approve Texas tagged contemporaneous period for major sources with a PTE greater than 250 TPY of VOC.

For sources with a PTE less than 250 TPY, Texas adopted a contemporaneous period which begins five years prior to commencement of construction and ends when the proposed emission increase occurs. Texas adopted a “moving” contemporaneous period rather than the tagged contemporaneous period because these smaller sources do not have as many netting opportunities as the larger sources. The moving window provides smaller sources with greater flexibility for growth. The contemporaneous period is identical to the contemporaneous period specified in 40 CFR 52.21(b)(3)(ii) for determining applicability under the Federal regulations for prevention of significant deterioration of air quality. This contemporaneous period more closely approximates the contemporaneous period in section 182(c)(6) of the Act, which requires contemporaneous netting over a period of five consecutive calendar years.

Our evaluation of data for several Texas sources indicated that all projects which netted out of nonattainment review using Texas’ definition of “contemporaneous period,” would have netted out of review using the netting period in the Act. The Technical Support Document for today’s proposal contains the data gathered by us and our evaluation thereof. We conclude that the

¹³ Prior to November 15, 1992, the applicable significance threshold for VOC was 40 TPY. See 40 CFR 51.165(a)(1)(x). The requirement to perform contemporaneous netting was triggered whenever a particular physical or operational change equaled or exceeded 40 TPY. The source would then add the proposed increase to all other contemporaneous increases and decreases to determine the net emissions increase. If the resulting net emissions increase was 40 TPY or more, the proposed increase was subject to permitting requirements applicable in ozone nonattainment areas.

contemporaneous period adopted by Texas meets the Act.

Texas further provides that for major sources of NO_x in ozone nonattainment areas in which NO_x is an ozone precursor, the contemporaneous period for NO_x shall begin no earlier than November 15, 1992. In serious and severe ozone nonattainment areas, the contemporaneous period is different from the netting period in section 182(c)(6) of the Act. Prior to November 15, 1997, Texas' definition will provide for a shorter contemporaneous period than the five consecutive calendar years specified in the Act. However, Texas recognized the need to incorporate a transition period because the Act does not require NO_x to be regulated as an ozone precursor until after November 15, 1992.

We believe that the conclusions made for VOC will hold equally well for the emissions of NO_x. Earlier discussions herein illustrate that since November 15, 1992, a declining trend in the net increases of VOC emissions in ozone nonattainment areas. Factors which contribute to this trend are the lower significance threshold of 25 TPY and the five TPY netting trigger. We believe that this trend will hold true for net increases of NO_x and well as for VOC. After November 15, 1997, NO_x increases will be treated the same as VOC

increases. At that time, the reasoning for proposing approval of the contemporaneous period for VOC will hold true for proposing to approve the contemporaneous period for NO_x. For sources with a PTE of 250 TPY or more of NO_x, the tagged contemporaneous period will continue to apply after November 15, 1997. As discussed earlier in this preamble, the tagged contemporaneous period will result in additional incentives for sources to reduce emissions of NO_x than would otherwise occur in a moving five-year window. The trend towards lower emissions in an ozone nonattainment area should mitigate any affects caused by not including increases and decreases of NO_x which occurred prior to November 15, 1992.

For the reasons described above, we consider the definition of "contemporaneous period" to be consistent with the Act and proposes to approve this definition as submitted. We request comments concerning Texas' definition of "contemporaneous period."

4. Special Modification Rules in Sections 182(c) (7) and (8) of the Act

a. *What does the Act require in sections 182(c)(7) and (8)?* These sections establish special rules for a major stationary source located in a

serious or severe ozone nonattainment area. These sections apply to a major source which undergoes a physical or operational change that is not considered *de minimis* under section 182(c)(6). These subsections offer sources options that may be more desirable than would otherwise apply. Specifically, sections 182(c)(7) and (8) allow a major source to internally offset its proposed increase of VOC or NO_x¹⁴ at a ratio of 1.3 to 1. Obtaining this internal offset allows a source to:

- Avoid NSR entirely if the source emits, or has the potential to emit, less than 100 tpy of the offset pollutant under section 182(c)(7), or
- Avoid application of Lowest Achievable Emission Rate if the source emits, or has the potential to emit, 100 tpy or more of the offset pollutant under section 182(c)(8).

A summary of the provisions of sections 182(c)(7) and (8) is in Table 8 located in paragraph b below. Table 8 also compares Texas regulations with the Act.¹⁵

b. *What SIP revisions did Texas make to address Sections 182(c)(7) and (8)?* On April 13, 1998, Texas submitted revisions to Section 116.150 which implement the special rules in sections 182(c)(7) and (8) of the Act. Section 116.150 provides the following as shown in Table 8 below:

TABLE 8.—DESCRIPTION OF SPECIAL REQUIREMENTS FOR PERMITTING MODIFICATIONS IN SERIOUS AND SEVERE OZONE NONATTAINMENT AREAS

Potential to emit	Section of Act	State regulation	Provision of Act	Provisions of state rule
Less than 100 TPY of VOC or NO _x .	§ 182(c)(7)	§ 116.150(a)(3)(A)	Project is not a modification subject to NNSR if source elects to internally offset the same pollutant at an offset ratio of at least 1.3 to 1 the proposed increase of VOC or NO _x .	NNSR is not required if the project increases are offset with internal offsets the same pollutant at a ratio of at least 1.3 to 1.
		§ 116.150(a)(1)	Best available control technology (BACT) is substituted for LAER, if a source elects not to use internal offsets.	If a source elects to use internal offsets, it can substitute BACT for LAER, which is more stringent than required by the Act.
Greater than or equal to 100 TPY of VOC or NO _x .	§ 182(c)(8)	§ 116.150(a)(3)(B)	The requirements of LAER otherwise required by section 173(a)(2) of the Act do not apply, if the source elects to internally offset the same pollutant at 1.3 to 1 such proposed increase of VOC or NO _x ^a .	Source can substitute BACT for LAER, if the project increases are offset with internal offsets of the same pollutant at a ratio of at least 1.3 to 1.
		§ 116.150(a)(3)(B)	A source which elects to avoid LAER by satisfying the provisions of section 182(c)(8) may use the 1.3 to 1 internal offset ratio in lieu of the general offset ratio.	Internal offsets used as described above can also be applied to satisfy the offset requirement.

^a Applies to a proposed increase of VOC or NO_x from a any discrete operation, unit, or other pollutant emitting activity at the source.

¹⁴ Section 182(f)(1) of the Act provides that requirements (which include the requirements of sections 182(c)(6), (7), and (8)) applicable for major stationary sources of VOC shall apply to major stationary sources of NO_x, unless otherwise determined by the Administrator, based upon

certain determinations related to the benefits or contribution of NO_x control to air quality, ozone attainment, or ozone air quality. See section II.C.I of this preamble for further discussion of the requirements of section 182(f)(1).

¹⁵ A thorough analysis of the special rules in section 182(c)(7) and (8) and EPA's interpretations of this section is contained in the proposed NSR reform rulemaking.

c. Does Texas' regulation satisfy sections 182(c)(7) and (8) of the Act? We have evaluated the provisions of sections 116.150(a)(1) and (3)(A) and (B) which Texas adopted to implement the requirements of section 182(c)(7) and (8) of the Act. We have determined that these provisions of the State's regulations implement the special provisions of the Act only for project increases which are offset internally at an offset ratio of 1.3 to 1. These provisions of section 116.150, described in paragraph b of this preamble above, apply to any major source which internally offsets its proposed project increase at a ratio of at least 1.3 to 1. The project increase includes any increase resulting from any discrete operation, unit, or other pollutant emitting activity at the source that is part of the proposed project. These provisions are consistent with the Federal interpretation of section 182(c)(7) and (8) as discussed in paragraph a, above.

E. Other Revisions Affecting NSR Permitting in Nonattainment Areas

Texas submitted revisions to its definitions which apply to its permitting in nonattainment areas. Specifically Texas submitted definitions for:

“*de minimis* threshold test”—new definition

“major modification”—revised definition

“net emissions increase”—revised definition

“offset ratio”—new definition

“potential to emit”—revised definition

“stationary source”—new definition

The evaluation of these definitions is discussed below.

1. Definition of “*de minimis* threshold test”

A new definition of “*de minimis* threshold test” in section 116.12 replaces the former definition of “*de minimis* threshold.” The former definition of “*de minimis* threshold” defined the term as an emissions level, as determined by aggregating the proposed increase with all other creditable increases and decreases¹⁶ during the previous five calendar years, including the calendar year of the proposed change which equals the major modification level for the specific nonattainment area. Texas now defines “*de minimis* threshold test” consistent with the *de minimis* rule. Section

¹⁶To be creditable, an increase or decrease must meet the criteria in the definition of “net emissions increase” in section 116.12. The definition of “net emissions increase” is discussed in section II.E.3 of this preamble.

II.D.1–2 of this preamble contains further discussion of the *de minimis* rule. To summarize, the definition requires a source to add the proposed increase with all other creditable emission increases and decreases during the contemporaneous period, and compare the sum with the major modification column in Table I (following the definition of “major modification”) for the specific nonattainment area. A major source must undergo nonattainment review if the sum exceeds the major modification level in Table I.

The procedure described above is the same as the procedure for determining “net emissions increase” in 40 CFR 51.165(a)(vi). This section of the Federal rule provides that the net emissions increase is determined by adding the increase in actual emissions from a particular physical change or change in the method of operation at a stationary source with all other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable. See 40 CFR 51.165(a)(vi)(A)(1) and (2).

Texas submitted the definition of “*de minimis* threshold test” on August 31, 1993, and minor revisions thereto on April 13, 1998, to clarify that the definition only applies to contemporaneous netting in nonattainment areas. We determine that the definition of “*de minimis* threshold test” is consistent with section 182(c)(6) of the Act.

2. Definition of “Major Modification”

Texas recodified its definition of “major modification” from section 101.1 of its General Rules to section 116.12, and made several revisions thereto. The former rule defined the term as any physical change or change in the method of operation of a facility/stationary source which causes a net increase in its PTE, by the amounts in Table I, of VOC or any air contaminant for which a national ambient air quality standard has been established. The former definition was inconsistent with Texas' definition of “net emissions increase” in section 116.12 which requires such increase to be calculated on an actual emissions basis. It was also not consistent with the Federal definitions of “major modification” and “net emissions increase” in 40 CFR 51.165(a)(1)(ii) and (vi), respectively. The Federal definition bases major modifications upon a net increase in actual emissions.

Texas revised its definition of “major modification” to clarify that a major modification is based upon a net

emissions increase in actual emissions, in order to be consistent with its definition of “net emission increase” and to ensure consistency with the Federal definition of “major modification.” Texas also clarified that a physical change or change in the method of operation at a source not qualifying as an existing major stationary source is subject to nonattainment permitting only if the increase by itself equals or exceeds the emissions specified in the major source column in Table I.

The definition of “major modification” also includes Table I, which specifies the various classifications of nonattainment along with the associated emission levels which designate a major modification for those areas. On September 27, 1995, we approved Table I, as submitted August 31, 1993. See 60 FR 49781. On July 18, 1996; April 13, 1998; and March 16, 1999; Texas submitted revisions to Table I to make it consistent with the section 182(f) NO_x waivers that we approved.¹⁷ The July 18, 1996 submittal revised the Table as follows:

(1) Changed the pollutant designation for the line for ozone nonattainment areas from “VOC/NO_x” to “ozone,” and added a new line for NO_x, and specified a the major source threshold, major modification significance level, and offset ratio for NO_x respectively at “100 TPY”, “40 TPY”, and “1.00 to 1.”

(2) Clarified that the Table only applies to Texas nonattainment area designations specified in 40 CFR 81.344.

(3) Clarified that the major modification threshold applies only to existing major sources and applicability of nonattainment area NSR is evaluated after netting, unless that source chooses to apply nonattainment NSR directly to the project.

(4) Clarified that VOC and NO_x are precursors to ozone and are quantified individually. In counties which have approved exemptions for NO_x under section 182(f) of the Act, only VOC is precursor to ozone.

(5) Removed a reference to Victoria County as county designated as nonattainment for ozone but not classified because of incomplete data.¹⁸

¹⁷ See section II.C of this preamble for further discussion on the NO_x waivers approve in Texas under section 182(f) of the Act.

¹⁸ On November 15, 1990, the CAA Amendments of 1990 were enacted (Public Law 101–549, 104 Stat. 2399, codified at 42 U.S.C. 7401–7671q). The ozone nonattainment designation for Victoria County continued by operation of law according to section 107(d)(1)(C)(i) of the Act, as amended in 1990. See 56 FR 56694, November 6, 1991. Since the State had not yet collected the required three years of ambient air quality data necessary to petition for redesignation to attainment, the

(6) Added a provision that NO_x sources granted the temporary exemption and authorized under section 116.211 of this title (relating to Standard Exemption List) shall require registration for increases in NO_x over the major source/major modification level in Table I.

On April 13, 1998, Texas submitted a revision to Table 1 to remove the provision requiring the registration of NO_x sources granted the temporary exemption and authorized under section 116.211 of this title (relating to Standard Exemption List). This provision is no longer necessary with the expiration of the temporary NO_x waivers. On March 16, 1999, Texas submitted further revisions to Table I consistent with the reinstatement of NO_x as an ozone precursor in the Dallas-Fort Worth ozone nonattainment area. The changes to Table I as submitted April 13, 1998, and March 16, 1999, are discussed in section II.C of this preamble.

We have reviewed these changes and determine that these changes to the definition of "major modification" and to Table I are consistent with the Act.

3. Definition of "Net Emissions Increase"

Texas recodified the definition of "net emissions increase" to section 116.12 and formatted the definition consistent with the definition in 40 CFR 51.165(a)(1)(vi). Texas continues to define "net emissions increase" as the sum of the total increase in actual emissions from a particular physical change or change in the method of operation at a stationary source, plus any source wide creditable contemporaneous increases and decreases minus any source wide creditable contemporaneous decreases.

In the former definition, Texas specified that an increase or decrease was creditable if it occurred within a reasonable time (to be specified by the permitting authority) before the date that the increase from a particular change occurs. In ozone nonattainment areas, Texas specified a period of five

consecutive calendar years (including the calendar year of the proposed increase plus the four preceding calendar years) in former section 116.3(a)(7) to determine if a particular increase in emissions of VOCs or NO_x is subject to nonattainment review. The provisions for permitting major sources and modifications in areas designated nonattainment for criteria pollutants other than ozone (former section 116.3(a)(10)) did not specify a specific time frame in which emissions increases and decreases would be considered to be contemporaneous with a particular change.

In the revised definition, Texas specified that the increase or decrease must actually occur within the contemporaneous period, which Texas has defined separately.¹⁹ We consider the submitted definition of "net emissions increase" to be consistent with the requirements in 40 CFR 51.165(1)(vi) and with the Act.

4. Definition of "Offset Ratio"

Texas adopted the definition of "offset ratio" to satisfy section 173(a)(1)(A) of the Act. The provisions of this definition were previously included in sections 116.3(a)(7)(C) and 116.3(a)(10)(D). In the recodified regulations, the provisions of sections 116.3(a)(7)(C) and 116.3(a)(10)(D), were incorporated into a new sections 116.150(a)(3) and 116.151(c), respectively. In the recodification, Texas removed specific language which defined "offset ratio" from sections 116.3(a)(7)(C) and 116.3(a)(10)(D) and referenced the offset ratios in Table I of section 116.12 (part of the definition of "major modification"). Texas then added the new definition of "offset ratio" and defined it as ratio of total actual reductions of emissions to the total allowable emissions increases of such pollutant from the new source. The definition references the minimum offset ratios in Table I under the definition of major modification.

On April 13, 1998, Texas submitted a revision to the definition of "offset

ratio" and added a sentence which clarifies that creditable offsets must be enforceable, permanent, quantifiable through a replicable methodology, real, and surplus. The revision further specified that the reduction must occur after January 1, 1990, must be represented in the 1990 and subsequent emissions inventory, and not relied upon in issuance of any previous nonattainment permit or permit issued under regulations for the prevention of significant deterioration. This definition is consistent with section 173(a)(1) of the Act.

5. Definition of "Potential to Emit"

Texas recodified the definition of "potential to emit" from section 101.1 of its General Rules into section 116.12, and revised the term to match the definition as presently defined in 40 CFR 51.165(a)(1)(iii). The definition as revised does not conflict with the federal definition or with the Act.

6. Definition of "Stationary Source"

Texas adopted a new definition of "stationary source" consistent with the term as defined in 40 CFR 51.165(a)(1)(i). The submitted definition does not conflict with the Federal definition or with the Act.

III. Individual SIP Submittals Acted Upon in This Document

A. General Discussion

The Governor of Texas submitted revisions to the Texas SIP to us relating to the permitting of new and modified sources in nonattainment areas. We are proposing to approve revisions submitted August 31, 1993; November 1, 1995; July 18, 1996; April 13, 1998; and March 16, 1999. The basis for our proposed approval is discussed in section II of this preamble.

B. Summary of Each Individual SIP Submittal

Table 9 below summarizes each individual SIP submittal that we are proposing to approve in today's action.

TABLE 9. SUMMARY OF EACH INDIVIDUAL SIP SUBMITTAL

Date adopted by state	Date submitted to EPA	Description of SIP submittal
August 16, 1993	August 31, 1993	Provisions of submittal relating to permitting under part D of the Act. This includes: —Section 116.12, —Section 116.150, and —116.151, and —Section 116.170(1) and (3).

nonattainment area was further designated as nonclassifiable incomplete data for ozone. On July 27, 1994, Texas's submitted a maintenance plan for Victoria County and a request to redesignate

Victoria County to attainment. On March 7, 1995, we approved the maintenance plan and redesignated Victoria County from ozone nonattainment to attainment. See 60 FR 12453.

¹⁹Texas definition of "contemporaneous period" is in section 116.12(7). We discuss the definition of "contemporaneous period" in section II.D.3 of this preamble.

TABLE 9. SUMMARY OF EACH INDIVIDUAL SIP SUBMITTAL—Continued

Date adopted by state	Date submitted to EPA	Description of SIP submittal
October 26, 1995	November 1, 1995	Revisions to Section 116.150 to address nonattainment permitting requirements for NO _x (as an ozone precursor) in the Dallas-Fort Worth, El Paso, Houston-Galveston, and Beaumont-Port Arthur ozone nonattainment areas consistent with waivers approved by EPA pursuant to section 182(f) of the Act.
May 15, 1996	July 18, 1996	Revisions to Table I of Section 116.12 to conform to NO _x waivers approved by EPA pursuant to section 182(f) of the Act.
March 18, 1998	April 13, 1998	Revisions to Sections 116.12, Table I of Section 116.12, and 116.150, and 116.151. Texas revised the SIP to reinstate NO _x as an ozone precursor in the Houston-Galveston and Beaumont-Port Arthur ozone nonattainment areas.
February 24, 1999	March 16, 1999	Revisions to Chapter 116, which reinstate the requirement to review NO _x as an ozone precursor in the Dallas-Fort Worth ozone nonattainment area.

C. EPA Action

For the reasons stated herein, we have determined that each of the above SIP submittals or revisions to 30 TAC Chapter 116 satisfies the requirements of Title I of the Act. Sections II and III of this preamble and the TSD for this proposed action contain detailed evaluations of each of the sections submitted by the State of Texas and the basis for EPA's proposal to approve of these sections.

IV. Request for Public Comments

We are requesting comments on all aspects of the requested SIP revision and our proposed rulemaking action. Comments received by date indicated above will be considered in the development of EPA's final rule.

V. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled "Regulatory Planning and Review."

B. Executive Order 13132

Executive 13132, entitled "Federalism" (64 FR 43255, August 10, 1999) revokes and replaces Executive Order 12612, "Federalism," and Executive Order 12875, "Enhancing the Intergovernmental Partnership." Executive Order 13132 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." Under Executive

Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. The EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This proposed rule 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 approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Act.

C. Executive Order 13045

Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045 because it approves a State program.

D. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, 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. This proposed rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, 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 Act, preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Act forbids EPA to base its actions concerning SIPs on such grounds. *See Union Electric Co. v. U.S. EPA*, 427 U.S. 246, 255-66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to State, local, or tribal governments in the aggregate; or to private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves 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.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon Monoxide, Hydrocarbons, Incorporation by reference, Lead, Nitrogen oxides, Ozone, Particulate matter, Sulfur oxides, Volatile organic compounds.

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

Dated: December 16, 1999.

Jerry Clifford,

Acting Regional Administrator, Region 6.

[FR Doc. 00-1081 Filed 1-14-00; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket OST-99-6578]

RIN 2105-AC49

Procedures for Transportation Workplace Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Notice of public meetings.

SUMMARY: The U.S. Department of Transportation (DOT) is scheduling three public listening sessions on its notice of proposed rulemaking (NPRM) to revise the Department's drug and alcohol testing procedures, published in the **Federal Register** on December 9, 1999 (64 FR 69076). The meetings are scheduled approximately 90 days after the publication of the NPRM to provide the public time to read and review the document. The intent of the meetings is to obtain additional information from the public that was not submitted in formal comments to the docket.

DATES AND ADDRESSES: The public meetings will be held on March 20 and 21, 2000, at the Ronald Reagan Building and International Trade Center, 1300 Pennsylvania Avenue, NW., Washington, DC 20004; on March 28, 2000, at the Hilton Los Angeles Airport, 5711 West Century Boulevard, Los Angeles, CA 90045, telephone number (310) 410-4000, fax (310) 410-6177; and on March 30, 2000, at the Crowne Plaza, Dallas Market Center, 7050 Stemmons Freeway, Dallas, TX 75247, telephone number (214) 630-8500, fax (214) 630-0037. Meeting facilities may accommodate only a limited number of attendees and all participants and commenters must pre-register to ensure entry into the meetings. Registration

procedures are specified under supplemental information below. Other persons will be accommodated as space and time permit.

FOR FURTHER INFORMATION CONTACT: For general meeting information and to register for one of the meetings, contact the DOT contractor, Marti Bludworth, Transportation Safety Institute (TSI), Special Programs Division, DTI-100, 4400 Will Rogers Parkway, Suite 205, Oklahoma City, OK 73108-2057, telephone number (800) 862-4832, extension 323, fax number (405) 946-4268, or e-mail marti_bludworth@tsi.jccbi.gov.

SUPPLEMENTARY INFORMATION:

A. Purpose

The purpose of the meetings is to provide all segments of the transportation industry and the general public with an opportunity to make statements, which have not already been made previously, to the docket. These meetings would also give DOT the opportunity to ask questions and ensure that the public comments are clearly understood by the Department. It may also give the Department the opportunity to clarify issues related to comments that had already been submitted to the docket during the early days of the formal comment period. Questions by commenters and other attendees to the DOT will be permitted as time allows.

B. Procedural Matters

The meeting in Washington, DC will be held for a day and a half to provide ample opportunity for attendees to make comments and for DOT to have additional time, if needed, to ask follow up questions. This geographic location will also provide added opportunity for additional DOT staff and industry representatives from the Capital area to attend the meeting. All facilities will be ADA accessible. The Department will provide sign-language interpreters, if requested. Attendees needing this accommodation should notify TSI no later than February 28, 2000. If no requests are received, this service may not be available.

Because these are listening sessions, DOT will not offer space for vendors or exhibitors to display their products.

All meetings will have limited, first-come-first-served capacity due to physical constraints of the facilities. "First come" will be based on the date that the registration information is received by TSI. Once the capacity of the meeting room is reached, DOT will not be able to ensure entry to subsequent applicants. TSI will confirm