

**No. 12-60694**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**LUMINANT GENERATION COMPANY LLC, et al.,**

**Petitioners,**

**v.**

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, et al.,**

**Respondents.**

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**PRINCIPAL BRIEF OF PETITIONERS LUMINANT GENERATION  
COMPANY LLC, AND ENERGY FUTURE HOLDINGS CORP.**

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**Respondent.**

**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**

Luminant Petitioners believe oral argument would assist the Court in resolving the complex legal issues presented in this petition for review.

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**GLOSSARY OF TERMS AND ACRONYMS**

CAA	Clean Air Act, 42 U.S.C. §§7401-7671q
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980
EFH	Energy Future Holdings Corp.
EPA	U.S. Environmental Protection Agency
Luminant Generation	Luminant Generation Company LLC
Luminant Petitioners	EFH and Luminant Generation
NAAQS	National Ambient Air Quality Standards
NFOV	Notice and Finding of Violation
NO <sub>x</sub>	Nitrogen Oxides
NSR	New Source Review
PSD	Prevention of Significant Deterioration
SIP	State Implementation Plan
SO <sub>2</sub>	Sulfur Dioxide

**STATEMENT OF JURISDICTION**

The U.S. Environmental Protection Agency (“EPA”) issued a Notice and Finding of Violation (“NFOV”) to Luminant Generation Company LLC and Energy Future Holdings Corp. (collectively “Luminant Petitioners”) on July 13, 2012. Luminant Petitioners timely filed a petition for review on September 10, 2012. EPA moved to dismiss on the ground that this Court lacked jurisdiction. On December 19, 2012, this Court ordered that EPA’s motion to dismiss be carried with the case. As briefed in Section IV below, and in Luminant Petitioners’ opposition to EPA’s motion to dismiss (Doc. 00512052112), this Court has jurisdiction pursuant to 42 U.S.C. §7607(b)(1) to review and set aside EPA’s NFOV.

## **STATEMENT OF THE ISSUES**

1. The Clean Air Act (“CAA”) requires EPA to find a violation and notify the State and the targeted facility before taking judicial enforcement action. Did EPA’s Notice and Finding of Violation (“NFOV”) to Luminant Petitioners, which contained only boilerplate legal conclusions, violate EPA’s obligation under 42 U.S.C. §7413(a)(1)?
2. The CAA authorizes EPA to issue an NFOV only for violations of State Implementation Plans (“SIP”) or permits. Did EPA exceed its statutory authority by also finding violations of the CAA’s separate Title V program in the NFOV?
3. The CAA subjects only “owners and operators” of facilities to potential liability under the statute’s Prevention of Significant Deterioration requirements. Did EPA err when it issued the NFOV to Energy Future Holdings Corp. (“EFH”) where EPA made no findings that EFH directed the emissions-related activities at the plants?
4. The CAA confers jurisdiction on the Courts of Appeals to review “any . . . final action” of EPA under the statute. Was EPA’s NFOV here “any . . . final action”?

## STATEMENT OF THE CASE

The U.S. Environmental Protection Agency (“EPA”) has disregarded important statutory limitations on its authority to issue a Notice and Finding of Violation (“NFOV”) under the Clean Air Act (“CAA”). In its NFOV, EPA purports to “find” that Luminant Petitioners violated the New Source Review (“NSR”) provisions of the CAA by replacing equipment at two power plants without seeking appropriate permits. Congress required EPA, before enforcing the New Source Review (“NSR”) provisions of the CAA in court, to take specific steps. Specifically, EPA must issue a “finding” that a “violation” of the CAA has occurred, provide “notice” of those findings to the target and the State, and wait at least thirty days before bringing an enforcement action. 42 U.S.C. § 7413(a)(1).

In imposing these requirements on EPA, Congress achieved two distinct purposes. *First*, Congress ensured the regulated entity has an opportunity to cure the violation or resolve the dispute before further legal action. *Second*, Congress ensured that States have the first opportunity to police violations of the implementation plans they promulgate and administer under the CAA.

Here, EPA purported to “find” violations, but treated its obligations under §7413(a)(1) as a meaningless exercise in “checking the box.” The NFOV consists of little more than boilerplate that would apply to almost any NSR case in Texas.

It recites pages of regulations that EPA says apply. Then, in an appendix, it states that Luminant replaced equipment on seven occasions.

The NFOV's "finding" that these actions violated the Texas rules implementing the CAA is pure *ipse dixit*. Notwithstanding its title, the NFOV provides no real "notice" and contains statutorily inadequate "findings." The NFOV cites no data and applies no law. It concludes that violations occurred, but does not even address many of the elements necessary to demonstrate a violation of the CAA under the implementing Texas rules it cites—certainly not in any way that would allow Luminant Petitioners, or the State of Texas, to understand why EPA has found a violation here, much less to respond meaningfully to that finding.

Such barebones "notice" and "finding" disserves Congress's carefully crafted enforcement scheme. It undermines Luminant's efforts to comply with the law and denies Texas information necessary to fulfill its role as the primary authority for enforcing the CAA and as the entity responsible for issuing the very permits EPA says are required. EPA's NFOV would not even satisfy the minimal standards of ordinary notice pleading for parties that, unlike EPA, cannot demand pre-enforcement discovery and that, unlike EPA, are not obligated to provide a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In short, the

NFOV falls short of the safeguards Congress set forth in §7413(a)(1) and should be set aside.

But that is not the only way in which the NFOV exceeds EPA's authority under §7413(a)(1). The NFOV also finds that Energy Future Holdings Corp. ("EFH") and its subsidiary Luminant Generation Company LLC ("Luminant Generation") violated Title V of the CAA by failing to seek changes to its operating permits when Luminant Generation undertook the challenged equipment replacements. But the very authority EPA relied on to issue the NFOV, 42 U.S.C. §7413(a)(1), does not permit EPA to issue an NFOV with regard to putative Title V violations. EPA further improperly finds that EFH can be held liable for the failure to secure the permits EPA says were necessary. The CAA imposes permitting obligations only on the "owner" or "operator" of a stationary source. 42 U.S.C. §7475(a). EFH is a holding company, and the NFOV makes no findings that EFH directly managed operations related to pollution control, as required under the Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51 (1998). For these reasons too, the NFOV must be set aside.

## STATUTORY AND REGULATORY BACKGROUND

### I. The Clean Air Act’s Cooperative Federalism Structure

The CAA creates “a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution.” *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The CAA makes clear, however, that “air pollution prevention . . . and air pollution control at its source is the *primary* responsibility of States and local governments.” 42 U.S.C. §7401(a)(3) (emphasis added); *see also id.* §7407(a); *Luminant Generation Co. v. EPA*, 675 F.3d 917, 932 (5th Cir. 2012) (“[The CAA’s] cooperative federalism regime . . . affords sweeping discretion to the states . . . .”); *Texas v. EPA*, 690 F.3d 670, 674 (5th Cir. 2012) (“As designed by Congress, states play a central role in the CAA regulatory structure.”).

Consistent with this structure, EPA’s job is to promulgate National Ambient Air Quality Standards (“NAAQS”)<sup>1</sup> for certain pollutants (like sulfur dioxide (“SO<sub>2</sub>”) and nitrogen oxides (“NO<sub>x</sub>”)), and to ensure that the minimum requirements for air pollution control programs are met. *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003). The role of the States under the CAA is

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<sup>1</sup> NAAQS set the overall quality of the air in the environment. *See* 42 U.S.C. §7409(b); *Sierra Club v. EPA*, 314 F.3d 735, 737 (5th Cir. 2002). NAAQS are translated by States into limitations on individual sources or groups of sources in order to achieve the overall mandated quality of the ambient air. *See* 42 U.S.C. §7410; *Sierra Club*, 314 F.3d at 737.

to develop, administer, and enforce their own State laws to achieve these requirements. *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 586-87 (5th Cir. Unit B June 1981). A State Implementation Plan (“SIP”) is the overall body of regulations that govern air emissions in a State. Its provisions are adopted in the first instance by the State and then approved by EPA.

SIPs are not “static” and may be revised from time to time by the State. *See Luminant Generation*, 675 F.3d at 921; *see also* 40 C.F.R. §51.104(a). When States submit revisions of their SIP, EPA must act on the revisions within one year after the plan submittal is complete. 42 U.S.C. §§7410(k)(1)(B), (k)(2), (k)(3); *see also Luminant Generation*, 675 F.3d at 921 (discussing statutory deadlines).

EPA issues regulations to implement the CAA. But, except in limited circumstances, EPA’s regulations do not directly impose obligations on regulated entities. Rather, they inform States of requirements EPA expects to see in a SIP. And it is the SIP, not EPA’s regulations, that is controlling and that defines the legal obligations of regulated entities. *See, e.g., United States v. Cinergy Corp.*, 623 F.3d 455, 458 (7th Cir. 2010). This is so even to the extent that a SIP differs from EPA’s existing regulations. *Id.*<sup>2</sup>

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<sup>2</sup> To the extent a State revises a SIP in a way that is not consistent with a valid EPA regulation, EPA’s primary means for ensuring compliance with the regulation is to disapprove the SIP revision. 42 U.S.C. §§7410(k)(1)(C), (k)(3). In certain circumstances, EPA can also issue what is known as a “SIP call” to direct that a State revise its SIP to conform with EPA’s regulations. *Id.* §7410(k)(5).

Although States have the primary role in implementing and enforcing the requirements of the CAA through SIPs, EPA may also, in certain situations, directly enforce the implementing SIP (but not the federal regulations) against regulated entities. Specifically, 42 U.S.C. §7413(a)(1) provides:

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding.

Thirty days after EPA makes such a finding and provides notice “of such finding,” EPA may file an enforcement action against the regulated entity for civil penalties and injunctive relief in U.S. District Court, or pursue administrative sanctions. *Id.*

Under EPA’s NOV Guidance Manual, an NFOV “serve[s] to clarify the legal obligations imposed by the Act.”<sup>3</sup> It does so by including, among other things, “[s]pecific reference to the legal standard that has been violated” and “[t]he factual basis for the NOV, including the date, time, and evidence of the violation.”<sup>4</sup> According to EPA, this information is necessary because “an owner/operator may wish to comply with the law but does not know what the law requires.”<sup>5</sup>

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<sup>3</sup> EPA, Clean Air Act Compliance / Enforcement Guidance Manual, Chapter Six: Administrative Enforcement Actions: Notice of Violation and Administrative Orders at 6-3 (1986), *available at* <http://envinfo.com/caain/enforcement/caad117.html> (“EPA NOV Guidance Manual”).

<sup>4</sup> *Id.* at 6-4 to 6-5.

<sup>5</sup> *Id.* at 6-3.

Additionally, the “NOV also notifies the state of the problem, which may prompt the state to commence enforcement action.”<sup>6</sup>

## II. The Prevention Of Significant Deterioration (“PSD”) Program

The NFOV purports to find that Luminant violated the Prevention of Significant Deterioration (“PSD”) provisions of the Texas rules. The PSD program is a state-adopted, federally-approved component of the Texas SIP. 42 U.S.C. §7471. Relevant here, the PSD program imposes two important obligations on existing sources emissions: They must obtain a permit from the State before constructing any “major modification” and must install best-available control technology (“BACT”) as specified in the permit from the State when undertaking a “major modification.”<sup>7</sup> See 42 U.S.C. §7410(a)(2)(C); see also *United States v. DTE Energy Co.*, 711 F.3d 643, 645 (6th Cir. 2013) (existing facilities “do not have to obtain a permit unless and until they are modified”).

PSD is *not* “a program designed to force every source to eventually adopt modern emissions control technology” by characterizing all physical and operational changes as major modifications. *Id.* at 650-51. Instead, “the statute

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<sup>6</sup> *Id.*

<sup>7</sup> “BACT” is “[a]n air pollution control method for a new or modified facility that through experience and research, has proven to be operational, obtainable, and capable of reducing or eliminating emissions from the facility, and is considered technically practical and economically reasonable for the facility.” 30 Tex. Admin. Code §116.10(1).

and regulations allow sources to replace parts indefinitely without losing their grandfathered status so long as none of those changes cause an emissions increase.” *Id.* at 651.

States are the primary implementers and enforcers of the Act’s PSD provisions. *See Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 491 (2004) (“*Alaska*”). Thus, for example, in most States, a facility seeking a PSD permit would apply to the State agency, not to EPA. NFOV ¶11. Similarly, a facility could ask the relevant State agency to find that a particular equipment replacement does *not* require any permitting. EPA’s review of a State’s PSD permitting decision is limited, and EPA cannot “second guess” a State’s “reasonable” PSD permitting determination regarding the obligations imposed under its rules. *Alaska*, 540 U.S. at 491-92.

### **III. Texas’s Implementation Of The Clean Air Act’s PSD Provisions**

The Texas Commission on Environmental Quality (“TCEQ”) has promulgated rules to implement the PSD program. *See* 40 C.F.R. §52.2273 (Texas SIP). The NFOV addresses the years between 2005 and 2010. As described below, these dates span two different iterations of the Texas PSD rules. *See* NFOV ¶¶13-18, 37-38 (finding violations of 2001 and 2006 Texas PSD rules).

### A. Texas's 2001 PSD Rules

The first set of regulations cited in the NFOV was promulgated by TCEQ in 2001. 30 Tex. Admin. Code §116.160 (2001); 26 Tex. Reg. 8539 (Oct. 26, 2001) (Texas approval); 69 Fed. Reg. 43,752 (July 22, 2004) (EPA approval). These rules largely tracked and incorporated EPA's own PSD rules and definitions. 30 Tex. Admin. Code §116.160(a) (2001) (incorporating EPA's PSD regulations codified at 40 C.F.R. §52.21(1996)).<sup>8</sup> As such, the 2001 Texas regulations defined a “major modification” as “any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase [of a relevant pollutant].” 30 Tex. Admin. Code §116.160(a) (incorporating 40 C.F.R. §52.21(b)(2)(i) (1996)).<sup>9</sup>

EPA has emphasized that its PSD regulations, incorporated into the 2001 Texas rules cited in the NFOV, impose a “*causation* requirement”—*i.e.*, in order for a change to “result in” a significant net emissions increase, it must be a but-for cause of the increase. *See generally* 57 Fed. Reg. 32,314, 32,326-28 (July 21, 1992). Thus, as EPA explained, where an increase in emissions will be a result of “independent factors” other than the physical change in the plant (such as a growth

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<sup>8</sup> Texas's PSD rules as issued in 2001 and 2006, as well as EPA's 1996 PSD regulations, are reproduced in the Addendum to this brief.

<sup>9</sup> A “significant” net emissions increase is a net emissions increase, described below, that reaches certain regulatory thresholds established under 30 Tex. Admin. Code §116.160(a) (incorporating 40 C.F.R. §52.21(b)(23)(i)-(ii)).

in demand for electricity) and the unit would “have been able to accommodate” that projected increase “even absent the particular change,” the increase must “be excluded from the projection of future actual emissions.” *Id.* Causation “must be resolved on a case-by-case basis and is *dependent on the individual facts and circumstances of the change at issue.*” *Id.* at 32,327 (emphasis added).

In addition, any determination of whether a “change” caused a net “increase” in emissions requires establishing a “starting” amount of emissions against which an increase may be measured. The 2001 Texas rules did so by defining a “net emissions increase” as “any increase in actual emissions from a particular physical change or change in the method of operation.” 30 Tex. Admin. Code §116.160(a) (incorporating §52.21(b)(3)(i)(a)(1996)). The rules, in turn, defined “actual emissions” as the emissions “actually emitted” “during a two-year period which precedes the particular date and which is representative of normal source operation.” *Id.* (incorporating §52.21(b)(21)(i)(1996)). Finally, under the rules, TCEQ may select a different period over which to measure “actual emissions” if it determines that period is more appropriate. *Id.*

#### **B. Texas’s 2006 PSD Rules**

In 2006, Texas amended its PSD rules and definitions. 31 Tex. Reg. 516 (Jan. 27, 2006). One purpose of the revision was to clarify the sequence of findings required before a “change” can be found to have increased emissions. 31

Tex. Reg. at 518. As amended, Texas’s PSD definitions no longer simply incorporate EPA’s regulations by reference. *See* 36 Tex. Reg. 1305 (Feb. 25, 2011). Instead, Texas developed its own PSD definitions found in §116.12. The new rules amended the definition of “major modification,” abandoned the use of the term “actual emissions” for PSD applicability purposes, and added new definitions and a clarification of how a source and TCEQ must determine whether an activity resulted in an emissions increase that triggered PSD.

Thus, beginning in 2006, Texas’s rules defined a “major modification” as “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*.” *Id.* §116.12(18) (2006) (emphasis added). Accordingly, the 2006 Texas PSD rules identified two steps: determining, *first*, whether a significant “*project emissions increase*” occurred and, *second*, whether a significant “net emissions increase” also resulted.<sup>10</sup> A change must “cause” both a

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<sup>10</sup> *See* 31 Tex. Reg. at 518 (“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.”); TCEQ-Air Permits Division, *Major New Source Review – Applicability Determination*, at 21 (Mar. 2013) (“If the difference between the planned emission rate and the baseline actual emission rate of any modified or affected facilities . . . equals or exceeds the significant emission rate for the pollutant . . . the project is considered to be a significant project. If the project is a significant project, the net emission increase at the source must be determined.”), *available at* [http://tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/fnsr\\_app\\_determ.pdf](http://tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/fnsr_app_determ.pdf).

“project emissions increase” and a “significant net emissions increase” to be a “major modification” that triggers PSD.

“Project emissions increase,” a term not found in EPA’s regulations, is defined as:

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. . . .

*Id.* §116.12(30) (emphases added).

Thus, determining whether an activity caused a project emissions increase requires a comparison of (1) “projected actual emissions” relative to (2) “baseline actual emissions.” Both of these terms were also new to the 2006 Texas PSD rules. *Id.* §116.12(3), (29). “Projected actual emissions” are “[t]he maximum annual rate . . . at which an existing facility is projected to emit” a regulated pollutant in any rolling twelve-month period during the five years after the facility resumes regular operation after the project (or, in certain circumstances, ten years following that date). *Id.* §116.12(29).

“Baseline actual emissions” are the rate of emissions, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month

period chosen by the facility operator within the five years immediately preceding actual construction of the project. 30 Tex. Admin. Code §116.12(3). As with its 2001 rules, TCEQ retained authority to allow use of a different baseline period. *Id.*

As such, Texas’s regulations clarified and strengthened the requirement that a “change” can be considered a “major modification” only if it is expected to *cause* an emissions increase. The regulations thus make clear that any emissions that “could have [been] accommodated” before the change and that are “unrelated” to the change—such as anticipated demand growth—are not “project emissions increases.” *Id.* §116.12(30).

Further, while a “net emissions increase” remains a necessary element for triggering a “major modification,” that definition was revised in 2006 to eliminate the reference to “actual emissions,” which had previously been the central term used in the 2001 rules to determine whether or not there was an emissions increase. *Id.* §116.12(20) (2006). The 2006 rules stated expressly that the “definition [of actual emissions] *shall not apply* for calculating whether a significant emissions increase has occurred . . . .” Instead, “baseline actual emissions shall apply for this purpose.” *Id.* §116.12(1) (emphasis added).

Therefore, in order to determine PSD applicability in Texas beginning in 2006, a facility’s “baseline actual emissions” must be compared to its “projected actual emissions” resulting from the project. If this results in a significant “project

emissions increase” then, and only then, must the facility determine whether a significant “net emissions increase” is also expected to occur.

TCEQ submitted its revised PSD definitions in §116.12 to EPA for approval on February 1, 2006. In 2011, EPA approved the definition of “major modification,” and in 2012, it approved the definitions of “project emissions increase,” “baseline actual emissions,” and “projected actual emissions” in §116.12.<sup>11</sup> *See* 77 Fed. Reg. 65,119 (Oct. 25, 2012); 76 Fed. Reg. 81,371 (Dec. 28, 2011).

#### **IV. The Title V Provisions Of The Clean Air Act**

The NFOV also contains findings of violations of the Act’s Title V program. Unlike PSD, Title V does not itself impose substantive requirements on a facility. Instead, Title V requires that major sources of air emissions operate under a federal “Title V permit.” *See* 42 U.S.C. §§7661-7661f.

Title V permits consolidate all applicable operating requirements for a source into a single document. *See Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 453 (5th Cir. 2003). Compliance with the permit therefore “assure[s] compliance with

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<sup>11</sup> EPA initially disapproved these definitions in September 2010 for reasons not at issue here. Texas resubmitted these definitions in a form that was essentially identical to the 2006 version of the definitions relevant to this case, and EPA approved them in 2011 and 2012. 76 Fed. Reg. 81,371 (Dec. 28, 2011) (2011 approval); 77 Fed. Reg. 65,119 (Oct. 25, 2012); 36 Tex. Reg. 1305 (2011 Texas approval); 37 Tex. Reg. 5857 (Aug. 10, 2012) (2012 Texas approval).

all emission limitations and other substantive CAA requirements that apply to the source.” *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 993 (D.C. Cir. 2005).

Texas is authorized and approved to administer and enforce the Title V permit program in the State. *See* 66 Fed. Reg. 63,318 (Dec. 6, 2001) (EPA approval of Texas’s Title V program); *see also Pub. Citizen, Inc.*, 343 F.3d at 463 (upholding EPA’s approval of Texas’s Title V program). Texas has implemented the Title V permit requirements through its own regulations. *See* 30 Tex. Admin. Code Chapter 122 (Texas Title V regulations).

## STATEMENT OF THE FACTS

### **I. EPA's Issuance Of The NFOV**

Luminant Generation is a competitive power generation business that operates power plants and sells electricity. It operates both the Big Brown Power Plant in Freestone County, Texas, and the Martin Lake Power Plant in Rusk County, Texas. Each plant operates pursuant to a Title V permit issued by Texas and approved by EPA. R. 76, 77. Luminant Generation owns the Martin Lake Power Plant, but not the Big Brown Power Plant. The latter is owned by Big Brown Power Company LLC, a separate legal entity. *See* Joint Appendix (LUMINANT\_MO\_000001709). Luminant Generation is a wholly, but indirectly, owned subsidiary of the other named Petitioner in this case, EFH.

Starting in June 2008, EPA sent to Luminant Generation multiple information requests under 42 U.S.C. §7414(a) in order “to obtain information necessary to determine compliance with the CAA.” Doc. 00512052112, Attach. A.<sup>12</sup> In total, Luminant Generation has provided EPA with approximately 415,000 pages of documents. Doc. 00512018772 at 2.

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<sup>12</sup> After the NFOV, EPA issued yet another information request to Luminant, but EPA has not withdrawn or amended the NFOV.

EPA issued the NFOV on July 31, 2012. It concludes that “Luminant is violating the Clean Air Act” at Big Brown and Martin Lake.<sup>13</sup> NFOV at 1. Specifically, the NFOV finds that Luminant Petitioners have violated the PSD provisions of the Act, 42 U.S.C. §§ 7470-92; the “federally-approved” Texas PSD regulations; Title V of the CAA, 42 U.S.C. §§7661-7661f; and the “federally-approved” Texas Title V program. *Id.*

The bulk of the NFOV paraphrases various statutory and regulatory provisions. NFOV ¶¶6-29. It offers only a few perfunctory facts: Big Brown and Martin Lake power plants are “owned and operated” by Luminant Petitioners, *id.* ¶30, and at these facilities, Luminant “completed physical changes and/or changes in the method of operation” during “seven (7) outages,” *id.* ¶¶36-37.

A brief table, included in a non-public appendix, provides scarcely more detail. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] R. 40, Appendix at 1 n.2 (emphasis added).

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<sup>13</sup> In the NFOV, EPA uses the term “Luminant” to refer to both Luminant Generation and EFH collectively.

Without any analysis or explanation, the NFOV finds that these “physical changes and/or changes in the method of operation” were “major modifications” under the Texas PSD rules (30 Tex. Admin. Code §§116.12, 116.160). NFOV ¶38. It further finds that these changes “resulted in a ‘significant’ net emissions increase of SO<sub>2</sub> and/or NO<sub>x</sub>.” *Id.* ¶37. It concludes that Luminant failed to obtain PSD permits or utilize BACT for each of these “major modifications.” *Id.* ¶¶39, 40.

The NFOV also finds, again without any analysis or explanation, that “Luminant failed, and continues to fail, to submit timely and complete Title V permit applications for the Big Brown and Martin Lake Power Plants with information pertaining to the modifications referenced in [the NFOV] and with information concerning all applicable requirements, including . . . the requirement to apply, install and operate BACT . . . .” *Id.* ¶46. The NFOV states that, as a result, Luminant Petitioners are presently obligated to supplement their Title V permit applications for Big Brown and Martin Lake to reflect an obligation to “apply, install and operate BACT.” *Id.* ¶¶29, 46.

EPA’s transmittal letter reiterated the NFOV’s conclusion that Luminant had violated the CAA and also requested that Luminant Petitioners meet with EPA to “present information on the specific findings of violations and the steps [Luminant] will take to bring the plants into compliance.” R.40 at 1. EPA issued the NFOV

to both Luminant Generation and Texas but did not include the confidential appendix with the NFOV supplied to Texas. *Id.* at 2.

## **II. Proceedings To Date**

Luminant Petitioners challenged the NFOV by filing this petition for review on September 11, 2012. EPA moved to dismiss the petition on the ground that the NFOV was not a reviewable “final” agency action. Luminant Petitioners opposed, explaining that the Court had jurisdiction pursuant to 42 U.S.C. §7607(b)(1). On December 19, 2012, this Court ordered that EPA’s motion be carried with the case.

## SUMMARY OF THE ARGUMENT

This Court should set aside the NFOV. In issuing it, EPA disregarded important limitations on its authority to enforce SIPs. Under 42 U.S.C. §7413(a)(1), at least 30 days before bringing an enforcement action, EPA must finalize critical administrative action—it must make “findings” of a violation and provide “notice” of those findings to both the regulated entity and the State in which the entity operates. *See Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 23, 29 (1989); *United States v. Pan Am. Grain Mfg. Co.*, 29 F. Supp. 2d 53, 56 (D.P.R. 1998); *United States v. La.-Pac. Corp.*, 682 F. Supp. 1122 (D. Colo. 1987).

Congress imposed this administrative prerequisite on EPA for two distinct reasons. First, it sought to avoid unnecessary litigation. By requiring EPA to undertake the investigation necessary to make the requisite “findings” and to provide “notice” of those “findings” to the regulated entity prior to filing suit, Congress sought to encourage resolution of any dispute without resort to litigation. *See, e.g., Wash. Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1354 (9th Cir. 1995) (interpreting cognate provisions of Clean Water Act). Second, Congress wanted to give the States the first chance to address the findings. That is because States have “primary responsibility for the Act’s enforcement at the level of the individual plant.” *United States v. AM Gen. Corp.*, 34 F.3d 472, 475 (7th Cir. 1994). Indeed, in cases such as this, PSD permits require the concurrence and action of the State.

Therefore, it is essential that the State be informed of EPA's reasons for finding that a violation has occurred, especially given the deference owed a State's "reasonable" determination regarding the obligations imposed by the PSD provisions of the State's rules. *Alaska*, 540 U.S. at 490-91.

Neither of these twin goals—nor any other conceivable statutory purpose—could be accomplished unless the CAA's finding and notice requirements have substance. In the NFOV at issue here, however, EPA treated §7413(a)(1)'s "notice" and "finding" requirements as a pointless and perfunctory exercise of "checking the box." *See infra* Part I. The NFOV consists of little more than conclusory boilerplate that could be applied to any generating facility in Texas. The NFOV does not make any meaningful "findings" and does not provide any "notice" of those findings—other than that EPA has concluded that Luminant Petitioners violated two potentially applicable Texas PSD rules, 30 Texas Administrative Code §§116.12, 116.160, and are required to amend their Title V operating permits to comply with BACT.

The NFOV is deficient on its face and must be set aside. Nowhere does EPA explain why the purported "changes" would have been expected to cause emissions increases that trigger PSD permitting obligations. Nor does the NFOV reveal which type of emissions is at issue. *See* NFOV ¶37 (finding a "significant" net emissions increase of SO<sub>2</sub> and/or NO<sub>x</sub>) (emphasis added). Indeed, the NFOV

does not even find that emissions actually increased, let alone why or in what amount.

Congress clearly expected more. Given the important purposes to be served by §7413(a)(1)'s notice and finding requirements, EPA should at least be expected to make findings that would satisfy the minimal requirements of pleading. *Ashcroft v. Iqbal*, 556 U.S. 662, 681-83 (2009); *Bell Atl. Corp. v. Twombly*, 540 U.S. 544, 558-65 (2007). Indeed, unlike the ordinary civil litigant, EPA has broad authority to compel regulated parties to provide it with extensive information prior to issuing an NFOV, *see* 42 U.S.C. §7414(a), and EPA has a background obligation to “provide a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43. This Court should thus vacate the NFOV and make clear that EPA must take its obligations under §7413(a)(1) seriously.

The NFOV violates §7413(a)(1) in two other, independent respects. The NFOV finds that Luminant violated Title V of the CAA because Luminant failed to obtain revised Title V permits that reflected an obligation to comply with BACT. *See infra* Part II. But the sole authority relied upon by EPA for its NFOV is 42 U.S.C. §7413(a)(1). That statute provides only that EPA may issue “findings” that a person has “violated an applicable [State] implementation plan or

a permit”; it does not authorize findings by EPA of failure *to revise* an existing permit.

EPA also issued its NFOV to an entity that could not have “violated . . . an applicable [State] implementation plan or permit,” 42 U.S.C. §7413(a)(1), even if EPA were otherwise correct in its findings. *See infra* Part III. EPA issued the NFOV to Luminant Generation *and* EFH. Although Luminant Generation is an operating company, EFH is a holding company, and, under the CAA, only a “person” who “owns or operates” a facility can be held liable for the failure to obtain a PSD permit before undertaking a “major modification” to that facility. *See* 42 U.S.C. §7475(a). Liability can be imposed on EFH as an “owner or operator” only to the extent EFH “manages” or “directs the workings of” the “operations specifically related to pollution.” *Bestfoods*, 524 U.S. at 67. The NFOV does not make such findings with regard to EFH.

Finally, this Court has jurisdiction to review EPA’s illegal NFOV. *See infra* Part IV. Congress authorized the Courts of Appeals to hear challenges to “any . . . final action of the Administrator” under the CAA. 42 U.S.C. §7607(b)(1). In *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 583 (1980), EPA conceded and the Supreme Court agreed that a three-page *letter* simply noting that EPA had “determined” that “new source regulations” applied to a party’s facility could be challenged under §7607(b)(1). That letter was less concrete and definitive than the

NFOV, which unambiguously finds that “Luminant is *violating* the Clean Air Act,” NFOV at 1 (emphasis added), and which necessarily finds that EPA has satisfied the requirements of §7413(a)(1) and may now bring an enforcement action against Luminant Petitioners, NFOV ¶47.

Any doubt on this score is dispelled by the Supreme Court’s recent decision in *Sackett v. EPA*, 132 S. Ct. 1367 (2012). As in *Sackett*, the NFOV represents the “culmination” of EPA’s decisionmaking process. And as in *Sackett*, the NFOV imposes real “legal consequences” on Luminant. According to EPA, it establishes an immediate obligation to come into compliance. The NFOV directs Luminant to supplement its Title V permit applications and EPA asserts that the failure to do so subjects Luminant to *separate* civil penalties. Such final agency actions are subject to judicial review.

## STANDARD OF REVIEW

Luminant Petitioners seek review under 42 U.S.C. §7607(b)(1) of the validity of the NFOV. This Court’s review of this challenge is governed by the Administrative Procedure Act (“APA”). The APA requires federal courts to “set aside agency action, findings, and conclusions” that are “in excess of statutory jurisdiction, authority, or limitations” or “otherwise not in accordance with law.” *See* 5 U.S.C. §706(2)(A), (C); *Tex. Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 933-34 (5th Cir. 1998).

Whether the NFOV exceeds EPA’s jurisdiction or otherwise contravenes 42 U.S.C. §7413(a)(1) is a question of law reviewed *de novo*. *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 558 (1988).<sup>14</sup>

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<sup>14</sup> The nature and scope of this *pre-enforcement* review sought under 42 U.S.C. §7607(b)(1) by Luminant Petitioners is necessarily different and more limited than the nature and scope of judicial review of any enforcement action that EPA may pursue under 42 U.S.C. §7413(b). *See Sackett*, 132 S. Ct. at 1374-75 (Ginsburg, J., concurring) (noting the difference between challenging “EPA’s authority” underlying the administrative compliance order and challenging its “terms and conditions”). This appeal thus presents only purely legal questions regarding the sufficiency of the NFOV’s “findings” under §7413(a)(1). *Cf. id.* at 1374 (noting that pre-enforcement review concerns the “validity” of EPA’s action and “the question whether the regulated party is within the EPA’s jurisdiction”); *CSI Aviation Servs. v. U.S. Dep’t of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011) (pre-enforcement review of agency order that “present[ed] a ‘purely legal’ question of statutory interpretation.”). In contrast, the ultimate substance of EPA’s “findings” will involve “disputed facts” and can only be determined in a subsequent federal district court action. *See CSI*, 637 F.3d at 412.

EPA contends that this Court lacks jurisdiction over this petition for review because the NFOV is not “final action” under 42 U.S.C. §7607(b)(1). Whether this Court has jurisdiction is also determined *de novo*. *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1079 (5th Cir. 2008).

## ARGUMENT

### **I. EPA’s Boilerplate NFOV Violates The Clean Air Act**

The NFOV violates the CAA and should be vacated. The CAA requires administrative action by EPA before the agency may file an enforcement action in court claiming a violation of a SIP. Under 42 U.S.C. §7413(a)(1), EPA must “find” a violation, “notify” the alleged violator and the State of that finding, and wait at least thirty days before commencing further proceedings. EPA’s barebones NFOV disregards Congress’s carefully crafted enforcement scheme which is intended to facilitate compliance with the CAA and preserve the State’s primary role in implementing and enforcing the Act.

#### **A. Congress Intended NFOVs To Facilitate Compliance And Preserve Federalism**

**The requirements and purposes of 42 U.S.C. §7413(a)(1).** The CAA’s dual State and federal regime departs significantly from enforcement practices under most other federal statutes. EPA may not immediately or directly initiate an enforcement action for the violation of a State permitting requirement. EPA may act against permit violators only after taking three prerequisite steps: finding a violation, giving notice of that finding, and waiting at least thirty days. 42 U.S.C. §7413(a)(1).

Under the CAA, EPA must convey its finding to not one but *two* parties: the “person [who] has violated or is in violation of any requirement or prohibition of

an applicable implementation plan or permit,” and “the State in which the plan applies.” *Id.* For at least thirty days before EPA commences enforcement action, therefore, the alleged violator is on notice, and the State is part of the enforcement process. Congress imposed these requirements to achieve two corresponding purposes.

*First*, §7413(a)(1) allows the regulated entity receiving the NFOV to cure the violation or resolve the dispute before judicial proceedings, or further administrative actions, begin. Congress required EPA to provide pre-enforcement “notice [to] give[] the alleged violator an opportunity to bring itself into complete compliance with the Act. . . .” *Hallstrom*, 493 U.S. at 29 (construing the Resource Conservation and Recovery Act’s related citizen-suit notice provision) (internal quotation marks omitted).<sup>15</sup> The notice must provide “enough information that the defendant can identify and correct the problem.” *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1155 (9th Cir. 2002) (interpreting the Clean Water Act’s notice provision). And the pre-enforcement stay of at least thirty days offers “time to resolve [the parties’] conflicts in a nonadversarial time period.” *Wash. Trout*, 45 F.3d at 1354 (interpreting the Clean Water Act’s notice provision). As

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<sup>15</sup> Many federal environmental statutes are modeled on the CAA’s enforcement and review provisions. Decisions construing corresponding notice provisions in other statutes, such as the Clean Water Act and the Resource Conservation and Recovery Act, illuminate the CAA as well. *See Hallstrom*, 493 U.S. at 23 & n.1; *Wash. Trout*, 45 F.3d at 1353 n.3 & 1354.

EPA itself recognizes, an NFOV must include “the factual basis for the NOV” and “evidence of the violation” because “an owner/operator may wish to comply with the law but does not know what the law requires.” EPA NOV Guidance Manual at 6-3, 6-4. Resolution within this window avoids, among other costs, the need for litigation or formal administrative proceedings over permitting issues that Congress intended to be addressed, at least in the first instance, outside court.

*Second*, Congress intended that States have the first opportunity to police alleged violations of State-issued permits and implementation plans. As explained above, Congress charged EPA with setting broad requirements for ambient air quality, but tasked the States with primary responsibility for implementing these standards. *See supra* pp. 6-7. The CAA’s notice requirement “is designed to give the state an opportunity to bring about an abatement of a violation” before EPA “may act directly against the violator.” *United States v. Ohio Dep’t of Highway Safety*, 635 F.2d 1195, 1202 (6th Cir. 1980). *See also* S. Rep. No. 101-228, at 362 (1989) (“The 30-day notice . . . ensures that the States will have an opportunity to exercise their enforcement prerogatives under the Act prior to initiation of a Federal enforcement action.”).

EPA’s own practice reflects this important State role. EPA’s NOV Guidance Manual makes clear that the NFOV “notifies the state of the problem, which may prompt the state to commence enforcement action.” EPA NOV

Guidance Manual at 6-3. This deference to State enforcement reflects Congress’s recognition, in enacting the CAA, that the “prevention and control of air pollution...is the primary responsibility of States and local governments.” *Am. Cyanamid Co. v. EPA*, 810 F.2d 493, 500-01 (5th Cir. 1987) (citing 42 U.S.C. §7410(a)(3)).<sup>16</sup> Indeed, the CAA does not simply aspire to federal-state cooperation; it “*requires* cooperation between the federal government and the states in administrating the CAA.” *Texas v. EPA*, 690 F.3d at 677 (emphasis added).

**The statutory scheme depends on meaningful findings and notice.**

Neither of these two goals could be accomplished unless the CAA’s finding and notice requirements have substance. The NFOV prerequisite is “not a technical wrinkle or superfluous formality.” *Garcia v. Cecos Int’l, Inc.*, 761 F.2d 76, 79 (1st Cir. 1985).

Each participant in the statutory scheme has an interest in meaningful notice. *Recipients* of NFOVs, if given only generalized notice, may not know the specific issues to investigate or abate, or how to seek relief from State regulators. *EPA* has no legitimate reason to hold its cards close to the vest. By informing States and regulated entities of the agency’s view of the regulatory scheme, properly prepared

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<sup>16</sup> As EPA itself has acknowledged, its own “involvement in interpretative and enforcement issues” regarding the NSR program is “limited to only a small number of cases,” relative to the number brought by State regulators. *Alaska*, 540 U.S. at 491.

NFOVs further the uniform administration of the NSR program. And *States*—as issuers and primary enforcers of the permits—have a particular interest in how EPA enforces SIPs and permits. States may wish to bring their own enforcement action, *see Ohio Dep’t of Highway Safety*, 635 F.2d at 1202, which can relieve EPA of having to do so, EPA NOV Guidance Manual at 6-3. Or they may receive applications for a retroactive permit or a “non-applicability” determination—*i.e.*, a determination that no permit was required. To make either decision, State officials must understand EPA’s factual and legal theory about the SIP violation. In the related citizen-suit context, for example, “notice” provided by the would-be private-party plaintiff has been rejected as inadequate “because neither the State nor the EPA could fully evaluate the Plaintiffs’ grievances, [and both] were hampered in their ability to decide upon and implement an appropriate response.” *Frilling v. Vill. of Anna*, 924 F. Supp. 821, 834 (S.D. Ohio 1996). Thus, to satisfy §7413(a)(1), EPA must both find a violation and provide notice of that finding and supporting facts.

As to notice, Congress enacted §7413(a)(1) against a familiar legal backdrop. Notice allows parties to challenge agency facts and reasoning. “An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”

*Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Similarly, under the APA, an agency must provide notice at the outset of a rulemaking proceeding that enables meaningful engagement with the agency. *See* 5 U.S.C. §553; *Am. Radio Relay League v. FCC*, 524 F.3d 227, 236-37 (D.C. Cir. 2008). Nothing suggests Congress intended any *less* protection for States and NFOV recipients.

And as to the finding, a “rational connection between the facts found and the choice made” is a foundational requirement of the APA. *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (internal quotation marks omitted). Thus, in including a “finding” requirement in §7413, Congress expected the agency would supply a “clear statement of the theory on which the agency will proceed.” *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992).<sup>17</sup>

Thus, simply notifying alleged violators of barebones findings cannot be considered sufficient under §7413(a)(1). At a minimum, Congress expected EPA to satisfy at least the established standards for notice pleading: supporting legal claims with disclosed facts. Although notice pleading “does not require ‘detailed factual allegations,’” it “demands more than an unadorned . . . accusation.” *Iqbal*,

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<sup>17</sup> These basic expectations date to the earliest days of the administrative state. “A . . . prerequisite to fair formal proceedings is that . . . the parties should be fully apprised of the subject-matter and issues involved. Notice, in short, must be given; and it must fairly indicate what the respondent is to meet.” Final Report of the Attorney General’s Committee on the Administrative Procedure Act 63 (1941).

556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). It requires “fair notice of the claim being asserted so as to permit the adverse party the opportunity to file a responsive answer [and] prepare an adequate defense.” *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements” and “devoid of further factual enhancement,” are not enough. *Iqbal*, 556 U.S. at 678; *see also Twombly*, 550 U.S. at 555 (“labels and conclusions” are insufficient).

Like a civil complaint,<sup>18</sup> an NFOV “must provide enough information to allow the recipient to respond appropriately: to fix the alleged violation, to pursue administrative enforcement, or to file an answer and assert affirmative defenses.” Robin K. Craig, *Notice Letters and Notice Pleading*, 78 Or. L. Rev. 105, 164 (1999). EPA itself recognizes its obligation to provide the NFOV recipient with “specific reference to the legal standard that has been violated,” “[t]he factual basis” for the NFOV, and the “evidence of the violation.” EPA NOV Guidance Manual at 6-4. “It is not enough to [only] put the party on notice. EPA has to *affirmatively* allege what are its findings and violations.” *Pan Am. Grain Mfg. Co.*, 29 F. Supp. 2d at 56-57 (citing *Louisiana–Pacific*, 682 F. Supp. at 1155).

If anything, EPA should find it *easier* than most civil plaintiffs to meet this threshold: unlike most litigants, who must assemble a plausible and fact-based

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<sup>18</sup> Of course, an NFOV constitutes more than just a set of allegations—it contains findings that have legal consequences. *See infra* Part IV.

complaint to “unlock the doors of discovery,” *Iqbal*, 556 U.S. at 678, EPA has ready access to administrative discovery under the CAA well before issuing an NFOV. *See* 42 U.S.C. §7414(a). Here, EPA invoked that power to collect over 400,000 pages of information from Luminant Petitioners over a four-year period. Doc. 00512018772. Given Congress’s intent to supply States and facilities with information sufficient to facilitate informal resolution and protect State prerogatives—and the fact that any civil complaint cannot make allegations that go beyond the notice and findings provided by EPA, *see United States v. Ford Motor Co.*, 736 F. Supp. 1539, 1550 (W.D. Mo. 1990) (stating that “EPA is empowered to bring such a civil suit only on the basis of the *specific* violation alleged in the NOV”) (quoting *Louisiana-Pacific*, 682 F. Supp. at 1155)—nothing less than basic notice pleading must be required in NFOVs as well.

**B. EPA’s Conclusory Findings and Notice Violate the Act’s Procedural Protections and Disrupt its Federal-State Balance**

The NFOV issued to Luminant in this case does not even come close to satisfying these standards and statutory purposes. By glossing over—and in several respects simply omitting—critical facts and legal elements, EPA’s NFOV denied both Luminant and the State of Texas any opportunity to understand EPA’s findings and meaningfully respond.

**The showing required to establish a SIP violation.** EPA found that “major modifications” at two Luminant facilities resulted in a significant “net

emissions increase.” *See* NFOV ¶¶37-38. EPA concluded that Luminant, by failing to obtain PSD permits or implement emission controls prior to undertaking these “major modifications,” violated 30 Tex. Admin. Code §116.111(a)(2)(C). *Id.* ¶¶39-40. As explained in greater detail above, to find these violations, EPA must have satisfied several specific requirements under Texas law that define whether a project is a “major modification” and thus necessitates a PSD permit and emission controls.<sup>19</sup>

As to projects undertaken before 2006, Texas’s rules largely tracked EPA’s federal definitions. *See supra* p. 11. Thus, Texas’s rules defined a “major modification” as a physical or operational change that was expected to “result in a significant net emissions increase” over the “actual emissions” during a two-year period of “normal source operation.” 30 Tex. Admin. Code §116.160(a) (incorporating 40 C.F.R. §52.21 (1996)). For projects undertaken after 2006, the revised Texas PSD rules, as cited in the NFOV, no longer merely “incorporate the EPA rules by reference.” 36 Tex. Reg. at 1305. A “major modification” under these revised Texas PSD definitions requires distinct findings of a significant “project emissions increase” and significant “net emissions increase.” 30 Tex. Admin. Code §116.12(18).

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<sup>19</sup> EPA’s findings regarding Title V are derivative of its PSD findings, *see* NFOV ¶46, and thus, a determination by this Court that EPA’s PSD findings are legally insufficient also means that EPA’s Title V-related findings are legally insufficient. *See also infra* note 23.

As explained in greater detail above, both the pre- and post-2006 Texas rules require a causation analysis. EPA must demonstrate that a reasonable operator would have predicted, before the project began, that the change would produce a significant emissions increase. *See, e.g., DTE Energy*, 711 F.3d at 645 (“In order to determine whether a proposed change [at any existing facility] would *cause* a significant emissions increase, and thus require a permit, an operator must *project* post-change emissions.”) (emphasis added); *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 297 (1st Cir. 1989); *see also* 57 Fed. Reg. at 32,326. This causation inquiry “must be resolved on a case-by-case basis and is dependent on the individual facts and circumstances of the change at issue.” *Id.* at 32,327.

Both the pre- and post-2006 rules also require that any projected emission increases be judged against a “baseline” of “normal source operation,” with the TCEQ given discretion to determine alternative baselines. *See supra* pp. 10-15. This is a critical calculation. As a matter of mathematics, whether a change was expected to cause an “increase” requires a determination of not only expected emissions after the change but a relevant baseline of emissions before the change.

**EPA’s bare assertions fall far short of the required showing.** By contrast, the NFOV merely reproduces perfunctory legal boilerplate and determines a few facts of marginal relevance. It simply asserts that a violation occurred—and leaves Luminant and Texas to sort out why that is (or is not) so.

Such “notice” and “findings” do not suffice to meet the standard Congress set forth in §7413(a)(1) or even the standards EPA has set for itself in its NOV Guidance Manual.

The NFOV largely paraphrases various statutory and regulatory provisions, with no mention of how the provisions apply to Luminant’s operations. Rote recitation of applicable legal rules, of course, does little if anything “to inform the alleged violator about what it is doing wrong,” *Atl. States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th Cir. 1997), or “how to rectify the problem,” EPA NOV Guidance Manual at 6-3; *see also Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by merely conclusory statements, do not suffice.”).

The NFOV, moreover, fails to make any findings that would establish “the legal standard that has been violated.” EPA NOV Guidance Manual at 6-4. Missing, for example, is any indication that, when the project began, a reasonable operator would have projected emissions would increase. *See supra* pp. 13-15. Neither does EPA indicate that it considered whether contemporaneous demand increases (rather than the modifications themselves) account for any rise in the plants’ usage or emissions (facts also not found). *Cf.* 57 Fed. Reg. at 32,326. And there is no indication that EPA measured any emissions increases against actual

emissions preceding the date of the project, as the Texas rules require. 30 Tex. Admin. Code §116.12(3).

As for violations found for projects undertaken after 2006, the NFOV is even more deficient. Although EPA finds that Texas's 2006 SIP revisions are applicable, and purports to find a violation of them, it does not make the requisite findings for such violations. As noted, under 30 Texas Administrative Code §116.12(18), to be a "major modification" for purposes of PSD, the modification must result in both a "significant net emissions increase" *and* a "significant project emissions increase." The NFOV finds only a "significant net emissions increase" and makes *no* findings that a "*project emissions increase*" first occurred. As with "project emissions increase," the NFOV also fails to even mention, among other required findings, Luminant's "baseline actual emissions."

Nor has EPA found relevant facts in support of its legal conclusions. *Iqbal*, 556 U.S. at 678 ("While legal conclusions can provide the framework of a complaint, they must be supported by *factual* allegations.") (emphasis added). The NFOV identifies no data showing that emissions increased, much less when, or in what amount. It includes no data or facts to support an emissions baseline against which these unmentioned increases were measured. EPA does not attempt to link the increases to the equipment replacements it cites. EPA's own guidance states that such conclusory statements about emissions increases—without detailed facts

and any numbers to back them up—are “[u]nacceptable.” EPA NOV Guidance Manual at 6-4.<sup>20</sup> Notwithstanding massive “discovery” into Luminant Petitioner’s records under 42 U.S.C. §7414, EPA provides only rote legal conclusions.

EPA never even identifies the emissions at issue. The NFOV finds only that “SO<sub>2</sub> and/or NO<sub>x</sub>” emissions may have increased as a result of the projects. NFOV ¶37 (emphasis added). This is a critical distinction, because the BACT analysis for each pollutant would be distinct.

The reason that EPA is unable to make any factual findings is because there is nothing in the administrative record that would support them. The administrative record it has submitted to this Court contains *no emissions calculations by EPA*. Luminant cannot determine whether EPA’s claim is one it should address or deny—much less how to raise any legal objections before judicial enforcement commences. Luminant also does not know the aspects of its projects EPA considers problematic (or even all the projects that concern EPA), why EPA determined those projects would increase emissions, whether or how EPA accounted for demand growth, or the representative baseline and emissions

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<sup>20</sup> For example, according to EPA, the following generic “finding” is “unacceptable” for an NFOV: “Our recent inspection indicates persistent opacity problems.” EPA NOV Guidance Manual at 6-4. An “acceptable” finding, according to EPA, requires much greater factual detail: “On the basis of opacity readings taken in accordance with EPA Reference Method 9 (40 C.F.R. Part 60, Appendix A) between the hours of 3:00 and 3:50 pm on December 17, 1983, EPA observed exceedances of the applicable standard ranging from a low of 50 percent opacity to a high of 100 percent opacity, and an average opacity of 60 percent.” *Id.*

data EPA used. All Luminant knows is that EPA believes some outages violated the Texas PSD rules; only EPA knows precisely why. This is hardly enough to enable Luminant Generation to cure, settle, or respond to the alleged violations—much less seek an applicability determination from its State regulators or an amendment to its permits.

As for the State of Texas, these deficiencies are even more problematic. EPA's empty findings exclude from the enforcement process the very regulator that applies the rules EPA sued on—and the same regulator that would issue the *new* PSD permit EPA says is required. As noted, States like Texas are charged, under the CAA, with determining whether a “change” requires a PSD permit. *See supra* pp. 9-10. If PSD is triggered, States determine in the first instance what BACT requires. *See Alaska*, 540 U.S. at 490. And States receive deference in interpreting their own SIPs. *See id.* (deference owed to reasonable state BACT determination); *Wisc. Env'tl. Decade Inc. v. Wisc. P&L*, 395 F. Supp. 313 (W.D. Wisc. 1975) (deference to state determination of SIP violation). The TCEQ is the authority that would consider in the first instance, for example, whether the replacement work “caused” an emissions increase and what the “baseline” should be for measuring any increase. Yet the agency provided Texas with no meaningful information to assess whether and how to get involved. EPA's failure to do so requires that the NFOV be set aside.

## II. EPA Lacks Authority To Issue An NFOV That Finds Violations Of Title V Of The Clean Air Act

EPA's NFOV should also be set aside for exceeding its statutory authority in another way. In the NFOV, EPA found that "Luminant failed, and continues to fail, to submit timely and complete Title V permit applications for the Big Brown and Martin Lake Power Plants with information pertaining to the modifications" cited by EPA, "including . . . the requirement to apply, install, and operate BACT." NFOV ¶46. The failure to modify a Title V permit, however, is not enforceable under 42 U.S.C. §7413(a)(1), the authority EPA relied upon to issue to NFOV.

Title V, as discussed above, requires covered facilities to obtain permits which incorporate emissions limitations, monitoring, reporting, and other requirements designed to ensure compliance with the CAA's air quality standards. *See Sierra Club v. Johnson*, 436 F.3d 1269 (11th Cir. 2006). Unlike PSD permits, Title V permits do not impose any new substantive requirements. *See* 40 C.F.R. §70.1(b). A Title V operating permit merely consolidates "in a single document all of the clean air requirements already applicable to that source." *Sierra Club v. Ga. Power Co.*, 443 F.3d 1346 (11th Cir. 2006). They are intended only to gather in one place all relevant CAA requirements. *See Operating Permit Program*, 57 Fed. Reg. 32,250, 32,250-51 (July 21, 1992); *see also* 42 U.S.C. §7661a; *Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008).

Here, EPA cited 42 U.S.C. §7413(a)(1) as the only authority for its enforcement action. NFOV at 1. That provision, however, does not apply to the supposed failure to *amend* a Title V permit. Section 7413(a)(1) provides only that EPA may issue “findings” that a person has “violated an applicable [State] implementation plan or a permit.” 42 U.S.C. §7413(a)(1). But Title V and its requirements are not part of the state “implementation plan.”<sup>21</sup> Neither does the NFOV find that Luminant has violated its current Title V permit. Rather, the NFOV says that Luminant violated Title V requirements by failing to *amend* its existing and approved Title V permits to reflect the modifications found in the NFOV and Luminant’s asserted obligation to operate BACT for these plants. *See* NFOV ¶46. But the courts have made clear that a failure to obtain (or seek) amendment of a Title V permit is not a “violation” of a Title V permit. *See Nat’l Parks & Conservation Ass’n, Inc. v. TVA*, 502 F.3d 1316, 1323 (11th Cir. 2007) (explaining that “operation” of a modified emitting facility “is not articulated as a basis for NSR”); *see also United States v. Cemex, Inc.*, 864 F. Supp. 2d 1040, 1049-50 (D. Colo. 2012) (“The Court sees no possible interpretation of this language that would permit a cause of action for the failure to obtain a ‘proper’

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<sup>21</sup> The structure of the CAA makes clear that PSD and Title V are separate programs enacted at different times, and set forth in different subchapters of the CAA. *See United States v. Marine Shale Processors*, 81 F.3d 1329, 1356 (5th Cir. 1996); *see also* 40 C.F.R. §52.2273 (listing provisions that are part of the Texas SIP and identifying the PSD provisions—but not Title V requirements—as among those which are included in the SIP).

permit.”); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1083 (W.D. Wis. 2001).

EPA thus had no authority under §7413(a)(1) to issue an NFOV finding that Luminant violated Title V by failing to modify a permit. As a federal agency, EPA is “a creature of statute,” and may exercise “only those authorities conferred upon it by Congress.” *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). The NFOV is thus without basis in law and should be vacated. *See PPG Indus. v. Harrison*, 660 F.2d 628, 633 (5th Cir. 1981) (“[A] reviewing court must determine whether the action was within the agency’s statutory authority.”).

### **III. EPA Erred By Issuing The NFOV To Energy Future Holdings Corp., Which Neither Owns Nor Operates The Big Brown Or Martin Lake Plants**

The NFOV should be set aside as to Petitioner EFH for the additional reason that it does not make requisite findings to support that EFH is the “owner” or “operator” of either facility and thus a proper recipient for a PSD NFOV. EPA issued its NFOV to EFH and Luminant Generation, a wholly, but indirectly, owned subsidiary of EFH. *See* NFOV ¶¶1, 30. EPA concluded that both entities “owned and operated” the power plants at issue—Big Brown and Martin Lake—and thus could be held liable for the CAA violations found in the NFOV. *Id.*

Under the CAA, however, only a “person” who “owns or operates” a facility can be held liable for the failure to obtain any PSD permit for a “major

modification” to that facility. *See* 42 U.S.C. §7475(a).<sup>22</sup> Although the NFOV correctly notes that Luminant Generation “operates” the Big Brown and Martin Lake plants (and has EPA-approved Title V permits to do so), the NFOV’s conclusory “finding” that EFH also “owned and operated” these two power plants is insufficient as a matter of law. *See* NFOV ¶¶7, 39.<sup>23</sup>

**EFH does not “operate” Big Brown or Martin Lake.** EFH is not an operating company. It is a holding company. *See* SEC Form 10-K, at 1-2 (filed February 19, 2013).<sup>24</sup> As such, it does not directly “operate” either of the two power plants at issue. Rather, those plants are operated by Luminant Generation and the operating permits are solely in Luminant Generation’s name. *See, e.g., R.* 76, 77, 83.

EPA’s conclusory finding to the contrary is insufficient under *United States v. Bestfoods*, 524 U.S. 51 (1998). There, applying the cognate provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of

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<sup>22</sup> The CAA defines the terms “owner or operator” as meaning any person who “owns, leases, operates, controls, or supervises a stationary source.” 42 U.S.C. §7411(a)(5).

<sup>23</sup> Because the NFOV’s Title V findings are derivative of the findings that EFH and Luminant Generation failed to obtain the PSD permit required by the Texas SIP and to install BACT, to the extent the NFOV improperly identified EFH as an “operator” or “owner” under 42 U.S.C. §7475(a), the NFOV also errs in finding that EFH violated Title V of the CAA in failing to modify Luminant Generation’s existing permits to reflect a BACT obligation.

<sup>24</sup> EFH SEC Filings, <http://phx.corporate-ir.net/phoenix.zhtml?c=102498&p=irol-sec> (filed Feb. 19, 2013).

1980 (“CERCLA”),<sup>25</sup> the Supreme Court made clear that a parent corporation could not be held liable simply “because of control through ownership of another corporation’s stock.” 524 U.S. at 61. The Court emphasized that it is “hornbook law” that the “exercise of ‘control’ which stock ownership gives to the stockholders will not create liability beyond the assets of the subsidiary.” *Id.* at 61-62.<sup>26</sup>

In *Bestfoods*, the Supreme Court authorized “operator” liability against a parent in only two narrow circumstances. First, the Court found that a parent can be held derivatively liable for the acts of a subsidiary “when (but only when) the corporate veil may be pierced.” *Id.* at 63-64. Second, the Court found that only a parent that actually “manages” or “directs the workings of” or “conducts operations specifically related to pollution” qualifies as an “operator.” *Id.* at 67. The Court stressed, however, that mere control of the subsidiary, including appointment of officers and directors of the subsidiary, was insufficient to establish

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<sup>25</sup> In *United States v. Anthony Dell’Aquila, Enterprises and Subsidiaries*, 150 F.3d 329, 334 (1998), the Third Circuit found that although the Supreme Court addressed the definition of “operator” “in CERCLA and not the CAA, the purposes of the two statutes is the same, and the language in question is nearly identical.” Thus, in *Dell’Aquila*, the Third Circuit found that the Supreme Court’s interpretation of the CERCLA definition was also highly relevant to the construction of “operator” under the CAA. *Id.*

<sup>26</sup> “[C]ontrol’ includes the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of stockholders.” *Bestfoods*, 524 U.S. at 61-62. Even a duplication of some or all of the directors or executive officers will not be fatal. *Id.*

a parent as an “operator.” *Id.* at 68-69. Rather, to be an “operator,” the parent must “exercise . . . direction over the *facilities*’ activities” related to pollution. *Id.* at 71.

*Atlanta Gas Light Co. v. UGI Utilities, Inc.*, 463 F.3d 1201 (11th Cir. 2006), is in accord. There, the court held that parent companies were not liable as operators of a gas plant even though both parents played active roles in the management of the gas plant’s predecessor-owner. Neither parent conducted operations related to alleged leakage or disposal of hazardous substances and thus did not manage, direct, or conduct operations specifically related to pollution, or make decisions about regulatory compliance.<sup>27</sup> *Id.* at 1206, 1208.

The NFOV makes no findings that EFH directed emission-related operations at the Big Brown or Martin Lake plants. Nor does it make any findings that would permit the agency to disregard the separate corporate identity between EFH and its subsidiaries. Indeed, the NFOV cites no evidence or facts whatsoever indicating that EFH controlled pollution-related activities at Big Brown or Martin Lake, or that its subsidiary companies are sham entities. To the contrary, the evidence provided to EPA shows that all relevant corporate formalities were carefully respected by EFH with regard to its subsidiaries. *See, e.g.*, R. 78, 79, 83.

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<sup>27</sup> As the *Bestfoods* Court noted, the “critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under acceptable norms of parental oversight of a subsidiary’s facility.” 524 U.S. at 72.

**EFH does not “own” Big Brown or Martin Lake.** *Bestfoods* also forecloses the NFOV’s conclusory finding that EFH “owns” Big Brown and Martin Lake. The Supreme Court made clear that general principles of corporate law deeply “ingrained in our economic and legal system[s]” preclude holding a parent liable for a subsidiary’s actions where the parent merely owns the subsidiary’s stock. 524 U.S. at 62-64. Even before *Bestfoods*, this Court in *Joslyn Manufacturing Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990), had held that the term “owner” in CERCLA could not include “the parent company of offending wholly-owned subsidiaries.”<sup>28</sup>

Again, the NFOV makes no findings that would establish the “exceptional circumstances” under which the legal difference between a corporation and its shareholders and could be “disregarded.” *Burnet v. Clark*, 287 U.S. 410, 415 (1932). And, again, no such finding could be made here given that the NFOV cites no evidence indicating EFH somehow “owns” the power plants at issue and, indeed, the record demonstrates that entities besides EFH (or its predecessor) own the facilities. Luminant Generation (or a predecessor) has owned Martin Lake

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<sup>28</sup> In *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 452 (9th Cir. 2011), the Ninth Circuit found that in establishing “owner” liability (under CERCLA), “Congress did not say ‘de facto owner’; or ‘possessor’; or ‘person with some attributes of ownership’ . . . it used the unmodified term ‘owner’ which . . . when used alone, imparts an absolute owner.” The court then went on to suggest, without deciding, that “Congress intended to limit ‘owner’ liability to those individuals possessing all of the proverbial ‘sticks in the bundle of rights’ including fee title to the property.” *Id.*

since 2002 and Big Brown Power Company LLC (or a predecessor) has owned Big Brown since 2002. *See* Joint Appendix (LUMINANT\_MO\_000001709).

#### **IV. This Court Has Jurisdiction To Review And Set Aside EPA’s NFOV**

Finally, contrary to EPA’s arguments in its motion to dismiss, this Court has jurisdiction under 42 U.S.C. §7607(b)(1) to review EPA’s NFOV issued to Luminant Petitioners. *See generally* Doc. 00512052112 (Luminant Petitioners’ opposition to EPA’s motion to dismiss). That provision provides in relevant part:

A petition for review of the Administrator’s action [under certain enumerated sections not at issue here], *or any other final action of the Administrator under this chapter . . .* which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.

(emphasis added). This provision is construed in light of the “presumption in favor of judicial review of agency action.” *Asbestos Info. Ass’n v. Reich*, 117 F.3d 891, 893 (5th Cir. 1997).

In this petition for review, Luminant brings a narrow challenge to the NFOV. Luminant raises only “purely legal” objections to the validity of the NFOV under §7413(a)(1). *CSI*, 637 F.3d at 412. Luminant does not in this petition for review challenge the underlying substance of any of EPA’s factual determinations, but contends that the NFOV’s conclusory “findings” are insufficient as a matter of law under §7413(a)(1).

This Court has jurisdiction pursuant to §7607(b)(1) to review Luminant’s limited challenge to EPA’s NFOV. *First*, this case is indistinguishable from *Harrison v. PPG Industries, supra*, where EPA conceded, and the Supreme Court accepted, that a three-page letter declaring EPA’s views regarding the applicability of regulation to a facility was reviewable “final” agency action. *Second*, as confirmed by the Supreme Court’s recent decision in *Sackett*, 132 S. Ct. 1367, EPA’s NFOV is reviewable because it marks the consummation of EPA’s administrative process and imposes legal obligations on Luminant.

1. In *Harrison*, the Supreme Court held that a three-page EPA letter to the petitioner simply notifying the petitioner of “EPA[’s] determination” that “new-source regulations apply to PPG’s facility” was “any other final action” reviewable in the court of appeals under §7607(b)(1). 446 U.S. at 583. Although the Supreme Court’s analysis focused primarily on whether the letter was “*any other* final action,” it first addressed whether it was “final” action—a critical issue with regard to the Court’s subject matter jurisdiction.<sup>29</sup> The Supreme Court accepted EPA’s and petitioner’s agreement that the letter was a “*final* action,” *id.* at 586, observing, “[s]hort of an enforcement action, EPA has rendered its last word on the matter,” *id.*; *see also Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 437 (D.C. Cir. 1986)

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<sup>29</sup> “[C]ourts, including [the Supreme] Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

(quoting and relying on this aspect of *Harrison* as supporting pre-enforcement challenge to EPA letter). It also accepted that “the basic purpose of §7607(b) [is] to provide prompt pre-enforcement review of EPA action.” *Id.* at 592. And because Congress added the phrase “any other final action” to 42 U.S.C. § 7607(b)(1) in 1977 to “expand[] the jurisdiction of the regional courts of appeals,” *id.* at 590, the Court concluded that the letter was “*any other* final action” subject to review in the courts of appeals, *id.* at 594.

EPA’s NFOV has at least as many indicia of finality as its letter in *Harrison*. The NFOV purports to require immediate action by the recipient. Just as EPA directed the recipient in *Harrison* to contact the regional office “to determine the specifics” of monitoring that EPA required, the NFOV directs Luminant Petitioners to provide “information on the specific findings of violations and the steps [Luminant] will take to bring the plants into compliance.” R.40 at 1. Indeed, in many ways, the NFOV here is significantly more concrete and definitive than the letter found “final” in *Harrison*. In issuing the NFOV, EPA necessarily concluded that it has satisfied the independent “finding” and “notice” requirements of §7413(a)(1). *See* NFOV ¶47. Further, the NFOV concludes that “Luminant is violating the Clean Air Act” at Big Brown and Martin Lake. NFOV at 1 (emphasis added). The Supreme Court was correct in accepting EPA’s concession in *Harrison* that the agency’s “applicability” determination was final agency action

subject to pre-enforcement review, and there is no basis for treating the NFOV any differently here.

2. Last year, the Supreme Court confirmed that EPA's pre-enforcement determinations can constitute "final action" subject to immediate judicial review. *Sackett*, 132 S. Ct. 1367. *Sackett* involved an EPA administrative compliance order ("ACO") issued under the Clean Water Act. The ACO contained a number of "Findings and Conclusions," including that the Sacketts violated the Clean Water Act by placing fill material in a wetland without a permit. *Id.* at 1371. Based on those findings, the ACO directed the Sacketts to "restore the Site in accordance with [an EPA-approved] Restoration Work Plan" and provide EPA access to the lot and to certain documents. *Id.* The Supreme Court unanimously reversed the Ninth Circuit and held over EPA's objection that the pre-enforcement order by EPA "has all of the hallmarks of APA finality that our opinions establish." *Id.*

In so holding, the Supreme Court applied the two-part test for finality established in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997): (1) "the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature[;]" and (2) "the action must be one by which 'rights or obligations have been determined,' *or* from which 'legal consequences will flow.'" (citations omitted) (emphasis added). The Court held

that the ACO satisfied both prongs: (1) it marked the “end” of EPA’s decisionmaking process because, *inter alia*, the Sacketts were not entitled to further agency review; and (2) it imposed an obligation on the Sacketts to “restore” their property and resulted in legal consequences—exposure to double penalties in future enforcement proceedings and limits on their ability in the future to obtain a Clean Water Act permit. *Sackett*, 132 S. Ct. at 1371-72.

The NFOV issued to Luminant Petitioners has all the hallmarks of finality found dispositive in *Sackett*. *See also Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967) (finality is to be determined in a “pragmatic way”). It represents the “consummation” of EPA’s decisionmaking process. This investigation started at least four years before EPA issued the NFOV, when EPA directed Luminant to provide “information necessary to determine compliance with the CAA.” Doc. 00512052112, Attach. A. EPA then reviewed “approximately 415,000 pages of information” Luminant Petitioners provided in response to its “multiple requests for information.” Doc. 00512018772 at 2. Before issuing the NFOV, the agency “considered numerous documents and conducted various analyses.” And “at least ten EPA staff engineers and attorneys have worked on developing the NSR/PSD NOV to Luminant.” *Id.* EPA’s process “to determine compliance” then concluded with the issuance of the NFOV. *See id.* (“EPA has *determined* that Luminant has

violated and continues to violate” the CAA, and must take action to come “into compliance.”) (emphasis added).

For the Luminant Petitioners, like the Sacketts, the finality of EPA’s action is underscored by the unavailability of any avenue of further agency review. 132 S. Ct. at 1372. EPA holds all the cards: the recipient of an NFOV must wait to learn when, or if, EPA will take action that triggers further process. *See* Doc. 00512052112, Attach. D at 8:9-11 (Government Counsel: “[O]nly EPA can request the administrative option [to seek review of the NFOV]. The potential power plant emitter cannot trigger the administrative option.”). Here, EPA gave Luminant Petitioners only an informal “opportunity to confer with [EPA] about the violations” and “the steps [Luminant] will take to bring the plants into compliance.” R.40 at 1. But, as the Supreme Court made plain in *Sackett*, the “mere possibility that an agency might reconsider in light of ‘informal discussion’ . . . does not suffice to make an otherwise final agency action nonfinal.” 132 S. Ct. at 1372.

The NFOV also meets the second prong of the finality test: the agency action must “be one by which ‘rights or obligations have been determined,’ *or* from which ‘legal consequences will flow.’” *Bennett*, 520 U.S. at 177-78 (emphasis added). In fact, it satisfies both alternatives. The NFOV begins by “finding that Luminant is violating the Clean Air Act,” specifically the PSD

provisions of the Act and the Texas rules. NFOV at 1. The NFOV also “determines” that “Luminant failed, and continues to fail, to submit timely and complete Title V permit applications for the Big Brown and Martin Lake Power Plants.” NFOV ¶46. And EPA necessarily determined the NFOV provided the Luminant Petitioners with all the “notice” of “findings” that they were due under §7413(a)(1). *See* NFOV ¶47.

According to EPA, serious “legal consequences will flow” from this determination of Luminant Petitioners’ “obligations.” *See Bennett*, 520 U.S. at 177-78. EPA reads the NFOV as requiring Luminant Petitioners to take “the steps necessary “to bring the plants into compliance” (and explain to EPA’s satisfaction how this will be done). NFOV at 1. The NFOV itself expressly states that Luminant Petitioners are under a present obligation to supplement their Title V permit applications to seek a BACT determination because the agency has found a CAA violation. NFOV ¶46. This permitting obligation that EPA asserts is, in and of itself, a substantial consequence of the NFOV.<sup>30</sup>

EPA ascribes additional and significant legal consequences to its NFOV. Foremost, EPA has determined that it is now free to bring an enforcement action

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<sup>30</sup> Just the permitting process for BACT (not to mention its implementation) is a costly and time-consuming undertaking—“an applicant must sometimes spend up to \$500,000 on the permit process and . . . , for a complex project, the time for approval can take from five to seven years.” *Alaska*, 540 U.S. at 516-17 (Kennedy, J. dissenting).

against Luminant Petitioners because it has satisfied §7413(a)(1)'s preconditions for doing so. *See* NFOV ¶47.

Further, EPA's position is that separate penalties can be imposed as a result of the NFOV. Under EPA's Title V regulations, the "[d]uty to supplement" a Title V permit is triggered upon the permit holder "becoming aware" that it had made an "incorrect submittal." 40 C.F.R. §70.5(b). In an enforcement action in this Circuit, EPA has taken the position that its issuance of an NFOV finding a PSD violation can be deemed to have "*provided [the] notice*" that obligates a utility to supplement a Title V permit. Doc. 00512052112, Attach. H at 16-17. In that enforcement action, EPA argued, "the defendant continued to fail to" install BACT "despite EPA's contention [in the NFOV] that such projects required the application of BACT." *Id.* at 17. Thus, according to EPA's litigation position in this Circuit, issuing an NFOV can trigger a legal obligation—the obligation to seek amendment of the plant's Title V permit.<sup>31</sup>

Critically, EPA's position is that double penalties can issue based on the issuance of an NFOV. In the *Louisiana Generating* case, EPA sought separate civil penalties between \$27,500 and \$37,500 for the company's failure to seek an

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<sup>31</sup> EPA also argued in the *Louisiana Generating* case that no notice from EPA was required to establish a Title V violation. *See* Doc. 00512052112, Attach. H at 16. But EPA did not dispute that the applicable regulation imposes the duty to supplement the permit only when the regulated entity "becom[es] aware" of the need to do so. EPA argued that to the extent notice was necessary, the NFOV provided it.

amendment of its Title V permit, in addition to penalties for the underlying alleged violation. Doc. 00512052112, Attach. G ¶¶28-29, 59 (*citing* 42 U.S.C. §7413(a)(3) and (b) as EPA’s authority to seek separate penalties for Title V violations in addition to penalties for underlying violation). Thus, just like the *Sacketts*, should they ignore the NFOV, Luminant Petitioners may face penalties that would not have accrued but for the agency’s final determination, announced in the NFOV, that Luminant violated Title V. *Sackett*, 132 S. Ct. at 1372.

But even if Luminant were not subject to “double penalties,” the NFOV is still reviewable in this Court. Applying an analysis that is “complementary to *Bennett v. Spear*,” *see Reckitt Benckiser, Inc. v. EPA*, 613 F.3d 1131, 1137 (D.C. Cir. 2010), the D.C. Circuit has held agency action comparable to EPA’s here to be reviewable. For example, in *CSI Aviation Services, Inc. v. U.S. Department of Transportation*, the D.C. Circuit held that a “cease and desist” letter sent by the Department of Transportation declaring that the recipient of the letter had violated the Federal Aviation Act—but not yet seeking to impose penalties—was “final” agency action subject to pre-enforcement judicial review. 637 F.3d at 412-13. Similarly, in *Ciba-Geigy Corp. v. EPA*, the D.C. Circuit cited and relied on *Harrison v. PPG Industries, supra*, to hold that a regulated party could bring a pre-enforcement challenge to the validity of a letter sent by EPA to companies ordering

the company to modify its pesticide labels or potentially face future enforcement action and penalties. 801 F.2d 437-39.

In both cases, the D.C. Circuit stressed three factors supported pre-enforcement judicial review, and all are met here. First, as explained above, EPA has “issued a ‘definitive’ statement of the agency’s legal position.” *CSI*, 637 F.3d at 412; *see also Ciba-Geigy*, 801 F.2d at 437 (“EPA has provided its final word on the matter ‘[s]hort of an enforcement action.’”) (quoting *Harrison*, 446 U.S. at 586). EPA has found that “Luminant is violating the Clean Air Act,” NFOV at 1, and that it can bring suit in federal court having satisfied its “finding” and “notice” obligations under §7413(a)(1), NFOV ¶47. Second, as explained above, Luminant’s petition for review involves a legal, rather than factual, question. *CSI*, 637 F.3d at 412. Luminant challenges only the validity of the NFOV on the grounds that the NFOV’s “findings” and “notice” are insufficient under §7413(a)(1) as a matter of law. This is “antecedent and distinct from whether [Luminant] itself has violated the law.” *Id.*; *see also Ciba-Geigy*, 801 F.2d at 435 (allowing pre-enforcement review of “pure legal question of what procedures EPA was obligated to follow before requiring a labeling change” that “is entirely independent of and separable from the largely factual question of whether [Ciba-Geigy’s product] poses a substantial danger of groundwater contamination.”). Third, as explained above, EPA has ordered Luminant to install costly pollution

control equipment to “conform” to EPA’s view of the law or face the “pain of civil . . . penalties” for failure to do so. *CSI*, 637 F.3d at 412; *see also id.* (final agency action where agency would “put the company to the painful choice between costly compliance and the risk of prosecution at an uncertain point in the future”).

**CONCLUSION**

For all these reasons, the Court should hold unlawful and vacate the NFOV.

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 12th day of June, 2013. Any other counsel of record will be served by first class U.S. mail on this same day.

/s/ P. Stephen Gidiere III  
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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,692 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 2010 in Times New Roman 14-point font.

June 12, 2013

/s/ P. Stephen Gidiere III  
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**ADDENDUM OF RULES AND REGULATIONS**  
**TO PRINCIPAL BRIEF OF PETITIONERS**  
**LUMINANT GENERATION CO. LLC, ET AL.**

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

Texas Administrative Code provisions

30 TAC §116.12 (effective Sept. 14, 2003) .....	Add. 1
30 TAC §116.12 (effective June 15, 2005) .....	Add. 7
30 TAC §116.12 (effective Feb. 1, 2006).....	Add. 12
30 TAC §116.160 (effective Nov. 1, 2001).....	Add. 23
30 TAC §116.160 (effective Feb. 1, 2006).....	Add. 25

Federal regulations

40 C.F.R. §52.21 (1996) .....	Add. 27
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## **Historical Rule for the Texas Administrative Code**

<b>TITLE 30</b>	<b>ENVIRONMENTAL QUALITY</b>
<b>PART 1</b>	<b>TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</b>
<b>CHAPTER 116</b>	<b>CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION</b>
<b>SUBCHAPTER A</b>	<b>DEFINITIONS</b>
<b>RULE §116.12</b>	<b>Nonattainment Review Definitions</b>

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Unless specifically defined in the 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 which are defined by the TCAA, and in §101.1 of this title (relating to Definitions), the following words and terms, when used in §116.150 and §116.151 of this title (relating to Nonattainment Review), shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Actual emissions**--Actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. 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 which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit 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 which restrict the operating rate, or hours of operation, or both), and the most stringent of the following:

(A) the applicable standards set forth in Title 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) **Begin actual construction**--In general, initiation of physical on-site construction activities on an emissions unit which 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 which mark the initiation of the change.

(4) **Building, structure, facility, or installation**--All of the pollutant-emitting activities which 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 shall be considered as part of the same industrial grouping if they belong to the same "major group" (i.e., which have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(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.

(6) Construction--Any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(7) Contemporaneous period--As follows.

(A) For major sources with the potential to emit 250 tons per year (tpy) or more of a nonattainment pollutant, the period between:

(i) November 15, 1992; and

(ii) the date that the increase from the particular change occurs.

(B) For major sources with the potential to emit less than 250 tpy of a nonattainment pollutant, the period between:

(i) the date five years before construction on the particular change commences; and

(ii) the date that the increase from the particular change occurs.

(C) Notwithstanding subparagraphs (A) and (B) of this definition, for major sources of nitrogen oxides as a precursor to ozone in ozone nonattainment areas, the contemporaneous period shall begin no earlier than November 15, 1992.

(8) De minimis threshold test (netting)--A method of determining if a proposed emission increase will trigger nonattainment review. The summation of the proposed increase with all other creditable source emission increases and decreases during the contemporaneous period is compared to the MAJOR MODIFICATION column of Table I (in tons per year) for that specific nonattainment area. If the major modification level is exceeded, then nonattainment review is required.

(9) Lowest achievable emission rate--For any emitting facility, that rate of emissions of a contaminant which does not exceed the amount allowable under applicable New Source Performance Standards promulgated by the EPA under the FCAA, §111, and which reflects the following:

(A) the most stringent emission limitation which 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 which is achieved in practice by a specific class or category of facilities, whichever is more stringent.

(10) Major facility/stationary source--Any facility/stationary source which emits, or has the potential to emit, the amount specified in the MAJOR SOURCE column of Table I of this section or more of any air contaminant (including volatile organic compounds (VOCs)) for which a National Ambient Air Quality Standard (NAAQS) has been issued. Any physical change that would occur at a stationary source not qualifying as a major stationary source 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 shall be considered 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).

(11) Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a facility/stationary source that causes a significant net emissions increase for any 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 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 in the MAJOR MODIFICATION column of Table I.

#### Attached Graphic

(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 the FCAA, §125;

(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 which 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.

(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 which are part of the applicable state implementation plan.

(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.

(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 nonattainment permit for the source (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 only to the extent that the new level of actual emissions exceeds the old level.

(C) A decrease in actual emissions is creditable only to the extent that all of the following conditions are met:

(i) the 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 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 permit, or the state has not relied on it in demonstrating attainment or reasonable further progress; and

(iv) it has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(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.

(E) At major sources with the potential to emit 250 tons per year or more of a nonattainment pollutant:

(i) increases and decreases of such pollutant resulting from authorizations or applications received before November 15, 1992, are creditable to the extent that the increases or decreases occur within the period five years prior to the date construction on a particular change commences and meet all other

credibility criteria; and

(ii) increases and decreases of such pollutant resulting from authorizations or applications received on or after November 15, 1992, are creditable indefinitely to the extent that all other credibility criteria are met.

(F) For all major sources of nitrogen oxides (NO<sub>x</sub>) in ozone nonattainment areas, increases and decreases of NO<sub>x</sub> are creditable only if they resulted from authorizations or applications received on or after November 15, 1992.

(14) Offset ratio--For the purpose of satisfying the emissions offset reduction requirements of the FCAA, §173(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. 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.

(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, shall 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 Cont'd...

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in determining the potential to emit for a stationary source.

(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. Increases and decreases must meet the creditability criteria listed under paragraph (13) of this section.

(17) 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 source or modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions include emissions from any off-site support facility which 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 which come directly from a mobile source such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.

(18) Stationary source--Any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the FCAA.

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**Source Note:** The provisions of this §116.12 adopted to be effective September 13, 1993, 18 TexReg 5746; amended to be effective June 7, 1996, 21 TexReg 4790; amended to be effective April 7, 1998, 23 TexReg 3515; amended to be effective March 21, 1999, 24 TexReg 1781; amended to be effective November 1, 2001, 26 TexReg 8539; amended to be effective September 14, 2003, 28 TexReg 7763

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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 §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. 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) **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.

(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.

(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.

(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.

(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.

(8) *De minimis* threshold test (netting)--A method of determining if a proposed emission increase will trigger nonattainment review. The summation of the proposed increase in tons per year with all other creditable source emission increases and decreases during the contemporaneous period is compared to the MAJOR MODIFICATION column of Table I located in the definition of major modification in this section for that specific nonattainment area. If the major modification level is exceeded, then nonattainment review is required.

(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.

(10) Major facility/stationary source--Any facility/stationary source that emits, or has the potential to emit, 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. Any physical change that would occur at a stationary source not qualifying as a major stationary source 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).

(11) Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a facility/stationary source that causes a significant net emissions increase for any 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 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 in the MAJOR MODIFICATION column of Table I.

Attached Graphic

(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); or

(vii) any change in ownership at a stationary source.

(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.

(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.

(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 nonattainment permit for the source (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 only to the extent that the new level of actual emissions exceeds the old level.

(C) A decrease in actual emissions is creditable only to the extent that all of the following conditions are met:

(i) the 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 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 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.

(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.

(14) 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 allowable emissions increases of such pollutants. The minimum offset ratios are included in Table I 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 permit.

(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.

(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. Increases and decreases must meet the creditability criteria listed under the definition of net emissions increase in this section.

(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.

(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.*

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**Source Note:** The provisions of this §116.12 adopted to be effective September 13, 1993, 18 TexReg 5746; amended to be effective June 7, 1996, 21 TexReg 4790; amended to be effective April 7, 1998, 23 TexReg 3515; amended to be effective March 21, 1999, 24 TexReg 1781; amended to be effective November 1, 2001, 26 TexReg 8539; amended to be effective September 14, 2003, 28 TexReg 7763; amended to be effective June 15, 2005, 30 TexReg 3422

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<b>CHAPTER 116</b>	<b>CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION</b>
<b>SUBCHAPTER A</b>	<b>DEFINITIONS</b>
<b>RULE §116.12</b>	<b>Nonattainment and Prevention of Significant Deterioration Review Definitions</b>

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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.

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(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.

### Attached Graphic

(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 [Cont'd...](#)

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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.

**Source Note:** The provisions of this §116.12 adopted to be effective September 13, 1993, 18 TexReg 5746; amended to be effective June 7, 1996, 21 TexReg 4790; amended to be effective April 7, 1998, 23 TexReg 3515; amended to be effective March 21, 1999, 24 TexReg 1781; amended to be effective November 1, 2001, 26 TexReg 8539; amended to be effective September 14, 2003, 28 TexReg 7763; amended to be effective June 15, 2005, 30 TexReg 3422; amended to be effective February 1, 2006, 31 TexReg 515

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<b>TITLE 30</b>	<b>ENVIRONMENTAL QUALITY</b>
<b>PART 1</b>	<b>TEXAS NATURAL RESOURCE CONSERVATION COMMISSION</b>
<b>CHAPTER 116</b>	<b>CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION</b>
<b>SUBCHAPTER B</b>	<b>NEW SOURCE REVIEW PERMITS</b>
<b>DIVISION 6</b>	<b>PREVENTION OF SIGNIFICANT DETERIORATION REVIEW</b>
<b>RULE §116.160</b>	<b>Prevention of Significant Deterioration Requirements</b>

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(a) Each proposed new major source or major modification in an attainment or unclassifiable area shall comply with the 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 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).

(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 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.

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**Source Note:** The provisions of this §116.160 adopted to be effective September 13, 1993, 18 TexReg 5746; amended to be effective April 5, 1995, 20 TexReg 2052; amended to be effective July 8, 1998, 23 TexReg 6973; amended to be effective November 1, 2001, 26 TexReg 8539

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<b>TITLE 30</b>	<b>ENVIRONMENTAL QUALITY</b>
<b>PART 1</b>	<b>TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</b>
<b>CHAPTER 116</b>	<b>CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION</b>
<b>SUBCHAPTER B</b>	<b>NEW SOURCE REVIEW PERMITS</b>
<b>DIVISION 6</b>	<b>PREVENTION OF SIGNIFICANT DETERIORATION REVIEW</b>
<b>RULE §116.160</b>	<b>Prevention of Significant Deterioration Requirements</b>

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(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.

(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 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 Nonattainment and Prevention of Significant Deterioration Review Definitions) the following definitions from prevention of significant deterioration of air quality regulations promulgated by the United States Environmental Protection Agency (EPA) in 40 CFR §52.21 and the definitions for protection of visibility and promulgated in 40 CFR §51.301 as amended July 1, 1999, are incorporated by reference:

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

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

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**Source Note:** The provisions of this §116.160 adopted to be effective September 13, 1993, 18 TexReg 5746; amended to be effective April 5, 1995, 20 TexReg 2052; amended to be effective July 8, 1998, 23 TexReg 6973; amended to be effective November 1, 2001, 26 TexReg 8539; amended to be effective February 1, 2006, 31 TexReg 515

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(7) Iowa, Kansas, Missouri, and Nebraska. EPA Region 7, 726 Minnesota Avenue, Kansas City, KS 66101.

(8) Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming. EPA Region 8, 999 18th Street, Suite 500, Denver, CO 80202-2466.

(9) Arizona, California, Hawaii, Nevada, American Samoa, and Guam. EPA, Region 9, 75 Hawthorne Street, San Francisco, CA 94105.

(10) Alaska, Idaho, Oregon, and Washington. EPA, Region 10, 1200 6th Avenue, Seattle, WA 98101.

[61 FR 16061, Apr. 11, 1996]

### § 52.17 Severability of provisions.

The provisions promulgated in this part and the various applications thereof are distinct and severable. If any provision of this part or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of such provision to other persons or circumstances which can be given effect without the invalid provision or application.

[37 FR 19808, Sept. 22, 1972]

### § 52.18 Abbreviations.

Abbreviations used in this part shall be those set forth in part 60 of this chapter.

[38 FR 12698, May 14, 1973]

### § 52.20 Attainment dates for national standards.

Each subpart contains a section which specifies the latest dates by which national standards are to be attained in each region in the State. An attainment date which only refers to a month and a year (such as July 1975) shall be construed to mean the last day of the month in question. However, the specification of attainment dates for national standards does not relieve any State from the provisions of subpart N of this chapter which require all sources and categories of sources to comply with applicable requirements of the plan—

(a) As expeditiously as practicable where the requirement is part of a control strategy designed to attain a primary standard, and

(b) Within a reasonable time where the requirement is part of a control strategy designed to attain a secondary standard.

[37 FR 19808, Sept. 22, 1972, as amended at 39 FR 34535, Sept. 26, 1974; 51 FR 40676, Nov. 7, 1986]

### § 52.21 Prevention of significant deterioration of air quality.

(a) Plan disapproval. The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in subparts B through DDD of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in subparts B through DDD of this part. Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(b) Definitions. For the purposes of this section:

(1)(i) Major stationary source means:

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing

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plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source, if the changes would constitute a major stationary source by itself.

(ii) A major stationary source that is major for volatile organic compounds shall be considered major for ozone.

(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this section whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

- (a) Coal cleaning plants (with thermal dryers);
- (b) Kraft pulp mills;
- (c) Portland cement plants;
- (d) Primary zinc smelters;
- (e) Iron and steel mills;
- (f) Primary aluminum ore reduction plants;
- (g) Primary copper smelters;
- (h) Municipal incinerators capable of charging more than 250 tons of refuse per day;
- (i) Hydrofluoric, sulfuric, or nitric acid plants;
- (j) Petroleum refineries;
- (k) Lime plants;
- (l) Phosphate rock processing plants;
- (m) Coke oven batteries;
- (n) Sulfur recovery plants;
- (o) Carbon black plants (furnace process);
- (p) Primary lead smelters;

(q) Fuel conversion plants;

(r) Sintering plants;

(s) Secondary metal production plants;

(t) Chemical process plants;

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

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

(w) Taconite ore processing plants;

(x) Glass fiber processing plants;

(y) Charcoal production plants;

(z) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, and

(aa) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(2)(i) Major modification means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(a) Routine maintenance, repair and replacement;

(b) Use of an alternative fuel or raw material by reason of an order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plant pursuant to the Federal Power Act;

(c) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(d) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(e) Use of an alternative fuel or raw material by a stationary source which:

(1) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under

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any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or 40 CFR 51.166; or

(2) The source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166;

(f) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or 40 CFR 51.166.

(g) Any change in ownership at a stationary source.

(h) The addition, replacement or use of a pollution control project at an existing electric utility steam generating unit, unless the Administrator determines that such addition, replacement, or use renders the unit less environmentally beneficial, or except:

(1) When the Administrator has reason to believe that the pollution control project would result in a significant net increase in representative actual annual emissions of any criteria pollutant over levels used for that source in the most recent air quality impact analysis in the area conducted for the purpose of title I, if any, and

(2) The Administrator determines that the increase will cause or contribute to a violation of any national ambient air quality standard or PSD increment, or visibility limitation.

(i) The installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with:

(1) The State implementation plan for the State in which the project is located, and

(2) Other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(j) The installation or operation of a permanent clean coal technology demonstration project that constitutes repowering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemp-

tion shall apply on a pollutant-by-pollutant basis.

(k) The reactivation of a very clean coal-fired electric utility steam generating unit.

(3)(i) Net emissions increase means the amount by which the sum of the following exceeds zero:

(a) Any increase in actual emissions from a particular physical change or change in method of operation at a stationary source; and

(b) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

(a) The date five years before construction on the particular change commences; and

(b) The date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the Administrator has not relied on it in issuing a permit for the source under this section, which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase or decrease in actual emissions of sulfur dioxide, particulate matter, or nitrogen oxide, which 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. With respect to particulate matter, only PM-10 emissions can be used to evaluate the net emissions increase for PM-10.

(v) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(vi) A decrease in actual emissions is creditable only to the extent that:

(a) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(b) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(c) It has approximately the same qualitative significance for public

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health and welfare as that attributed to the increase from the particular change.

(vii) [Reserved]

(viii) 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.

(4) Potential to emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the 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, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(5) Stationary source means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(6) 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 the same person (or persons under common control) except the activities of any vessel. 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 (U. S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

(7) Emissions unit means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

(8) Construction means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(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:

(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled 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) Necessary preconstruction approvals or permits means those permits or approvals required under Federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(11) Begin actual construction means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

(12) Best available control technology means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification

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through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR parts 60 and 61. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

(13)(i) "Baseline concentration" means that ambient concentration level which exists in the baseline area at the time of the applicable minor source baseline date. A baseline concentration is determined for each pollutant for which a baseline date is established and shall include:

(a) The actual emissions representative of sources in existence on the applicable minor source baseline date, except as provided in paragraph (b)(13)(ii) of this section;

(b) The allowable emissions of major stationary sources which commenced construction before the major source baseline date but were not in operation by the applicable minor source baseline date.

(ii) The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase(s):

(a) Actual emissions from any major stationary source on which construction commenced after the major source baseline date; and

(b) Actual emissions increases and decreases at any stationary source occurring after the minor source baseline date.

(14)(i) Major source baseline date means:

(a) In the case of particulate matter and sulfur dioxide, January 6, 1975, and

(b) In the case of nitrogen dioxide, February 8, 1988.

(ii) "Minor source baseline date" means the earliest date after the trigger date on which a major stationary source or a major modification subject to 40 CFR 52.21 or to regulations approved pursuant to 40 CFR 51.166 submits a complete application under the relevant regulations. The trigger date is:

(a) In the case of particulate matter and sulfur dioxide, August 7, 1977, and

(b) In the case of nitrogen dioxide, February 8, 1988.

(iii) The baseline date is established for each pollutant for which increments or other equivalent measures have been established if:

(a) The area in which the proposed source or modification would construct is designated as attainment or unclassifiable under section 107(d)(1) (D) or (E) of the Act for the pollutant on the date of its complete application under 40 CFR 52.21; and

(b) In the case of a major stationary source, the pollutant would be emitted in significant amounts, or, in the case of a major modification, there would be a significant net emissions increase of the pollutant.

(iv) Any minor source baseline date established originally for the TSP increments shall remain in effect and shall apply for purposes of determining the amount of available PM-10 increments, except that the Administrator shall rescind a minor source baseline date where it can be shown, to the satisfaction of the Administrator, that the emissions increase from the major stationary source, or net emissions increase from the major modification, responsible for triggering that date did not result in a significant amount of PM-10 emissions.

(15)(i) Baseline area means any intrastate area (and every part thereof) designated as attainment or unclassifiable under section 107(d)(1) (D) or (E) of the Act in which the major source or major modification establishing the minor source baseline date would construct or would have an air quality impact equal

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to or greater than  $1 \mu\text{g}/\text{m}^3$  (annual average) of the pollutant for which the minor source baseline date is established.

(ii) Area redesignations under section 107(d)(1) (D) or (E) of the Act cannot intersect or be smaller than the area of impact of any major stationary source or major modification which:

(a) Establishes a minor source baseline date; or

(b) Is subject to 40 CFR 52.21 and would be constructed in the same state as the state proposing the redesignation.

(iii) Any baseline area established originally for the TSP increments shall remain in effect and shall apply for purposes of determining the amount of available PM-10 increments, except that such baseline area shall not remain in effect if the Administrator rescinds the corresponding minor source baseline date in accordance with paragraph (b)(14)(iv) of this section.

(16) Allowable emissions means 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 which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(i) The applicable standards as set forth in 40 CFR parts 60 and 61;

(ii) The applicable State Implementation Plan emissions limitation, including those with a future compliance date; or

(iii) The emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

(17) Federally enforceable means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR parts 60 and 61, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly re-

quires adherence to any permit issued under such program.

(18) Secondary emissions means 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 off-site support facility which 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 which come directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.

(i) Emissions from ships or trains coming to or from the new or modified stationary source; and

(ii) Emissions from any offsite support facility which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

(19) Innovative control technology means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emissions reduction than any control system in current practice or of achieving at least comparable reductions at lower cost in terms of energy, economics, or nonair quality environmental impacts.

(20) Fugitive emissions means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(21)(i) Actual emissions means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii) through (iv) of this section.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The Administrator shall allow the use of a different time period upon

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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.

(iii) The Administrator may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit (other than an electric utility steam generating unit specified in paragraph (b)(21)(v) of this section) which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(v) For an electric utility steam generating unit (other than a new unit or the replacement of an existing unit) actual emissions of the unit following the physical or operational change shall equal the representative actual annual emissions of the unit, provided the source owner or operator maintains and submits to the Administrator on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the Administrator if he determines such a period to be more representative of normal source post-change operations.

(22) Complete means, in reference to an application for a permit, that the application contains all of the information necessary for processing the application.

(23) (i) Significant means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

- Carbon monoxide: 100 tons per year (tpy)
- Nitrogen oxides: 40 tpy
- Sulfur dioxide: 40 tpy
- Particulate matter:
  - 25 tpy of particulate matter emissions;
  - 15 tpy of PM<sub>10</sub> emissions
- Ozone: 40 tpy of volatile organic compounds
- Lead: 0.6 tpy
- Asbestos: 0.007 tpy

- Beryllium: 0.0004 tpy
- Mercury: 0.1 tpy
- Vinyl chloride: 1 tpy
- Fluorides: 3 tpy
- Sulfuric acid mist: 7 tpy
- Hydrogen sulfide (H<sub>2</sub>S): 10 tpy
- Total reduced sulfur (including H<sub>2</sub>S): 10 tpy
- Reduced sulfur compounds (including H<sub>2</sub>S): 10 tpy
- Municipal waste combustor organics (measured as total tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans):  $3.2 \times 10^{-6}$  megagrams per year ( $3.5 \times 10^{-6}$  tons per year). Municipal waste combustor metals (measured as particulate matter): 14 megagrams per year (15 tons per year)
- Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tons per year)
- Municipal solid waste landfills emissions (measured as nonmethane organic compounds): 45 megagrams per year (50 tons per year)

(ii) Significant means, in reference to a net emissions increase or the potential of a source to emit a pollutant subject to regulation under the Act that paragraph (b)(23)(i) of this section, does not list, any emissions rate.

(iii) Notwithstanding paragraph (b)(23)(i) of this section, significant means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a Class I area, and have an impact on such area equal to or greater than 1 µg/m<sup>3</sup>, (24-hour average).

(24) Federal Land Manager means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(25) High terrain means any area having an elevation 900 feet or more above the base of the stack of a source.

(26) Low terrain means any area other than high terrain.

(27) Indian Reservation means any federally recognized reservation established by Treaty, Agreement, executive order, or act of Congress.

(28) Indian Governing Body means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self government.

(29) Adverse impact on visibility means visibility impairment which interferes

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with the management, protection, preservation or enjoyment of the visitor's visual experience of the Federal Class I area. This determination must be made on a case-by-case basis taking into account the geographic extent, intensity, duration, frequency and time of visibility impairment, and how these factors correlate with (1) times of visitor use of the Federal Class I area, and (2) the frequency and timing of natural conditions that reduce visibility.

(30) Volatile organic compounds (VOC) is as defined in §51.100(s) of this chapter.

(31) Electric utility steam generating unit means 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 MW 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.

(32) Pollution control project means any activity or project undertaken at an existing electric utility steam generating unit for purposes of reducing emissions from such unit. Such activities or projects are limited to:

(i) The installation of conventional or innovative pollution control technology, including but not limited to advanced flue gas desulfurization, sorbent injection for sulfur dioxide and nitrogen oxides controls and electrostatic precipitators;

(ii) An activity or project to accommodate switching to a fuel which is less polluting than the fuel in use prior to the activity or project, including, but not limited to natural gas or coal re-burning, or the co-firing of natural gas and other fuels for the purpose of controlling emissions;

(iii) A permanent clean coal technology demonstration project conducted under title II, section 101(d) of the Further Continuing Appropriations Act of 1985 (sec. 5903(d) of title 42 of the United States Code), or subsequent appropriations, up to a total amount of \$2,500,000,000 for commercial dem-

onstration of clean coal technology, or similar projects funded through appropriations for the Environmental Protection Agency; or

(iv) A permanent clean coal technology demonstration project that constitutes a repowering project.

(33) Representative actual annual emissions means the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change or change in the method of operation of a unit, (or a different consecutive two-year period within 10 years after that change, where the Administrator determines that such period is more representative of normal source operations), considering the effect any such change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization. In projecting future emissions the Administrator shall:

(i) Consider all relevant information, including but not limited to, historical operational data, the company's own representations, filings with the State or Federal regulatory authorities, and compliance plans under title IV of the Clean Air Act; and

(ii) Exclude, in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

(34) Clean coal technology means any technology, including technologies applied at the precombustion, combustion, or post combustion stage, at a new or existing facility which 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 which was not in widespread use as of November 15, 1990.

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(35) Clean coal technology demonstration project means a project using funds appropriated under the heading "Department of Energy-Clean Coal Technology", up to a total amount of \$2,500,000,000 for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the Environmental Protection Agency. The Federal contribution for a qualifying project shall be at least 20 percent of the total cost of the demonstration project.

(36) Temporary clean coal technology demonstration project means a clean coal technology demonstration project that is operated for a period of 5 years or less, and which complies with the State implementation plans for the State in which the project is located and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(37) (i) Repowering means replacement of an existing coal-fired boiler with one of the following clean coal technologies: atmospheric or pressurized fluidized bed combustion, integrated gasification combined cycle, magnetohydrodynamics, direct and indirect coal-fired turbines, integrated gasification fuel cells, or as determined by the Administrator, in consultation with the Secretary of Energy, a derivative of one or more of these technologies, and any other technology capable of controlling multiple combustion emissions simultaneously with improved boiler or generation efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of November 15, 1990.

(ii) Repowering shall also include any oil and/or gas-fired unit which has been awarded clean coal technology demonstration funding as of January 1, 1991, by the Department of Energy.

(iii) The Administrator shall give expedited consideration to permit applications for any source that satisfies the requirements of this subsection and is granted an extension under section 409 of the Clean Air Act.

(38) Reactivation of a very clean coal-fired electric utility steam generating unit means any physical change or change in the method of operation associated

with the commencement of commercial operations by a coal-fired utility unit after a period of discontinued operation where the unit:

(i) Has not been in operation for the two-year period prior to the enactment of the Clean Air Act Amendments of 1990, and the emissions from such unit continue to be carried in the permitting authority's emissions inventory at the time of enactment;

(ii) Was equipped prior to shut-down with a continuous system of emissions control that achieves a removal efficiency for sulfur dioxide of no less than 85 percent and a removal efficiency for particulates of no less than 98 percent;

(iii) Is equipped with low-NO<sub>x</sub> burners prior to the time of commencement of operations following reactivation; and

(iv) Is otherwise in compliance with the requirements of the Clean Air Act.

(c) Ambient air increments. In areas designated as Class I, II or III, increases in pollutant concentration over the baseline concentration shall be limited to the following:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Class I	
Particulate matter:	
PM-10, annual arithmetic mean .....	4
PM-10, 24-hr maximum .....	8
Sulfur dioxide:	
Annual arithmetic mean .....	2
24-hr maximum .....	5
3-hr maximum .....	25
Nitrogen dioxide:	
Annual arithmetic mean .....	2.5
Class II	
Particulate matter:	
PM-10, annual arithmetic mean .....	17
PM-10, 24-hr maximum .....	30
Sulfur dioxide:	
Annual arithmetic mean .....	20
24-hr maximum .....	91
3-hr maximum .....	512
Nitrogen dioxide:	
Annual arithmetic mean .....	25
Class III	
Particulate matter	
PM-10, annual arithmetic mean .....	34
PM-10, 24-hr maximum .....	60
Sulfur dioxide:	
Annual arithmetic mean .....	40
24-hr maximum .....	182

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Pollutant	Maximum allowable increase (micrograms per cubic meter)
3-hr maximum .....	700
Nitrogen dioxide:	
Annual arithmetic mean .....	50

For any period other than an annual period, the applicable maximum allowable increase may be exceeded during one such period per year at any one location.

(d) Ambient air ceilings. No concentration of a pollutant shall exceed:

(1) The concentration permitted under the national secondary ambient air quality standard, or

(2) The concentration permitted under the national primary ambient air quality standard, whichever concentration is lowest for the pollutant for a period of exposure.

(e) Restrictions on area classifications. (1) All of the following areas which were in existence on August 7, 1977, shall be Class I areas and may not be redesignated:

- (i) International parks,
- (ii) National wilderness areas which exceed 5,000 acres in size,
- (iii) National memorial parks which exceed 5,000 acres in size, and
- (iv) National parks which exceed 6,000 acres in size.

(2) Areas which were redesignated as Class I under regulations promulgated before August 7, 1977, shall remain Class I, but may be redesignated as provided in this section.

(3) Any other area, unless otherwise specified in the legislation creating such an area, is initially designated Class II, but may be redesignated as provided in this section.

(4) The following areas may be redesignated only as Class I or II:

(i) An area which as of August 7, 1977, exceeded 10,000 acres in size and was a national monument, a national primitive area, a national preserve, a national recreational area, a national wild and scenic river, a national wild-life refuge, a national lakeshore or seashore; and

(ii) A national park or national wilderness area established after August 7, 1977, which exceeds 10,000 acres in size.

(f) [Reserved]

(g) Redesignation. (1) All areas (except as otherwise provided under paragraph (e) of this section) are designated Class II as of December 5, 1974. Redesignation (except as otherwise precluded by paragraph (e) of this section) may be proposed by the respective States or Indian Governing Bodies, as provided below, subject to approval by the Administrator as a revision to the applicable State implementation plan.

(2) The State may submit to the Administrator a proposal to redesignate areas of the State Class I or Class II provided that:

(i) At least one public hearing has been held in accordance with procedures established in §51.102 of this chapter;

(ii) Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation were notified at least 30 days prior to the public hearing;

(iii) A discussion of the reasons for the proposed redesignation, including a satisfactory description and analysis of the health, environmental, economic, social and energy effects of the proposed redesignation, was prepared and made available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contained appropriate notification of the availability of such discussion;

(iv) Prior to the issuance of notice respecting the redesignation of an area that includes any Federal lands, the State has provided written notice to the appropriate Federal Land Manager and afforded adequate opportunity (not in excess of 60 days) to confer with the State respecting the redesignation and to submit written comments and recommendations. In redesignating any area with respect to which any Federal Land Manager had submitted written comments and recommendations, the State shall have published a list of any inconsistency between such redesignation and such comments and recommendations (together with the reasons for making such redesignation against the recommendation of the Federal Land Manager); and

(v) The State has proposed the redesignation after consultation with the elected leadership of local and other

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substate general purpose governments in the area covered by the proposed redesignation.

(3) Any area other than an area to which paragraph (e) of this section refers may be redesignated as Class III if—

(i) The redesignation would meet the requirements of paragraph (g)(2) of this section;

(ii) The redesignation, except any established by an Indian Governing Body, has been specifically approved by the Governor of the State, after consultation with the appropriate committees of the legislature, if it is in session, or with the leadership of the legislature, if it is not in session (unless State law provides that the redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area to be redesignated enact legislation or pass resolutions concurring in the redesignation:

(iii) The redesignation would not cause, or contribute to, a concentration of any air pollutant which would exceed any maximum allowable increase permitted under the classification of any other area or any national ambient air quality standard; and

(iv) Any permit application for any major stationary source or major modification, subject to review under paragraph (l) of this section, which could receive a permit under this section only if the area in question were redesignated as Class III, and any material submitted as part of that application, were available insofar as was practicable for public inspection prior to any public hearing on redesignation of the area as Class III.

(4) Lands within the exterior boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body. The appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III: Provided, That:

(i) The Indian Governing Body has followed procedures equivalent to those required of a State under paragraphs (g)(2), (g)(3)(iii), and (g)(3)(iv) of this section; and

(ii) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located and which border the Indian Reservation.

(5) The Administrator shall disapprove, within 90 days of submission, a proposed redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this paragraph or is inconsistent with paragraph (e) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(6) If the Administrator disapproves any proposed redesignation, the State or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator.

(h) Stack heights. (1) The degree of emission limitation required for control of any air pollutant under this section shall not be affected in any manner by—

(i) So much of the stack height of any source as exceeds good engineering practice, or

(ii) Any other dispersion technique.

(2) Paragraph (h)(1) of this section shall not apply with respect to stack heights in existence before December 31, 1970, or to dispersion techniques implemented before then.

(i) Review of major stationary sources and major modifications—Source applicability and exemptions. (1) No stationary source or modification to which the requirements of paragraphs (j) through (r) of this section apply shall begin actual construction without a permit which states that the stationary source or modification would meet those requirements. The Administrator has authority to issue any such permit.

(2) The requirements of paragraphs (j) through (r) of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the Act that it would emit, except as this section otherwise provides.

(3) The requirements of paragraphs (j) through (r) of this section apply

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only to any major stationary source or major modification that would be constructed in an area designated as attainment or unclassifiable under section 107(d)(1)(D) or (E) of the Act.

(4) The requirements of paragraphs (j) through (r) of this section shall not apply to a particular major stationary source or major modification, if;

(i) Construction commenced on the source or modification before August 7, 1977. The regulations at 40 CFR 52.21 as in effect before August 7, 1977, shall govern the review and permitting of any such source or modification; or

(ii) The source or modification was subject to the review requirements of 40 CFR 52.21(d)(1) as in effect before March 1, 1978, and the owner or operator:

(a) Obtained under 40 CFR 52.21 a final approval effective before March 1, 1978;

(b) Commenced construction before March 19, 1979; and

(c) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time; or

(iii) The source or modification was subject to 40 CFR 52.21 as in effect before March 1, 1978, and the review of an application for approval for the stationary source or modification under 40 CFR 52.21 would have been completed by March 1, 1978, but for an extension of the public comment period pursuant to a request for such an extension. In such a case, the application shall continue to be processed, and granted or denied, under 40 CFR 52.21 as in effect prior to March 1, 1978; or

(iv) The source or modification was not subject to 40 CFR 52.21 as in effect before March 1, 1978, and the owner or operator:

(a) Obtained all final Federal, state and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before March 1, 1978;

(b) Commenced construction before March 19, 1979; and

(c) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time; or

(v) The source or modification was not subject to 40 CFR 52.21 as in effect

on June 19, 1978 or under the partial stay of regulations published on February 5, 1980 (45 FR 7800), and the owner or operator:

(a) Obtained all final Federal, state and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before August 7, 1980;

(b) Commenced construction within 18 months from August 7, 1980, or any earlier time required under the applicable State Implementation Plan; and

(c) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time; or

(vi) The source or modification would be a nonprofit health or nonprofit educational institution, or a major modification would occur at such an institution, and the governor of the state in which the source or modification would be located requests that it be exempt from those requirements; or

(vii) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(a) Coal cleaning plants (with thermal dryers);

(b) Kraft pulp mills;

(c) Portland cement plants;

(d) Primary zinc smelters;

(e) Iron and steel mills;

(f) Primary aluminum ore reduction plants;

(g) Primary copper smelters;

(h) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(i) Hydrofluoric, sulfuric, or nitric acid plants;

(j) Petroleum refineries;

(k) Lime plants;

(l) Phosphate rock processing plants;

(m) Coke oven batteries;

(n) Sulfur recovery plants;

(o) Carbon black plants (furnace process);

(p) Primary lead smelters;

(q) Fuel conversion plants;

(r) Sintering plants;

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(s) Secondary metal production plants;

(t) Chemical process plants;

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

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

(w) Taconite ore processing plants;

(x) Glass fiber processing plants;

(y) Charcoal production plants;

(z) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(aa) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act; or

(viii) The source is a portable stationary source which has previously received a permit under this section, and

(a) The owner or operator proposes to relocate the source and emissions of the source at the new location would be temporary; and

(b) The emissions from the source would not exceed its allowable emissions; and

(c) The emissions from the source would impact no Class I area and no area where an applicable increment is known to be violated; and

(d) Reasonable notice is given to the Administrator prior to the relocation identifying the proposed new location and the probable duration of operation at the new location. Such notice shall be given to the Administrator not less than 10 days in advance of the proposed relocation unless a different time duration is previously approved by the Administrator.

(ix) The source or modification was not subject to §52.21, with respect to particulate matter, as in effect before July 31, 1987, and the owner or operator:

(a) Obtained all final Federal, State, and local preconstruction approvals or permits necessary under the applicable State implementation plan before July 31, 1987;

(b) Commenced construction within 18 months after July 31, 1987, or any earlier time required under the State implementation plan; and

(c) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable period of time.

(x) The source or modification was subject to 40 CFR 52.21, with respect to particulate matter, as in effect before July 31, 1987 and the owner or operator submitted an application for a permit under this section before that date, and the Administrator subsequently determines that the application as submitted was complete with respect to the particular matter requirements then in effect in the section. Instead, the requirements of paragraphs (j) through (r) of this section that were in effect before July 31, 1987 shall apply to such source or modification.

(5) The requirements of paragraphs (j) through (r) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as non-attainment under section 107 of the Act.

(6) The requirements of paragraphs (k), (m) and (o) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant, if the allowable emissions of that pollutant from the source, or the net emissions increase of that pollutant from the modification:

(i) Would impact no Class I area and no area where an applicable increment is known to be violated, and

(ii) Would be temporary.

(7) The requirements of paragraphs (k), (m) and (o) of this section as they relate to any maximum allowable increase for a Class II area shall not apply to a major modification at a stationary source that was in existence on March 1, 1978, if the net increase in allowable emissions of each pollutant subject to regulation under the Act from the modification after the application of best available control technology would be less than 50 tons per year.

(8) The Administrator may exempt a stationary source or modification from the requirements of paragraph (m) of this section, with respect to monitoring for a particular pollutant if:

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(i) The emissions increase of the pollutant from the new source or the net emissions increase of the pollutant from the modification would cause, in any area, air quality impacts less than the following amounts:

Carbon monoxide—575  $\mu\text{g}/\text{m}^3$ , 8-hour average;  
 Nitrogen dioxide—14  $\mu\text{g}/\text{m}^3$ , annual average;  
 Particulate matter—10  $\mu\text{g}/\text{m}^3$  of PM-10, 24-hour average;  
 Sulfur dioxide—13  $\mu\text{g}/\text{m}^3$ , 24-hour average;  
 Ozone;<sup>1</sup>  
 Lead—0.1  $\mu\text{g}/\text{m}^3$ , 3-month average;  
 Mercury—0.25  $\mu\text{g}/\text{m}^3$ , 24-hour average;  
 Beryllium—0.001  $\mu\text{g}/\text{m}^3$ , 24-hour average;  
 Fluorides—0.25  $\mu\text{g}/\text{m}^3$ , 24-hour average;  
 Vinyl chloride—15  $\mu\text{g}/\text{m}^3$ , 24-hour average;  
 Total reduced sulfur—10  $\mu\text{g}/\text{m}^3$ , 1-hour average;  
 Hydrogen sulfide—0.2  $\mu\text{g}/\text{m}^3$ , 1-hour average;  
 Reduced sulfur compounds—10  $\mu\text{g}/\text{m}^3$ , 1-hour average; or

(ii) The concentrations of the pollutant in the area that the source or modification would affect are less than the concentrations listed in paragraph (i)(8)(i) of this section, or the pollutant is not listed in paragraph (i)(8)(i) of this section.

(9) The requirements for best available control technology in paragraph (j) of this section and the requirements for air quality analyses in paragraph (m)(1) of this section, shall not apply to a particular stationary source or modification that was subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submitted an application for a permit under those regulations before August 7, 1980, and the Administrator subsequently determines that the application as submitted before that date was complete. Instead, the requirements at 40 CFR 52.21(j) and (n) as in effect on June 19, 1978 apply to any such source or modification.

(10)(i) The requirements for air quality monitoring in paragraphs (m)(1) (ii) through (iv) of this section shall not apply to a particular source or modification that was subject to 40 CFR

52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submits an application for a permit under this section on or before June 8, 1981, and the Administrator subsequently determines that the application as submitted before that date was complete with respect to the requirements of this section other than those in paragraphs (m)(1) (ii) through (iv) of this section, and with respect to the requirements for such analyses at 40 CFR 52.21(m)(2) as in effect on June 19, 1978. Instead, the latter requirements shall apply to any such source or modification.

(ii) The requirements for air quality monitoring in paragraphs (m)(1) (ii) through (iv) of this section shall not apply to a particular source or modification that was not subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submits an application for a permit under this section on or before June 8, 1981, and the Administrator subsequently determines that the application as submitted before that date was complete, except with respect to the requirements in paragraphs (m)(1) (ii) through (iv).

(11)(i) At the discretion of the Administrator, the requirements for air quality monitoring of PM<sub>10</sub> in paragraphs (m)(1) (i)—(iv) of this section may not apply to a particular source or modification when the owner or operator of the source or modification submits an application for a permit under this section on or before June 1, 1988 and the Administrator subsequently determines that the application as submitted before that date was complete, except with respect to the requirements for monitoring particulate matter in paragraphs (m)(1) (i)—(iv).

(ii) The requirements for air quality monitoring of PM<sub>10</sub> in paragraphs (m)(1), (ii) and (iv) and (m)(3) of this section shall apply to a particular source or modification if the owner or operator of the source or modification submits an application for a permit under this section after June 1, 1988 and no later than December 1, 1988. The data shall have been gathered over at least the period from February 1, 1988 to the date the application becomes otherwise complete in accordance with

<sup>1</sup>No de minimis air quality level is provided for ozone. However, any net increase of 100 tons per year or more of volatile organic compounds subject to PSD would be required to perform an ambient impact analysis including the gathering of ambient air quality data.

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the provisions set forth under paragraph (m)(1)(viii) of this section, except that if the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data over a shorter period (not to be less than 4 months), the data that paragraph (m)(1)(iii) requires shall have been gathered over a shorter period.

(12) The requirements of paragraph (k)(2) of this section shall not apply to a stationary source or modification with respect to any maximum allowable increase for nitrogen oxides if the owner or operator of the source or modification submitted an application for a permit under this section before the provisions embodying the maximum allowable increase took effect as part of the applicable implementation plan and the Administrator subsequently determined that the application as submitted before that date was complete.

(13) The requirements in paragraph (k)(2) of this section shall not apply to a stationary source or modification with respect to any maximum allowable increase for PM-10 if (i) the owner or operator of the source or modification submitted an application for a permit under this section before the provisions embodying the maximum allowable increases for PM-10 took effect in an implementation plan to which this section applies, and (ii) the Administrator subsequently determined that the application as submitted before that date was otherwise complete. Instead, the requirements in paragraph (k)(2) shall apply with respect to the maximum allowable increases for TSP as in effect on the date the application was submitted.

(j) Control technology review. (1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emissions standard and standard of performance under 40 CFR parts 60 and 61.

(2) A new major stationary source shall apply best available control technology for each pollutant subject to regulation under the Act that it would have the potential to emit in significant amounts.

(3) A major modification shall apply best available control technology for each pollutant subject to regulation under the Act for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

(4) For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the latest reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

(k) Source impact analysis. The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of:

(1) Any national ambient air quality standard in any air quality control region; or

(2) Any applicable maximum allowable increase over the baseline concentration in any area.

(l) Air quality models.

(1) All estimates of ambient concentrations required under this paragraph shall be based on the applicable air quality models, data bases, and other requirements specified in appendix W of part 51 of this chapter ("Guideline on Air Quality Models (Revised)" (1986), supplement A (1987), supplement B (1993) and supplement C (1994)). The Guideline and its supplements (EPA Publication No. 450/2-78-027R) are also for sale from the U.S. Department of Commerce, National Technical Information Service, 5825 Port Royal Road, Springfield, VA 22161.

(2) Where an air quality impact model specified in appendix W of part

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51 of this chapter (“Guideline on Air Quality Models (Revised)” (1986), supplement A (1987), supplement B (1993) and supplement C (1994)) are 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 developed in accordance with paragraph (q) of this section.

(m) Air quality analysis—(1) Preapplication analysis. (i) Any application for a permit under this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(a) For the source, each pollutant that it would have the potential to omit in a significant amount;

(b) For the modification, each pollutant for which it would result in a significant net emissions increase.

(ii) With respect to any such pollutant for which no National Ambient Air Quality Standard exists, the analysis shall contain such air quality monitoring data as the Administrator determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(iii) With respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

(iv) In general, the continuous air quality monitoring data that is required shall have been gathered over a period of at least one year and shall represent at least the year preceding receipt of the application, except that, if the Administrator determines that a complete and adequate analysis can be

accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data that is required shall have been gathered over at least that shorter period.

(v) For any application which becomes complete, except as to the requirements of paragraphs (m)(1) (iii) and (iv) of this section, between June 8, 1981, and February 9, 1982, the data that paragraph (m)(1)(iii) of this section, requires shall have been gathered over at least the period from February 9, 1981, to the date the application becomes otherwise complete, except that:

(a) If the source or modification would have been major for that pollutant under 40 CFR 52.21 as in effect on June 19, 1978, any monitoring data shall have been gathered over at least the period required by those regulations.

(b) If the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data over a shorter period (not to be less than four months), the data that paragraph (m)(1)(iii) of this section, requires shall have been gathered over at least that shorter period.

(c) If the monitoring data would relate exclusively to ozone and would not have been required under 40 CFR 52.21 as in effect on June 19, 1978, the Administrator may waive the otherwise applicable requirements of this paragraph (v) to the extent that the applicant shows that the monitoring data would be unrepresentative of air quality over a full year.

(vi) The owner or operator of a proposed stationary source or modification of volatile organic compounds who satisfies all conditions of 40 CFR part 51 Appendix S, section IV may provide post-approval monitoring data for ozone in lieu of providing preconstruction data as required under paragraph (m)(1) of this section.

(vii) For any application that becomes complete, except as to the requirements of paragraphs (m)(1) (iii) and (iv) pertaining to PM<sub>10</sub>, after December 1, 1988 and no later than August 1, 1989 the data that paragraph (m)(1)(iii) requires shall have been gathered over at least the period from

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August 1, 1988 to the date the application becomes otherwise complete, except that if the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data over a shorter period (not to be less than 4 months), the data that paragraph (m)(1)(iii) requires shall have been gathered over that shorter period.

(viii) With respect to any requirements for air quality monitoring of PM<sub>10</sub> under paragraphs (i)(11) (i) and (ii) of this section the owner or operator of the source or modification shall use a monitoring method approved by the Administrator and shall estimate the ambient concentrations of PM<sub>10</sub> using the data collected by such approved monitoring method in accordance with estimating procedures approved by the Administrator.

(2) Post-construction monitoring. The owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification, conduct such ambient monitoring as the Administrator determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in any area.

(3) Operations of monitoring stations. The owner or operator of a major stationary source or major modification shall meet the requirements of Appendix B to part 58 of this chapter during the operation of monitoring stations for purposes of satisfying paragraph (m) of this section.

(n) Source information. The owner or operator of a proposed source or modification shall submit all information necessary to perform any analysis or make any determination required under this section.

(l) With respect to a source or modification to which paragraphs (j), (l), (n) and (p) of this section apply, such information shall include:

(i) A description of the nature, location, design capacity, and typical operating schedule of the source or modification, including specifications and drawings showing its design and plant layout;

(ii) A detailed schedule for construction of the source or modification;

(iii) A detailed description as to what system of continuous emission reduction is planned for the source or modification, emission estimates, and any other information necessary to determine that best available control technology would be applied.

(2) Upon request of the Administrator, the owner or operator shall also provide information on:

(i) The air quality impact of the source or modification, including meteorological and topographical data necessary to estimate such impact; and

(ii) The air quality impacts, and the nature and extent of any or all general commercial, residential, industrial, and other growth which has occurred since August 7, 1977, in the area the source or modification would affect.

(o) Additional impact analyses. (1) The owner or operator shall provide an analysis of the impairment to visibility, soils and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial and other growth associated with the source or modification. The owner or operator need not provide an analysis of the impact on vegetation having no significant commercial or recreational value.

(2) The owner or operator shall provide an analysis of the air quality impact projected for the area as a result of general commercial, residential, industrial and other growth associated with the source or modification.

(3) Visibility monitoring. The Administrator may require monitoring of visibility in any Federal class I area near the proposed new stationary source for major modification for such purposes and by such means as the Administrator deems necessary and appropriate.

(p) Sources impacting Federal Class I areas—additional requirements—(1) Notice to Federal land managers. The Administrator shall provide written notice of any permit application for a proposed major stationary source or major modification, the emissions from which may affect a Class I area, to the Federal land manager and the Federal official charged with direct responsibility for management of any lands within any such area. Such notification shall include a copy of all information

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relevant to the permit application and shall be given within 30 days of receipt and at least 60 days prior to any public hearing on the application for a permit to construct. Such notification shall include an analysis of the proposed source's anticipated impacts on visibility in the Federal Class I area. The Administrator shall also provide the Federal land manager and such Federal officials with a copy of the preliminary determination required under paragraph (q) of this section, and shall make available to them any materials used in making that determination, promptly after the Administrator makes such determination. Finally, the Administrator shall also notify all affected Federal land managers within 30 days of receipt of any advance notification of any such permit application.

(2) Federal Land Manager. The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands have an affirmative responsibility to protect the air quality related values (including visibility) of such lands and to consider, in consultation with the Administrator, whether a proposed source or modification will have an adverse impact on such values.

(3) Visibility analysis. The Administrator shall consider any analysis performed by the Federal land manager, provided within 30 days of the notification required by paragraph (p)(1) of this section, that shows that a proposed new major stationary source or major modification may have an adverse impact on visibility in any Federal Class I area. Where the Administrator finds that such an analysis does not demonstrate to the satisfaction of the Administrator that an adverse impact on visibility will result in the Federal Class I area, the Administrator must, in the notice of public hearing on the permit application, either explain his decision or give notice as to where the explanation can be obtained.

(4) Denial—impact on air quality related values. The Federal Land Manager of any such lands may demonstrate to the Administrator that the emissions from a proposed source or modification would have an adverse impact on the air quality-related values (including visibility) of those lands, notwith-

standing that the change in air quality resulting from emissions from such source or modification would not cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the Administrator concurs with such demonstration, then he shall not issue the permit.

(5) Class I variances. The owner or operator of a proposed source or modification may demonstrate to the Federal Land Manager that the emissions from such source or modification would have no adverse impact on the air quality related values of any such lands (including visibility), notwithstanding that the change in air quality resulting from emissions from such source or modification would cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the Federal land manager concurs with such demonstration and he so certifies, the State may authorize the Administrator: Provided, That the applicable requirements of this section are otherwise met, to issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide, particulate matter, and nitrogen oxides would not exceed the following maximum allowable increases over minor source baseline concentration for such pollutants:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Particulate matter:	
PM-10, annual arithmetic mean .....	17
PM-10, 24-hr maximum .....	30
Sulfur dioxide:	
Annual arithmetic mean .....	20
24-hr maximum .....	91
3-hr maximum .....	325
Nitrogen dioxide:	
Annual arithmetic mean .....	25

(6) Sulfur dioxide variance by Governor with Federal Land Manager's concurrence. The owner or operator of a proposed source or modification which cannot be approved under paragraph (q)(4) of this section may demonstrate to the Governor that the source cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for a period of twenty-four hours

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or less applicable to any Class I area and, in the case of Federal mandatory Class I areas, that a variance under this clause would not adversely affect the air quality related values of the area (including visibility). The Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may, after notice and public hearing, grant a variance from such maximum allowable increase. If such variance is granted, the Administrator shall issue a permit to such source or modification pursuant to the requirements of paragraph (q)(7) of this section: Provided, That the applicable requirements of this section are otherwise met.

(7) Variance by the Governor with the President's concurrence. In any case where the Governor recommends a variance in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that the variance is in the national interest. If the variance is approved, the Administrator shall issue a permit pursuant to the requirements of paragraph (q)(7) of this section: Provided, That the applicable requirements of this section are otherwise met.

(8) Emission limitations for Presidential or gubernatorial variance. In the case of a permit issued pursuant to paragraph (q) (5) or (6) of this section the source or modification shall comply with such emission limitations as may be necessary to assure that emissions of sulfur dioxide from the source or modification would not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which would exceed the following maximum allowable increases over the baseline concentration and to assure that such emissions would not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less for more than 18 days, not necessarily consecutive, during any annual period:

MAXIMUM ALLOWABLE INCREASE [Micrograms per cubic meter]		
Period of exposure	Terrain areas	
	Low	High
24-hr maximum .....	36	62
3-hr maximum .....	130	221

(q) Public participation. The Administrator shall follow the applicable procedures of 40 CFR part 124 in processing applications under this section. The Administrator shall follow the procedures at 40 CFR 52.21(r) as in effect on June 19, 1979, to the extent that the procedures of 40 CFR part 124 do not apply.

(r) Source obligation. (1) Any owner or operator who constructs or operates a source or modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct, or any owner or operator of a source or modification subject to this section who commences construction after the effective date of these regulations without applying for and receiving approval hereunder, shall be subject to appropriate enforcement action.

(2) Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The Administrator may extend the 18-month period upon a satisfactory showing that an extension is justified. This provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within 18 months of the projected and approved commencement date.

(3) Approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the State implementation plan and any other requirements under local, State, or Federal law.

(4) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation

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which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements or paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

(s) Environmental impact statements. Whenever any proposed source or modification is subject to action by a Federal Agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321), review by the Administrator conducted pursuant to this section shall be coordinated with the broad environmental reviews under that Act and under section 309 of the Clean Air Act to the maximum extent feasible and reasonable.

(t) Disputed permits or redesignations. If any State affected by the redesignation of an area by an Indian Governing Body, or any Indian Governing Body of a tribe affected by the redesignation of an area by a State, disagrees with such redesignation, or if a permit is proposed to be issued for any major stationary source or major modification proposed for construction in any State which the Governor of an affected State or Indian Governing Body of an affected tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or Indian Reservation, the Governor or Indian Governing Body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian Governing Body involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable State implementation plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Adminis-

trator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

(u) Delegation of authority. (1) The Administrator shall have the authority to delegate his responsibility for conducting source review pursuant to this section, in accordance with paragraphs (v) (2) and (3) of this section.

(2) Where the Administrator delegates the responsibility for conducting source review under this section to any agency other than a Regional Office of the Environmental Protection Agency, the following provisions shall apply:

(i) Where the delegate agency is not an air pollution control agency, it shall consult with the appropriate State and local air pollution control agency prior to making any determination under this section. Similarly, where the delegate agency does not have continuing responsibility for managing land use, it shall consult with the appropriate State and local agency primarily responsible for managing land use prior to making any determination under this section.

(ii) The delegate agency shall send a copy of any public comment notice required under paragraph (r) of this section to the Administrator through the appropriate Regional Office.

(3) The Administrator's authority for reviewing a source or modification located on an Indian Reservation shall not be redelegated other than to a Regional Office of the Environmental Protection Agency, except where the State has assumed jurisdiction over such land under other laws. Where the State has assumed such jurisdiction, the Administrator may delegate his authority to the States in accordance with paragraph (v)(2) of this section.

(4) In the case of a source or modification which proposes to construct in a class III area, emissions from which would cause or contribute to air quality exceeding the maximum allowable increase applicable if the area were designated a class II area, and where no standard under section 111 of the act has been promulgated for such source

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category, the Administrator must approve the determination of best available control technology as set forth in the permit.

(v) Innovative control technology. (1) An owner or operator of a proposed major stationary source or major modification may request the Administrator in writing no later than the close of the comment period under 40 CFR 124.10 to approve a system of innovative control technology.

(2) The Administrator shall, with the consent of the governor(s) of the affected state(s), determine that the source or modification may employ a system of innovative control technology, if:—

(i) The proposed control system would not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function;

(ii) The owner or operator agrees to achieve a level of continuous emissions reduction equivalent to that which would have been required under paragraph (j)(2) of this section, by a date specified by the Administrator. Such date shall not be later than 4 years from the time of startup or 7 years from permit issuance;

(iii) The source or modification would meet the requirements of paragraphs (j) and (k) of this section, based on the emissions rate that the stationary source employing the system of innovative control technology would be required to meet on the date specified by the Administrator;

(iv) The source or modification would not before the date specified by the Administrator:

(a) Cause or contribute to a violation of an applicable national ambient air quality standard; or

(b) Impact any area where an applicable increment is known to be violated; and

(v) All other applicable requirements including those for public participation have been met.

(vi) The provisions of paragraph (p) of this section (relating to Class I areas) have been satisfied with respect to all periods during the life of the source or modification.

(3) The Administrator shall withdraw any approval to employ a system of in-

novative control technology made under this section, if:

(i) The proposed system fails by the specified date to achieve the required continuous emissions reduction rate; or

(ii) The proposed system fails before the specified date so as to contribute to an unreasonable risk to public health, welfare, or safety; or

(iii) The Administrator decides at any time that the proposed system is unlikely to achieve the required level of control or to protect the public health, welfare, or safety.

(4) If a source or modification fails to meet the required level of continuous emission reduction within the specified time period or the approval is withdrawn in accordance with paragraph (v)(3) of this section, the Administrator may allow the source or modification up to an additional 3 years to meet the requirement for the application of best available control technology through use of a demonstrated system of control.

(w) Permit rescission. (1) Any permit issued under this section or a prior version of this section shall remain in effect, unless and until it expires under paragraph (s) of this section or is rescinded.

(2) Any owner or operator of a stationary source or modification who holds a permit for the source or modification which was issued under 40 CFR 52.21 as in effect on July 30, 1987, or any earlier version of this section, may request that the Administrator rescind the permit or a particular portion of the permit.

(3) The Administrator shall grant an application for rescission if the application shows that this section would not apply to the source or modification.

(4) If the Administrator rescinds a permit under this paragraph, the public shall be given adequate notice of the rescission. Publication of an announcement of rescission in a newspaper of general circulation in the affected region within 60 days of the rescission shall be considered adequate notice.

[43 FR 26403, June 19, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 52.21, see the List of CFR

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Sections Affected in the Finding Aids section of this volume.

**§ 52.23 Violation and enforcement.**

Failure to comply with any provisions of this part, or with any approved regulatory provision of a State implementation plan, or with any permit condition or permit denial issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources, or with any permit limitation or condition contained within an operating permit issued under an EPA-approved program that is incorporated into the State implementation plan, shall render the person or governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act. With regard to compliance schedules, a person or Governmental entity will be considered to have failed to comply with the requirements of this part if it fails to timely submit any required compliance schedule, if the compliance schedule when submitted does not contain each of the elements it is required to contain, or if the person or Governmental entity fails to comply with such schedule.

[39 FR 33512, Sept. 18, 1974, as amended at 54 FR 27285, June 28, 1989]

**§ 52.24 Statutory restriction on new sources.**

(a) After June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area as designated in 40 CFR part 81, subpart C ("nonattainment area") to which any State implementation plan applies, if the emissions from such source will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction, such plan meets the requirements of Part D, Title I, of the Clean Air Act, as amended (42 U.S.C. 7501 et seq.) ("Part D"). This section shall not apply to any nonattainment area once EPA has fully approved the State implementation plan for the area as meeting the requirements of Part D.

(b) For any nonattainment area for which the SIP satisfies the requirements of Part D, permits to construct and operate new or modified major stationary sources may be issued only if the applicable SIP is being carried out for the nonattainment area in which the proposed source is to be constructed or modified in accordance with the requirements of Part D.

(c) The Emission Offset Interpretative Ruling, 40 CFR part 51, Appendix S ("Offset Ruling"), rather than paragraphs (a) and (b), governs permits to construct and operate applied for before the deadline for having a revised SIP in effect that satisfies Part D. This deadline is July 1, 1979, for areas designated as nonattainment on March 3, 1978 (42 FR 8962). The revised SIP, rather than paragraph (a) of this section, governs permits applied for during a period when the revised SIP is in compliance with Part D.

(d) The restrictions in paragraphs (a) and (b) apply only to major stationary sources of emissions that cause or contribute to concentrations of the pollutant for which the nonattainment area was designated as nonattainment, and for which the SIP does not meet the requirements of Part D or is not being carried out in accordance with the requirements of Part D.

(e) For any area designated as nonattainment for any national ambient air quality standard, the restrictions in paragraphs (a) and (b) of this section, shall apply to any major stationary source or major modification that would be major for the pollutant for which the area is designated nonattainment, if the stationary source or major modification would be constructed anywhere in the designated nonattainment areas. A major stationary source or major modification that is major for volatile organic compounds is also major for ozone.

(f) The following definitions shall apply under this section.

(1) Stationary source means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(2) Building, structure, facility or installation means all of the pollutant-emitting activities which belong to the