

US EPA ARCHIVE DOCUMENT

No. 10-60459

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS OIL AND GAS ASSOCIATION, TEXAS ASSOCIATION
OF MANUFACTURERS, BCCA APPEAL GROUP and
THE STATE OF TEXAS,

Petitioners,

v.

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and LISA P. JACKSON, ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

EPA'S MERITS BRIEF

IGNACIA S. MORENO
Assistant Attorney General

JOHN CRUDEN
Deputy Assistant Attorney General

ALAN D. GREENBERG
DAVID A. CARSON
United States Department of Justice
Environment and Natural Resources Division
South Terrace, Suite 370
999 18th Street
Denver, Colorado 80202
(303) 844-1349

REQUEST FOR ORAL ARGUMENT

EPA believes that oral argument is likely to assist the Court in the resolution of this matter. Accordingly, EPA requests that oral argument be scheduled.

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION.	1
ISSUES PRESENTED.	1
STATEMENT OF THE CASE.	2
I. NATURE OF THE CASE.	2
II. STATUTORY AND REGULATORY BACKGROUND.	3
A. Clean Air Act Overview.	3
B. New Source Review.	5
1. NSR for major sources.	6
2. NSR for minor sources.	7
C. The Texas Qualified Facilities Program.	9
STANDARD OF REVIEW.	15
SUMMARY OF THE ARGUMENT.	17
ARGUMENT.	20
I. The Qualified Facilities Program Cannot Be Approved as a Minor NSR SIP Revision Because It Can Interfere with Major NSR SIP Requirements.	21
A. The Relevant State Statutes and Regulations Governing the Qualified Facilities Program Do Not Clearly Limit the Program to Minor NSR.	21

B.	None of the Petitioners’ Efforts to Establish a Limitation of the Qualified Facilities Program Addresses the Problems Identified by EPA.	27
II.	EPA Applied the Proper Standard to Evaluate Texas’ Minor NSR Submission.	31
III.	EPA Reasonably Disapproved The Netting Provisions Of The Texas Qualified Facilities Program.	33
A.	EPA Reasonably Applied the Fundamental Principles For Major NSR Netting to the Qualified Facilities Program as a Minor NSR Program.	34
B.	EPA Reasonably Found that the Qualified Facilities Program Rules Did Not Meet the Fundamental Principles for NSR Netting.	36
C.	Petitioners’ Specific Arguments Regarding EPA’s Disapproval of the Program’s Minor NSR Netting Provisions Lack Merit.	39
IV.	EPA Reasonably Disapproved the Qualified Facilities Program Because It Could Not Find that the Program Protects the NAAQS and Control Strategies or that the Program Qualifies as a <i>De Minimis</i> Exemption.	44
A.	The Program Relaxes the Requirements of the Approved SIP.	44
B.	EPA Reasonably Determined that it Lacked Sufficient Information to Determine Whether the Qualified Facilities Program Qualifies as a <i>De Minimis</i> Exemption or Otherwise Satisfies the Requirements of CAA Section 110(l).	46
C.	Petitioners’ Arguments Regarding Other Areas and the Practicable Enforceability of the Program Lack Merit.	51

V.	EPA Reasonably Disapproved the Qualified Facilities Program, Based In Part, On Its Determination That Texas’ Definition of “Facility” Is Vague.	56
VI.	EPA’s Failure to Meet the Statutory Deadline for Final Action on the SIP Revision Is Not a Basis to Overturn the Final Rule.	57
	CONCLUSION.	61
	CERTIFICATE OF SERVICE.	62
	CERTIFICATE OF COMPLIANCE.. . . .	62

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Alabama Power Co. v. Costle</i> , 636 F.2d 323 (D.C. Cir. 1979)	36, 46
<i>Alaska Dep’t of Envtl. Conservation v. EPA</i> , 540 U.S. 461 (2004)	7
<i>American Cyanamid v. EPA</i> , 810 F.2d 493 (5th Cir. 1987)	30, 31
<i>Arkansas v. Oklahoma</i> , 503 U.S. 91 (1992)	17
<i>BCAA Appeal Group v. EPA</i> , 355 F.3d 817 (5th Cir. 2003)	48
<i>Burlington Truck Lines, v. United States</i> , 371 U.S. 156 (1962)	48
<i>Camp v. Pitts</i> , 411 U.S. 138 (1973)	17, 48
<i>Chemical Mfrs. Ass’n v. NRDC, Inc.</i> , 470 U.S. 116 (1985).	16
<i>Chevron U.S.A., Inc. v. NRDC, Inc.</i> , 467 U.S. 837 (1984)	16
<i>CleanCOALition v. TXU Power</i> , 536 F.3d 469 (5th Cir. 2008)	6
<i>Duquesne Light Co. v. EPA</i> , 698 F.2d 456 (D.C. Cir. 1983)	4
<i>Duke v. Univ. of Texas at El Paso</i> , 663 F.2d 522 (5th Cir. 1981)	25
<i>Envtl. Def. v. Duke Energy Corp.</i> , 549 U.S. 561 (2007)	6
<i>Ethyl Corp. v. EPA</i> , 541 F.2d 1 (D.C. Cir. 1976).	15
<i>Florida Power & Light Co. v. Costle</i> , 650 F.2d 579 (5th Cir. 1981)	28, 30
<i>Florida Power & Light Co. v. EPA</i> , 470 U.S. 729 (1985)	17
<i>Garcia v. United States</i> , 88 F.3d 318 (5th Cir. 1996)	24

<i>General Motors Corp. v. United States</i> , 496 U.S. 530 (1990)	4, 31, 58, 59
<i>Louisiana Envtl. Network v. EPA</i> , 382 F.3d 575 (5th Cir. 2004)	16, 55
<i>Michigan Dept. of Envtl. Quality v. Browner</i> , 230 F.3d 181 (6th Cir. 2000)	20
<i>Public Citizen, Inc. v. EPA</i> , 343 F.3d 449 (5th Cir. 2003)	16
<i>Sierra Club v. EPA</i> , 496 F.3d 1182 (11th Cir. 2007)	29
<i>Sierra Club v. TVA</i> , 430 F.3d 1337 (11th Cir. 2005)	4
<i>State of New York v. EPA</i> , 413 F.3d 3 (D.C. Cir. 2005).	26
<i>Texas Oil & Gas Ass’n v. EPA</i> , 161 F.3d 923 (5th Cir. 1998)	15
<i>Thomas Jefferson Univ. v. Shalala</i> , 512 U.S. 504 (1994)	16
<i>Train v. NRDC, Inc.</i> , 421 U.S. 60 (1975)	4, 20
<i>Union Elec. Co. v. EPA</i> , 427 U.S. 246 (1976)	20

FEDERAL STATUTES

5 U.S.C. § 706	17
5 U.S.C. § 706(2)(A)	15
42 U.S.C. §§ 7401-7671q	2, 3
42 U.S.C. § 7407(d)	5
42 U.S.C. §§ 7408-09	3
42 U.S.C. § 7410(a)(1)	4

42 U.S.C. § 7410(a)(2)	20, 53
42 U.S.C. § 7410(a)(2)(C)	8
42 U.S.C. § 7410(k)	4, 57, 59
42 U.S.C. § 7410(k)(1)(B)	59
42 U.S.C. § 7410(k)(2)	59
42 U.S.C. § 7410(l)	2, 5, 20, 31, 32, 47
42 U.S.C. § 7411(a)(4)	6
42 U.S.C. § 7413	4
42 U.S.C. § 7416	4, 60
42 U.S.C. §§ 7470-7492	6
42 U.S.C. § 7473	7
42 U.S.C. § 7475(a)(3)	7
42 U.S.C. § 7475(a)(4)	7
42 U.S.C. § 7476	7
42 U.S.C. § 7479(1)	6
42 U.S.C. § 7479(2)(C)	6
42 U.S.C. §§ 7501-7515	7
42 U.S.C. § 7502	7
42 U.S.C. § 7502(c)(5)	7

42 U.S.C. § 7503	7
42 U.S.C. § 7602(j)	7
42 U.S.C. § 7604(a)(2)	58, 59
42 U.S.C. § 7607(b)(1)	1

FEDERAL REGULATIONS

40 C.F.R. pt. 50	3
40 C.F.R. §§ 51.160-51.164	8, 32
40 C.F.R. § 51.100(n)	4
40 C.F.R. § 51.160(a)	8, 37
40 C.F.R. § 51.160(b)	8, 34, 38, 44, 51
40 C.F.R. § 51.160(b)(2)	44
40 C.F.R. § 51.160(e)	8, 44
40 C.F.R. § 51.160(f)	9
40 C.F.R. § 51.161(a).	9
40 C.F.R. § 51.161(b).	9
40 C.F.R. § 51.163.	9
40 C.F.R. § 51.165(a)(1)(i)	26
40 C.F.R. § 51.165(a)(1)(ii)	26

40 C.F.R. § 51.165(a)(1)(iv)	7
40 C.F.R. § 51.165(a)(1)(vi)	26, 35
40 C.F.R. § 51.166(b)(3)	26, 35
40 C.F.R. § 51.166(b)(5)	26
40 C.F.R. § 51.166(b)(6)	26
40 C.F.R. § 51.166(b)(49)(iv)	6
40 C.F.R. § 51.166(m)	41
40 C.F.R. § 51.281	28
40 C.F.R. § 52.21	23

FEDERAL REGISTER NOTICES

66 Fed. Reg. 57,230 (Nov. 14, 2001)	49
67 Fed. Reg. 58,697 (Sept. 18, 2002)	46
68 Fed. Reg. 64,543 (Nov. 14, 2003)	10, 45
69 Fed. Reg. 31,056 (June 2, 2004)	52, 53
69 Fed. Reg. 54,006 (Sept. 7, 2004)	52
71 Fed. Reg. 48,696 (Aug. 21, 2006)	51
71 Fed. Reg. 52,670 (Sept. 6, 2006)	49
74 Fed. Reg. 1,903 (Jan. 14, 2009)	49

74 Fed. Reg. 48,450 (Sept. 23, 2009).	passim
75 Fed. Reg. 19,468 (Apr. 14, 2010).. . . .	passim
75 Fed. Reg. 27,514 (May 17, 2010)	50

STATE STATUTES

Tex. Health & Safety Code § 382.003(9).	22
Tex. Health & Safety Code § 382.003(9)(E)	11
Tex. Health & Safety Code § 382.003(9)(E)(i)	11
Tex. Health & Safety Code § 382.003(9)(E)(ii)	12
Tex. Health & Safety Code § 382.05196	23
Tex. Health & Safety Code § 382.057	29

STATE REGULATIONS

30 Tex. Admin. Code § 101.1(1)	13, 26
30 Tex. Admin. Code § 106.4(a)(3)	23
30 Tex. Admin. Code § 106.436	10
30 Tex. Admin. Code § 106.163	10
30 Tex. Admin. Code Chapter 116	22, 23
30 Tex. Admin Code § 116.10	56

30 Tex. Admin. Code § 116.10(1)	12
30 Tex. Admin. Code § 116.10(2)	12
30 Tex. Admin. Code § 116.10(6)	56
30 Tex. Admin. Code § 116.10(11)(E)(ii)	41
30 Tex. Admin. Code § 116.110	10, 24
30 Tex. Admin. Code § 116.110(a)	10, 45
30 Tex. Admin. Code § 116.110(a)(1)	10
30 Tex. Admin. Code § 116.110(a)(2)	10
30 Tex. Admin. Code § 116.110(a)(3)	11
30 Tex. Admin. Code § 116.110(a)(4)	10
30 Tex. Admin. Code § 116.110(a)(5)	11
30 Tex. Admin. Code § 116.111	10
30 Tex. Admin. Code § 116.111(a)(2)(A)	41
30 Tex. Admin. Code § 116.111(a)(2)(H)	23, 30
30 Tex. Admin. Code § 116.111(a)(2)(I)	23, 30
30 Tex. Admin. Code §§ 116.116-116.118	22
30 Tex. Admin. Code § 116.116(e)	12, 13, 22, 39
30 Tex. Admin. Code § 116.116(e)(2)(B)	12
30 Tex. Admin. Code § 116.116(e)(3)	13

30 Tex. Admin. Code § 116.116(e)(3)(B)	43
30 Tex. Admin. Code § 116.116(e)(3)(F)	43
30 Tex. Admin. Code § 116.116(e)(6)(A)	12
30 Tex. Admin. Code § 116.116(e)(6)(B)	12
30 Tex. Admin. Code § 116.117(a)	14
30 Tex. Admin. Code § 116.117(a)(4)	30
30 Tex. Admin. Code § 116.117(b)	14
30 Tex. Admin. Code § 116.117(b)(1)	14
30 Tex. Admin. Code § 116.117(b)(2)	15
30 Tex. Admin. Code § 116.117(b)(3)	15
30 Tex. Admin. Code § 116.150(c)	27
30 Tex. Admin. Code § 116.150(d)	27
30 Tex. Admin. Code § 116.160(b)	27
30 Tex. Admin. Code § 116.160(c)(2)(B)	41
30 Tex. Admin. Code § 116.160(c)(3)	57
30 Tex. Admin. Code § 116.610(b)	24

JURISDICTION

Jurisdiction exists under 42 U.S.C. § 7607(b)(1). The petitions were timely filed.

ISSUES PRESENTED

1. Whether EPA reasonably determined that the Texas Qualified Facilities Program (“Program”) cannot be approved as a minor New Source Review State Implementation Plan Revision because the Program can interfere with major New Source Review State Implementation Plan requirements.
2. Whether EPA applied the proper standards to evaluate the Program as a minor New Source Review State Implementation Plan revision.
3. Whether EPA reasonably disapproved the netting provisions of the Program.
4. Whether EPA reasonably disapproved the Program because it could not find that the Program meets air quality standards or qualifies as a *de minimis* exemption from the requirement to meet such standards.
5. Whether EPA reasonably determined that the Program’s definition of “facility” is vague.
6. Whether EPA’s disapproval of the Program may be overturned due to the fact that EPA took more time than the Clean Air Act provides for EPA’s final action on the Program.

STATEMENT OF THE CASE

I. Nature of the Case

These cases involve the Texas “Qualified Facilities Program,” which exempts certain facilities from otherwise applicable regulatory requirements that protect air quality. After Texas submitted the Program to the United States Environmental Protection Agency (“EPA”) for approval into Texas’ federally-enforceable State clean air program, EPA determined that the Program did not satisfy the statutory and regulatory criteria for approval under the Clean Air Act, 42 U.S.C. §§ 7401-7671q. EPA disapproved the Program because it determined, among other things, (i) that because the Program is not explicitly limited to smaller sources of pollutants as Texas claims, a major source may circumvent applicable requirements, (ii) that the Program allows facilities to make changes that potentially increase emissions of pollutants without ensuring that there will be no interference with clean air standards or control strategies, and (iii) that Texas did not provide EPA with sufficient information to demonstrate that the Program meets certain statutory and regulatory requirements necessary to approve the Program under 42 U.S.C. § 7410(l).

At the time of EPA’s disapproval, Texas proposed revisions to the Program under State law to address the bases for EPA’s disapproval of the Program. Texas

has since adopted the revisions and recently submitted them to EPA for approval. While EPA has not completed its review of this submittal, we note that the State's action fully re-writes the Qualified Facilities Program.

EPA took the action challenged here under notice-and-comment rulemaking procedures and it will likewise review the revisions under notice-and-comment rulemaking procedures.

Texas and various industry Petitioners ("Industry") challenge EPA's disapproval of the Program. We address Petitioners' arguments in a combined fashion below.

II. Statutory and Regulatory Background

A. Clean Air Act Overview

The Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, establishes a comprehensive program for controlling and improving the nation's air quality through a system of shared federal and state responsibility. The central feature of that program is the National Ambient Air Quality Standards ("NAAQS"), which are nationally applicable standards set by EPA establishing permissible concentrations for six common (or "criteria") air pollutants, such as ozone. 42 U.S.C. §§ 7408-09. *See* 40 C.F.R. pt. 50.

The CAA requires each State to submit for EPA's approval a State

Implementation Plan (“SIP”) providing for the attainment and maintenance of the NAAQS and meeting the other requirements of the Act. 42 U.S.C. §§ 7410(a)(1), 7410(k). *See generally Train v. NRDC, Inc.*, 421 U.S. 60 (1975). Each SIP must contain, among other things, a “control strategy,” which is a combination of measures designed to achieve the reduction of emissions necessary for attainment and maintenance of the NAAQS. 40 C.F.R. § 51.100(n). State SIP provisions are only federally enforceable upon their approval by EPA. 42 U.S.C. § 7413. *See General Motors Corp. v. United States*, 496 U.S. 530, 540 (1990) (“There can be little or no doubt that the existing SIP remains the ‘applicable implementation plan’ even after the State has submitted a proposed revision”); *Duquesne Light Co. v. EPA*, 698 F.2d 456, 468 n.12 (D.C. Cir. 1983) (“With certain enumerated exceptions, states do not have the power to take any action modifying any requirement of their SIPs, without approval from EPA”); *Sierra Club v. TVA*, 430 F.3d 1337, 1346 (11th Cir. 2005) (“If a state wants to add, delete, or otherwise modify any SIP provision, it must submit the proposed change to EPA for approval”). Further, CAA section 116 forbids implementation of any emission limitation that is less stringent than the applicable, approved SIP. 42 U.S.C. § 7416.

Any revision to a SIP must meet the requirements of CAA section 110(l), 42

U.S.C. § 7410(l). Under section 110(l), EPA cannot approve a SIP revision if the revision would interfere with any applicable requirement of the CAA regarding attainment, or reasonable further progress towards attainment, or any other applicable requirement of the Act. *Id.*

Under CAA section 107(d), 42 U.S.C. § 7407(d), for each criteria air pollutant, a State is required to designate those areas within its boundaries where the air quality is better or worse than the NAAQS. An area that meets the NAAQS for a particular pollutant is classified as an “attainment area,” one that does not is classified as a “non-attainment area.” Because the classification is pollutant-specific, an area may be designated as “attainment” for one pollutant and “non-attainment” for another.

B. New Source Review

The CAA also contains specific requirements for the permitting of new and modified sources of air pollution, which is generically referred to as “New Source Review,” or “NSR.” Generally speaking, these programs may be implemented by a State as part of an approved SIP, or by EPA in certain circumstances. There are three types of NSR, one or more of which can apply at a given source, depending upon whether the source is minor or major, whether the construction or modification causes an increase in emissions for a given pollutant above the

significance threshold, and whether the source is located in an attainment area or a non-attainment area for the given pollutant.

1. NSR for major sources

For major sources in attainment areas, the Prevention of Significant Deterioration (“PSD”) program, 42 U.S.C. §§ 7470-7492, is intended to give “added protection to air quality in certain parts of the country notwithstanding attainment and maintenance of the NAAQS.” *CleanCOALition v. TXU Power*, 536 F.3d 469, 472 (5th Cir. 2008) (internal quotation marks and citations omitted). *See also Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 567-68 (2007) (concerning PSD program). A PSD permit must be obtained prior to construction or modification^{1/} of large pollutant-emitting facilities^{2/} often referred to as “major sources,” and the applicant is required, among other things, to demonstrate that the proposed new or modified source will not cause a violation of the NAAQS or

^{1/} The Act defines “construction” to include “modification,” which “means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” 42 U.S.C. §§ 7411(a)(4), 7479(2)(C).

^{2/} The Act defines a “major emitting facility” for the PSD program as one that emits either 100 tons per year or 250 tons per year of any pollutant regulated under the Act, depending on the type of facility. *Id.* § 7479(1). *See also* 40 C.F.R. § 51.166(b)(49)(iv).

“PSD increments” (*i.e.*, limits on increases in ambient pollution concentrations over specified area-specific baseline concentrations), *see* 42 U.S.C. §§ 7473, 7475(a)(3) and 7476. The source must also implement the “best available control technology” (or “BACT”) to limit emissions of each pollutant regulated under the CAA. 42 U.S.C. § 7475(a)(4); *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 468 (2004).

For non-attainment areas, major sources are subject to the more stringent non-attainment NSR program (“NNSR”), which applies to major new or modified sources of a pollutant for which the area is designated non-attainment. 42 U.S.C. §§ 7502, 7503. The purpose of the NNSR program is to improve air quality in areas where it has deteriorated to unacceptable levels. *Id.* at §§ 7501-7515. For NNSR, a source must meet the Lowest Achievable Emission Rate and must obtain sufficient emission reductions from existing sources to offset its increased emissions. *Id.* §§ 7502(c)(5) and 7503.^{3/}

2. NSR for minor sources

There is also an NSR requirement for minor sources, which are sources that

^{3/} For NNSR, a major source is generally one that emits, or has the potential to emit, 100 tons per year or more of a pollutant for which the area in which it is located is designated non-attainment. 42 U.S.C. § 7602(j); 40 C.F.R. § 51.165(a)(1)(iv).

have the potential to emit a relevant pollutant below the major source thresholds of the PSD and NNSR programs. Under CAA section 110(a)(2)(C), a State's SIP must provide for the regulation of the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. 42 U.S.C. § 7410(a)(2)(C). Thus, all SIPs must contain Minor NSR programs.

EPA has promulgated regulations specifying the requirements for Minor NSR programs, some of which are discussed below. 40 C.F.R. §§ 51.160-51.164. Under the regulations, each State's SIP must set forth legally enforceable procedures which will allow the State to determine whether the construction or modification of a minor source will (1) result in a violation of applicable portions of the State's control strategy, or (2) interfere with attainment or maintenance of any NAAQS in the State or in a neighboring State. *Id.* at § 51.160(a).

Accordingly, SIPs must require that owners or operators of minor sources submit applications to the State from which the State can determine whether the construction or modification of the source will result in a violation of the control strategy or interfere with attainment or maintenance of a NAAQS. *Id.* at § 51.160(b). The SIP must identify the types and sizes of sources that will be subject to review as minor sources, and must discuss the basis for determining which facilities will be subject to review as minor sources. *Id.* at § 51.160(e). The

SIP must discuss the air quality data and modeling used to meet the requirements of EPA's Minor NSR regulations, and the modeling must be based upon the applicable models and other specific technical requirements specified in the regulations. *Id.* at § 51.160(f).

Minor NSR SIPs must also require the opportunity for public comment on both the information submitted by minor source applicants and the State's analysis of the effect of construction or modification of each minor source on the ambient air quality, including the State's proposed approval or disapproval of the application. *Id.* at § 51.161(a). This information must be made available to the public at a location or locations in the area to be affected by the source and the public must be afforded a 30-day comment period. *Id.* at § 51.161(b).

Minor NSR SIPs must also identify the State or local agency responsible for implementing the program, and contain specific administrative procedures to be followed in making the determination of whether the construction or modification of a minor source will violate the State's control strategy or interfere with attainment and maintenance of the NAAQS. *Id.* at § 51.163.

C. The Texas Qualified Facilities Program

Under the current, federally-approved Texas SIP, all facilities are subject to NSR because the State's permitting requirements apply to any facility that "may

emit air contaminants into the air of this state.” 30 Tex. Admin. Code § 116.110(a); *See* 68 Fed. Reg. 64,543, 64,546 (Nov. 14, 2003) (approval of re-codified version of State’s SIP). Anyone intending to engage in the modification of an existing Texas facility that will increase the amount of any air contaminant emitted by the facility or result in the emission of an air contaminant not previously emitted must use one of three options to obtain authorization to proceed with the modification in accordance with the federally-approved SIP. 30 Texas Admin. Code § 116.110. First, the person can obtain an NSR permit by filing a general application, which involves a case-by-case evaluation of the proposed modification. *Id.* § 116.110(a)(1); *see id.* at § 116.111. Second, a standard permit may be available if the modification falls within certain categories for which Texas has developed standardized permit terms (*e.g.*, concentrated animal feeding operations). *Id.* § 116.110(a)(2). Third, the modification may satisfy the conditions for facilities “permitted by rule” under Chapter 106, which covers over 100 categories of facilities, from auto body refinishing facilities to zoos, and for which Texas has authorized permits through a prior rulemaking process *Id.* § 116.110(a)(4); *see, e.g. id.* at Chapter 106, §§ 106.436; 106.163.^{4/}

^{4/} Two additional options available under state law are not part of the State’s federally-approved SIP: flexible permits and qualifying as a *de minimis* facility or
(continued...)

The Qualified Facilities Program amends the State's definition of "modification of existing facility" to exclude certain facility changes from that definition. This proposed SIP revision thus exempts facilities from the obligation to obtain one of the three authorizations described above prior to engaging in the modification. The Program also includes the criteria for becoming a Qualified Facility, the methods for determining the net effect of emission increases and decreases, and recordkeeping and notification requirements.

In order to fall under the Program, the physical change in, or change in method of operation of, the facility must not result in a net increase in allowable emissions of any contaminant and not result in the emission of any air contaminant not previously emitted. Tex. Health & Safety Code § 382.003(9)(E). In addition, the facility change must fall in one of two eligible categories. The first category covers facilities that received a preconstruction permit or permit amendment (or was exempted from the preconstruction permit requirement) no earlier than 120 months before the change will occur. *Id.* § 382.003(9)(E)(i). The second category covers facilities that use an air pollution control method that is at least as

^{4/}(...continued)

source. *Id.* § 116.110(a)(3), (5). EPA's disapproval of the flexible permits program is subject to a separate challenge in *State of Texas v. EPA*, No. 10-60614 (5th Cir.).

effective as best available control technology, considering technical practicability and economic reasonableness, that Texas required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur. *Id.* § 382.003(9)(E)(ii).

This second category covers facilities that have not received a SIP approved authorization, but voluntarily added pollution controls. The Texas legislature envisioned this second category as a “carrot” to encourage grandfathered facilities – those constructed prior to 1971 and not subsequently modified – to install emission control technologies. See 74 Fed. Reg. 48,450, 48,455/3 (Sept. 23, 2009).

The Program includes procedures to determine whether the change will result in an increase in allowable emissions. No modification subject to NSR exists if the change does not cause a net increase in emissions above the Facility’s *allowable* emissions. 30 Texas Admin. Code § 116.116(e). A facility’s allowable emissions are based on the application of Minor NSR best available control technology, which is reflected as an allowable emission rate in a permit or, in the case of an unpermitted facility qualifying under the second category, based on the facility’s actual emissions. *See* 30 Texas Admin. Code §§ 116.10(1), (2); 116.116(e)(2)(B), 116.116(e)(6)(A), (B).

If the change will cause an increase in emissions above the Qualified Facility's authorized allowable emissions limit (or actual emissions for grandfathered facilities), then the facility owner may perform an applicability netting analysis. This netting analysis considers emission increases from the change, emission reductions from other emission points operated under the Qualified Facility making the change, and emission reductions from any other Qualified Facility at the same air quality account number. 30 Texas Admin. Code § 116.116(e). An "account" for Texas NSR purposes is any combination of sources under common ownership or control and located on one or more contiguous properties. 30 Texas Admin. Code § 101.1(1). An account can include several major and minor sources. The Program also allows a facility to offset increases of one chemical compound with decreases in emissions of another compound, subject to adjustments intended to ensure an equivalent impact on air quality. *Id.* § 116.116(e)(3).

If a physical or operational change results in an increase in allowable emissions that is equal to or less than an offsetting decrease in allowable emissions from the same Qualified Facility making the change, the change is not considered a modification under the Program and avoids NSR permitting requirements. 30 Texas Admin. Code § 116.116(e)(3). If the increase in allowable emissions

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exceeds the decrease from the same Qualified Facility, then the Program allows the facility owner to rely on decreases from one or more Qualified Facilities at the same air quality account number to offset the increases. Thus, in contrast to the regulatory structure in Texas' current, federally-approved SIP (in which modifications occurred when the change caused *any* increase in emissions), a Qualified Facility may make physical or operational changes that increase its allowable emissions limit without engaging in a "modification of existing facility."

No permit authorization is required to make a change under the Program. Instead, the Program contains record-keeping and notification requirements. Persons making changes under the Program must maintain documentation demonstrating that the changes satisfy the regulatory requirements of the Program. 30 Texas Admin. Code § 116.117(a).

The Program's notification requirements vary depending on the extent of emissions trading. *Id.* 116.117(b). When no intraplant trading (*e.g.*, trading between facilities) occurs, the facilities are not required to report anything until they submit their next annual report. *Id.* § 116.117(b)(1). If the change involves trading between facilities below a reportable limit set by the State, a facility need only submit notification within 30 days after the change occurs. *Id.* §

116.117(b)(2). Pre-change notification must be made for changes to Qualified Facilities for which there is trading between facilities above the reportable limit. *Id.* § 116.117(b)(3). The changes may occur within 45 days of the notification unless the State objects. *Id.*

On September 23, 2009, EPA proposed to disapprove the Program and solicited public comments. 74 Fed. Reg. 48,450. After considering those comments, EPA took final action to disapprove the program. 75 Fed. Reg. 19,468 (Apr. 14, 2010).

STANDARD OF REVIEW

In order to prevail on the merits, Petitioners must show that EPA's final action on the Program was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This highly deferential standard presumes the validity of agency actions and upholds them if they satisfy minimum standards of rationality. *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933-34 (5th Cir. 1998); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (*en banc*). Although this Court must assure itself that the agency considered the relevant factors in making the decision, the Court cannot substitute its own judgment for that of the agency. *Texas Oil & Gas Ass'n*, 161 F.3d at 933-34.

Questions of statutory interpretation are governed by the familiar two-step test set forth in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984). See *Louisiana Envtl. Action Network v. EPA*, 382 F.3d 575, 581-82 (5th Cir. 2004) (“We review the EPA’s interpretation of the CAA under the standards set forth in *Chevron*”). Under the first step, the reviewing court must determine “whether Congress has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. If Congress’ intent is clear from the statutory language, the Court must “give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 843. If, however, the statute is “silent or ambiguous with respect to the specific issue,” the Court must decide whether the Agency’s interpretation is based on a permissible construction of the statute. *Id.* To uphold EPA’s interpretation of the Act, the Court need not find that EPA’s interpretation is the only permissible construction that EPA might have adopted, but rather only that EPA’s interpretation is reasonable. *Chemical Mfrs. Ass’n v. NRDC, Inc.*, 470 U.S. 116, 125 (1985).

EPA's interpretations of its own regulations are entitled to even greater deference. EPA's interpretation of its own regulations should be given “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Public*

Citizen, Inc. v. EPA, 343 F.3d 449, 455-56 (5th Cir. 2003) (same).

EPA's factual findings are likewise entitled to substantial deference. *See Arkansas v. Oklahoma*, 503 U.S. 91, 112-13 (1992). EPA's factual determinations should be upheld as long as they are supported by the administrative record, even if there are alternative findings that could also be supported by the record. *Id.*

A reviewing court should apply the "arbitrary or capricious" standard to the agency decision based on the record the agency presents to the reviewing court. *Florida Power & Light Co. v. EPA*, 470 U.S. 729, 743-44 (1985). *See also* 5 U.S.C. § 706 (courts "shall review the whole record or those parts of it cited by a party"). When there is a contemporaneous explanation of the agency decision, the validity of that action "must . . . stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review," and thus "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973).

SUMMARY OF THE ARGUMENT

EPA reasonably disapproved the Program as a revision to the Texas SIP for a number of reasons, any one of which is sufficient to uphold EPA's decision. As described above, Congress imposed significant NSR requirements for major

sources. The CAA and EPA's regulations also contain NSR requirements for minor sources that, while less prescriptive than the Major NSR requirements, are necessary to ensure that the health-based NAAQS are attained and maintained. Because the Program is not clearly limited to minor sources, in contrast to the other federally-approved Texas Minor NSR programs which expressly state they apply only to minor sources, EPA reasonably disapproved the Program in order to prevent facilities from circumventing the congressionally mandated Major NSR requirements.

Contrary to Texas' and Industry's arguments, EPA reasonably determined to disapprove the program notwithstanding Texas' stated intention to apply the Program only to minor sources, and Texas' claimed past practice of having done so. EPA did not disregard Texas' interpretation of Texas law, nor has EPA somehow violated Texas' policy choices, as Petitioners assert. Rather, in light of the complexity of the Program, and the contrasting language in other Texas rules, EPA concluded that Texas' interpretation was not based on sufficient text within the submitted regulatory language of the Program and that this could lead to unnecessary problems in the administration and enforcement of the Program.

EPA reasonably applied principles gleaned from the netting provisions applicable to Major NSR programs and found that the netting provisions of the

Program could result in a violation of the applicable portions of the State's controls strategy and could interfere with attainment or maintenance of the NAAQS because, among other things, the program does not require netting reductions to be practicably enforceable. EPA has not established minor source netting criteria, but nonetheless, the major source netting criteria are specifically designed to ensure that modifications do not violate any applicable control strategy or interfere with attainment of the NAAQS, which are the very criteria applicable to Minor NSR modifications under EPA's regulations. Indeed, Petitioners provide no valid basis for EPA not to use major source netting principles as a guide in reviewing a minor source netting program, and EPA's application of those principles here is supported by the record and should therefore be upheld.

EPA reasonably determined that it lacked sufficient information to make certain required regulatory determinations under its regulations and CAA section 110(l). EPA also reasonably determined that it lacked sufficient information to determine that the Program is a *de minimis* exemption. In its notice of proposed rulemaking, EPA specifically informed Texas of the information EPA would need to make these determinations. However, Texas failed to provide the information.

EPA reasonably disapproved Texas' vague definition of "facility," which

differs in the Program from other Texas NSR provisions even though Petitioners claim the definitions are the same.

Finally, the Court should not overturn EPA's final rule on the basis that EPA took longer than Congress provided for EPA's review of a SIP revision. Industry's contrary argument is inconsistent with the CAA statutory scheme and binding Supreme Court precedent.

ARGUMENT

EPA may not approve a SIP revision if the revision would interfere with any applicable requirement concerning attainment and subsequent maintenance of the NAAQS or any other applicable requirements of the Act. 42 U.S.C. § 7410(l). CAA Section 110(a)(2) requires that each SIP include enforceable emission limitations and other control measures as may be necessary or appropriate to meet applicable CAA requirements and a program to provide for the enforcement of those measures. 42 U.S.C. § 7410(a)(2). Although the CAA grants the states considerable latitude in developing emissions limitations, *see Train v. NRDC, Inc.*, 421 U.S. 60, 79 (1975), it nonetheless subjects the states to strict minimum compliance requirements, adherence with which must be determined by EPA. *Union Elec. Co. v. EPA*, 427 U.S. 246, 256-57 (1976); *Michigan Dept. of Env'tl. Quality v. Browner*, 230 F.3d 181, 185 (6th Cir. 2000).

EPA determined that Texas' Qualified Facilities Program could not be approved as a Substitute Major NSR SIP Revision or a Minor NSR SIP Revision. 75 Fed. Reg. at 19472-73. Neither the State nor Industry Petitioners argues that the Program should be approved as a Major NSR SIP Revision, so EPA focuses its argument on its decision to disapprove the Program as a Minor NSR SIP revision.

I. The Qualified Facilities Program Cannot Be Approved As a Minor NSR SIP Revision Because It Can Interfere with Major NSR SIP Requirements.

The Program cannot circumvent Major NSR requirements without violating the CAA. Because the Program's regulatory language is ambiguous as to a facilities' obligation to comply with major modification requirements, EPA properly disapproved the Program.

A. The Relevant State Statutes and Regulations Governing the Qualified Facilities Program Do Not Clearly Limit the Program to Minor NSR.

As explained above, the construction or modification of facilities that exceed Major NSR thresholds must comply with the permitting and other requirements of the Major NSR programs. Both Texas and Industry concur that an approvable Minor NSR program cannot allow facilities undertaking major modifications to use the Minor NSR program to circumvent the Major NSR program. *See* Texas Br. at 20; Industry Br. at 22-23. Nonetheless, the Qualified Facilities Program does not

preclude its use for Major NSR, as required by the CAA and EPA's Major NSR regulations. *See* 75 Fed. Reg. at 19,473/1.

The Program amends the definition of “modification of existing facility” in the State’s statute and regulations to exclude certain emissions changes from the definition. *See* Tex. Health & Safety 382.003(9); 30 Texas Admin. Code §116.116(e). This definition is applicable to both Major NSR and Minor NSR, but neither the Texas statute authorizing the Program nor the regulatory provisions implementing the Program prohibit the use of the Program for major modifications. *See* Tex. Health & Safety 382.003(9); 30 Texas Admin. Code §§ 116.116 -116.118. These statutory and regulatory provisions do not clearly limit the use of the Program to minor modifications. *Id.* As the State acknowledged in its comments, there is no express provision in the SIP submittals specifying that the Program cannot be used to circumvent the requirements of Major NSR. *See* App. Tab L ((AR Doc. 19) Letter from Mark R. Vickery, Executive Director, Texas Commission on Environmental Quality to Stanley M. Spruiell, EPA (Nov. 23, 2009) at 1) (“Texas’ comments”) (limitation of Qualified Facilities Program to Minor NSR “is not specifically stated in the rule”). Because of this, Texas committed “to work with EPA to improve and clarify the 30 Tex. Admin. Code Chapter 116 rule language to ensure that the Qualified Facilities Program is

specifically limited to Minor NSR changes.” *Id.* at 2.

The absence of regulatory language limiting the use of the Program stands in stark contrast with the provisions of the two federally-approved Texas Minor NSR programs designed to simplify permitting obligations. For example, the statute and regulations authorizing Permits by Rule expressly preclude their use for major modifications and require facilities to determine whether Major NSR requirements apply to the change in emissions. The relevant statute provides that the “Commission may not adopt a permit by rule authorizing any facility defined as ‘major’ under any applicable preconstruction permitting requirement of the federal [CAA] . . . or regulations adopted under that Act.” Tex. Health & Safety Code § 382.05196. The Texas regulation addressing Permits by Rule similarly states that “any change which constitutes a major modification, as defined in 40 C.F.R. § 52.21 must meet the permitting requirements of Chapter 116, Subchapter B [addressing NSR permits] of this title and cannot qualify for a permit by rule under this chapter.” 30 Texas Admin. Code § 106.4(a)(3). Because the applicable preconstruction permitting requirements of Chapter 116, Subchapter B of the Texas regulations require sources to determine if the requirements apply, the statute and regulations expressly preclude circumvention of that requirement. 30 Tex. Admin. Code §§ 116.111(a)(2)(H), (I).

The regulations governing Standard Permits also require a Major NSR applicability determination and expressly prohibit circumvention of Major NSR. Those regulations provide that any project that constitutes a major modification as defined by Texas regulations is subject to the requirements of § 116.110, relating to applicability of permits, rather than the subchapter relating to Standard Permits. 30 Texas Admin. Code §116.610(b).

In contrast, as discussed above, the Texas statute and regulations establishing the Program contain no analogous express prohibitions or limitations on the use of the Program for major sources, and do not preclude owners or operators from circumventing the applicability requirements of section 116.110, which addresses applications for NSR permits. This lack of statutory or regulatory limitations on the Program creates an unacceptable ambiguity, especially in light of the complexity of the program. The Texas Legislature and TCEQ placed limitations on the use of the two federally-approved means for avoiding case-by-case Minor NSR permitting. The reasonable inference drawn from the State's approach is that the Program is not similarly limited and could improperly be used to authorize an action defined as major under the CAA. *See Garcia v. United States*, 88 F.3d 318, 324 (5th Cir. 1996) (where legislature includes particular language in one section of a statute but omits it in another section of the same Act,

it is generally presumed to act intentionally and purposely in the disparate inclusion or exclusion); *Duke v. Univ. of Texas at El Paso*, 663 F.2d 522, 526 (5th Cir. 1981) (drawing inference of an intent to exclude a particular result from the failure to expressly proscribe that result).^{5/} EPA reasonably concluded that the regulatory language is ambiguous in light of the potential inference that the Program is not limited to Minor NSR to justify disapproval of the Program.^{6/}

The ambiguity in the Program also invites the regulated community to use its provisions in several ways to authorize major modifications because it fails to state clearly that it applies only to minor modifications. First, the Program does not require an owner or operator that proposes a change to evaluate the applicability of the Major NSR requirements *prior* to receiving or asserting an exemption from permitting requirements under the Program. The applicability of Major NSR is based upon an assessment of anticipated emissions above an *actual* emissions

^{5/} Thus, the State's provisions that require "major modifications" to undergo Major NSR do not resolve the ambiguity in the Program. Texas Br. at 20; Industry Br. at 23.

^{6/} Texas claims that the limitations included in the other programs are irrelevant, State Br. at 29, yet fails to acknowledge that Standard Permits, Permits by Rule and the Qualified Facilities Program are three procedures Texas adopted in the 1990s to enable facilities to avoid the case-by-case permitting requirements that would otherwise be applicable. Yet, only the Qualified Facilities Program, and not the other two, lacks a provision limiting its use to Minor NSR.

US EPA ARCHIVE DOCUMENT

baseline. *See State of New York v. EPA*, 413 F.3d 3, 40 (D.C. Cir. 2005). If a facility first assesses changes in its *allowable* emissions under the Program, rather than assessing changes in *actual* emissions, a facility could conclude that the change is exempt, when in fact the change could trigger major NSR permitting requirements. The same issue arises under the Program's netting provisions, which allow trading of emissions between facilities based upon *allowable* rather than *actual* emissions.

Second, by allowing netting across Qualified Facilities located at the same account (a term broader than the Federal definition of major stationary source), the Program authorizes netting on a broader scale than allowed under Major NSR requirements. An account, for Texas NSR purposes, can include any combination of major and minor sources under common ownership or control and located on one or more contiguous properties. *See* 30 Texas Admin Code § 101.1(1) (defining "account"). In contrast to Major NSR requirements, which limit trading to pollution-emitting activities within a stationary source within the same industrial grouping, *see* 40 C.F.R. §§ 51.165(a)(1)(i), (ii), 51.165(a)(1)(vi)(A), 51.166(b)(3), (5), (6), the Program allows netting reductions to be traded among any Qualified Facilities within an account. At the same time, because netting under the Program is conducted only between Qualified Facilities, rather than all facilities at a single

stationary source, emission increases from non-Qualified Facilities could be omitted from the netting calculation. As a result, a change that would yield a net increase in emissions under the Major NSR requirements could net out of review under the Program. Thus, the Program's netting provisions are less stringent than the Major NSR program, and if Program netting is done before Major NSR netting, than a facility could conclude erroneously that a change is exempt.

Without a clear prohibition on the use of the complex Program for major sources, or at least some text that is a sufficient basis for the interpretation, any efforts to enforce Texas' current interpretation of the Program against an entity using it for a major modification could face potential difficulties. To avoid interference with Major NSR requirements, a facility must first be required to evaluate the applicability of Major NSR. 30 Tex. Admin. Code §§ 116.150(c), (d) (non-attainment review) 116.160(b) (PSD review).

B. None of the Petitioners' Efforts to Establish a Limitation of the Qualified Facilities Program Addresses the Problems Identified by EPA.

EPA recognizes that Texas currently interprets its Qualified Facilities Program as applying only to Minor NSR, but EPA determined here, in light of the lack of a clear prohibition on the use of the Program for Major NSR, that the State's interpretation is not sufficient to support approval of the program. SIPs and

their revisions must “be adopted as rules and regulations enforceable by the State agency.” 40 C.F.R. § 51.281. Texas’ interpretation of the Program is not based on sufficient text in an enforceable rule or regulation in the SIP revisions at issue.^{7/} EPA appropriately based its review on the revised SIP terms submitted by Texas and evaluated that submission against the federal statutory and regulatory requirements for a Minor NSR program. *See Florida Power & Light Co. v. Costle*, 650 F.2d 579 (5th Cir. 1981).^{8/}

Both Texas and Industry Petitioners cite to an EPA letter written in 1995 in which EPA indicated that the then-proposed Program adequately addressed concerns that the Program might apply to Major NSR. *See* Texas Br. at 26-27; Industry Br. at 25-26. That letter, however, was written before the Texas

^{7/} Both the State and Industry Petitioners cite to various guidance documents and statements in preambles to Texas rulemakings in which the State articulated its view that the Program is limited to Minor NSR. Texas Br. at 24; Industry Br. at 22. The State’s view, however, is not based on sufficient text within the submitted regulatory language for the Program given the lack of the clear prohibition on the use of the Qualified Facilities Program for major sources that is present in the other programs.

^{8/} In *Florida Power*, EPA added a two-year limitation to a proposed Florida SIP revision that Florida did not submit to EPA as part of its proposed SIP revision. 650 F.2d at 584. The Court found that EPA abused its discretion by forcing Florida “to convert its state limitation on relief into a federally enforceable SIP provision.” *Id.* at 587. In the case of the Qualified Facilities Program, EPA confined its review to the revised SIP terms submitted by Texas, consistent with *Florida Power*.

legislature and TCEQ adopted significant changes to the Texas Clean Air Act. In 1999, the Texas legislature amended the Texas Clean Air Act to authorize Permits by Rule, and the amendments contain express prohibitions on the use of Permits by Rule for major modifications discussed above. *See supra* at Argument I. A. TCEQ adopted, also after the 1995 letter, amended regulations containing regulatory prohibitions that precluded the use of Permit by Rule and Standard Permits to authorize major modifications. *See supra* at *id.* These subsequent legislative and regulatory amendments, which left the Program without statutory or regulatory limitations, in stark contrast to the other Texas programs, created an ambiguity that did not previously exist regarding the scope of the Program.^{9/}

Both the State and Industry Petitioners emphasize the degree of deference to which the State is entitled in interpreting its ambiguous statutes and regulations, Texas Br. at 25, Industry Br. at 20-21, but this argument misses the point.^{10/} The

^{9/} The State legislature also amended Section 382.057 in 1999 in a manner that raised additional ambiguities. In 1995, the statutory language provided that TCEQ could not exempt any facility or modification defined as “major.” The 1999 amendment removed the phrase “any facility” and left only modifications subject to the prohibition on exemption from “major” NSR. Changes under the Program are not considered “modifications,” so whether the prohibition still applied became ambiguous.

^{10/} It also fails to recognize that EPA gets deference in interpreting state law provisions that are part of a SIP. *Sierra Club v. EPA*, 496 F.3d 1182, 1186 (11th (continued...))

issue before the Court is whether EPA acted reasonably in disapproving the SIP revisions based upon the inference that can be drawn from the absence of the clear prohibition on the use of the Qualified Facilities Program for major sources that is present in the other programs, and in the absence of sufficient text to support the State's interpretation. *See supra* at Argument I. B.^{10/}

Texas' reliance on the Program's recordkeeping requirements, Texas Br. at 21, does not demonstrate that the Program is limited to minor modifications. The Program requires owners and operators to maintain documentation at the plant site containing sufficient information to demonstrate that the project will comply with the federal Major NSR provisions. 30 Texas Admin. Code § 116.117(a)(4). These recordkeeping requirements are the same general provisions as those found in the SIP for Minor and Major NSR SIP case-by-case permits. 30 Texas Admin. Code §§ 116.111(a)(2)(H) and (I). An owner or operator who fails to maintain the required documentation may be liable for a recordkeeping violation, but the

^{10/}(...continued)

Cir. 2007); *American Cyanamid v. EPA*, 810 F.2d 493, 498 (5th Cir. 1987).

^{11/} *Florida Power*, cited by all Petitioners, does not require an alternate conclusion. In the case of the Qualified Facilities Program, EPA evaluated the submitted regulatory language against the federal statutory and regulatory requirements for Minor NSR SIP approval. EPA did not add language to the SIP revision based on its interpretation of the requirements of State law in order to make the SIP revision approvable.

recordkeeping requirements do not substitute for a clear and enforceable provision, like those that appear in the Permits by Rule and Standard Permit programs, that limits applicability of the Program to minor modifications only.

Finally, EPA need not prove that the Program is actually used for major modifications. *Cf.* Industry Br. at 27. Indeed, a State normally should not be implementing a SIP revision prior to its approval by EPA. *See General Motors Corp. v. United States*, 496 U.S. at 540 (“There can be little or no doubt that the existing SIP remains the ‘applicable implementation plan’ even after the State has submitted a proposed revision”). Rather, EPA must review a SIP revision submission for its compliance with the CAA and its regulations. 42 U.S.C. § 7410(l); *American Cyanamid*, 810 F.2d at 495. Because the Program is not expressly limited to Minor NSR and does not preclude circumvention of the Major NSR program, EPA reasonably determined not to approve it.

II. EPA Applied the Proper Standard to Evaluate Texas’ Minor NSR Submission.

EPA applied the appropriate regulatory standards to evaluate the Program as a Minor NSR SIP revision. Minor NSR SIPs must include legally enforceable procedures enabling the State to determine whether a modification of a facility would violate a control strategy or interfere with attainment or maintenance of a

NAAQS. *See* 40 C.F.R. §§ 51.160 - 51.163. In addition, under CAA section 110(l), EPA cannot approve *any* SIP revision that relaxes the approved SIP if the revision would interfere with any applicable requirement of the CAA regarding attainment, reasonable further progress towards attainment, or any other applicable requirement of the Act. 42 U.S.C. § 7410(l). Because both Major NSR and Minor NSR SIP revisions must avoid violation of a control strategy or interference with attainment or maintenance of a NAAQS, and meet the requirements of CAA section 110(l), there are common threads in the criteria for approving the two different programs. Petitioners' arguments, however, that EPA applied Major NSR criteria to evaluate the Program as a Minor NSR submission are incorrect.

EPA applied the Minor NSR regulatory criteria, and CAA section 110(l) in consideration of the currently approved Texas Minor NSR SIP, when it identified those components of the Program that did not meet Minor NSR SIP requirements. In its proposal, EPA clearly stated that the "legal test for whether a plan's threshold can be approved is whether it is consistent with the need for a plan to include legally enforceable procedures to ensure that the State will not permit a source that will violate the control strategy or interfere with NAAQS attainment." 74 Fed. Reg. at 48,460/2. In EPA's final decision, EPA again articulated this Minor NSR test and repeatedly applied it to the various components of the Program. In EPA's

summary of why the Program is not approvable as a Minor NSR SIP revision, EPA referred to the need to prevent interference with the NAAQS and violations of control strategies *six* separate times. 75 Fed. Reg. at 19,473. EPA found that “[o]verall, the Program fails to include sufficient legally enforceable safeguards to ensure that the NAAQS and control strategies are protected.” *Id.* at 19,473/1. Accordingly, EPA applied the proper standard in evaluating the Program as a Minor NSR program. We next address Petitioners’ argument that EPA improperly used Major NSR criteria in evaluation the Program’s netting provisions.

III. EPA Reasonably Disapproved The Netting Provisions Of The Texas Qualified Facilities Program.

EPA reasonably disapproved the netting provisions of the Program as a Minor NSR program. EPA reasonably and correctly applied principles gleaned from the Major NSR program as guidance when it reviewed the Program’s netting provisions because those principles are designed to ensure that netting provisions do not violate any applicable control strategy or interfere with attainment of any NAAQS. Other than asserting that EPA’s application of the major source netting principles as guidance is somehow inherently incorrect, Petitioners provide no reasons why the Major NSR netting principles are not relevant and appropriate guidance for EPA’s review of Minor NSR netting provisions. Petitioners’ more

specific arguments are likewise erroneous.

A. EPA Reasonably Applied the Fundamental Principles For Major NSR Netting to the Qualified Facilities Program as a Minor NSR Program.

A State may not allow the modification of an existing minor source unless the State finds that the modification will not result in a violation of applicable portions of the State's control strategy, and will not interfere with attainment or maintenance of any NAAQS. 40 C.F.R. § 51.160(b). EPA has not established specific criteria for analyzing the netting provisions of a minor source program for compliance with this standard. However, as EPA explained in the notice-and-comment rulemaking for this case, the fundamental principles applicable to the evaluation of a major source netting program are designed to ensure that the same regulatory standard applicable to the evaluation of minor source modifications are achieved, namely, that there will be no violation of any applicable control strategy or interference with attainment of any NAAQS. Therefore, EPA reasonably applied the Major NSR netting principles as an aid in its evaluation of the Qualified Facilities Program netting provisions as a Minor NSR program. 75 Fed. Reg. at 19,473; 74 Fed. Reg. at 48,460.

The principles for evaluation of a Major NSR netting program are as follows:

- (1) there must be an identified contemporaneous period for evaluating both

increases and decreases in emissions, (2) the emissions reductions must be contemporaneous and creditable, (3) the reductions must be of the same pollutant as those that will be increased, (4) the reductions must be real reductions, (5) the reductions must be permanent, and (6) the reductions must be quantifiable. 75 Fed. Reg. at 19,473 (citing 40 C.F.R. §§ 51.165(a)(1)(vi), 51.166(b)(3)).

Petitioners criticize EPA's use of these principles, but never explain why, for example, EPA should approve a netting program that allows temporary reductions or unquantifiable reductions of a pollutant to offset permanently increased emissions. In fact, the State argues that EPA is exceeding its statutory authority because Minor NSR does not contain an express "permanence" requirement, only a requirement that the NAAQS be protected. Texas' Br. at 39. As EPA explained, to assure that the NAAQS *remain* protected from the original increase in pollutants, either the netting must include a prohibition against future increases at the facility, or any future increases at a facility at which a previous netting reduction occurred must be analyzed in totality. 75 Fed. Reg. at 19,479. EPA reasonably considered the lack of permanence in determining whether the Program assures maintenance or attainment of the NAAQS and avoids violations of the control strategies.

EPA further explained that, in order for the emissions reductions to be creditable, the old level of emissions must exceed the new level of emissions, the

reduction must be enforceable as a practical matter, and the reduction must have approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change. 75 Fed. Reg. at 19,473/3. Again, Petitioners never explain why a showing of decreased emissions, practical enforceability, or roughly equivalent public health and welfare effects are unreasonable principles for evaluating a netting program.

B. EPA Reasonably Found That the Qualified Facilities Program Rules Did Not Meet the Fundamental Principles for NSR Netting.

EPA reasonably found that the Program's netting provisions failed to ensure that exemptions under the Program's rules would not result in a violation of applicable portions of the State's control strategy, and would not interfere with attainment or maintenance of any NAAQS when viewed under the guidance provided by the Major NSR netting principles. EPA identified several problems with the Program's netting provisions.

EPA found that the program fails to define a contemporaneous or other time period during which the emissions reductions must occur. 75 Fed. Reg. at 19,473/3. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 402 (D.C. Cir. 1979) ("*Alabama Power*") (determining that any offset claimed by industry due to emissions reductions must be substantially contemporaneous with the emissions increases for

US EPA ARCHIVE DOCUMENT

purposes of the PSD program, and that EPA has discretion, within reason, to define which changes are contemporaneous). EPA recognized that Texas intended that any relied-upon reductions in emissions must occur simultaneously with the increases in emissions, but determined that the Program does not contain sufficient regulatory text that provides for this or any other applicable period in which the reductions must occur. 75 Fed. Reg. at 19,478.

EPA also found that the emissions reductions used to offset increased emissions under the Program are not enforceable as a practicable matter at, and after, any modification exempted under the Program, and therefore the emissions are not sufficiently creditable. 75 Fed. Reg. at 19,473/3. EPA found the emissions reductions were not enforceable as a practicable matter for several reasons. First, the Program fails to ensure that the source may rely upon the netting reduction only once. *Id.* Thus, EPA found that the Program does not prevent double counting. *Id.*^{12/} Second, EPA found that the Program does not require that each Qualified

^{12/} The regulatory text of the Program is not consistent with Texas' apparent intent that any future increases in emissions associated with additional projects at the same facility would require additional reductions at that time. 75 Fed. Reg. at 19,479/1. Therefore, EPA could not find that the Program prevented the double counting of emissions reductions. *Id.* Double counting under the Program could interfere with attainment and maintenance of the NAAQS and violate the control strategies because a facility could inappropriately rely on one emissions reduction to offset multiple emissions increases over time. *See* 40 C.F.R. § 51.160(a).

Facility involved in the transaction seek and obtain authorization from the State reflecting all of the changes that reduced or increased emissions. *Id.* Therefore, no emissions limitations are required to enforce the netting reductions. Likewise, EPA found that the Program does not require that an existing permit be revised to reflect an increase in emissions and thus could be read to authorize violations of existing emissions limitations. *Id.* at 19,474/1. Third, no monitoring is required, because there is no permit or other authorization establishing enforceable requirements that can be monitored. 75 Fed. Reg. at 19,479/2. Therefore, EPA found that the Program is not practically enforceable because sources are allowed to exempt themselves from regulation without sufficient oversight from the State, and without a clear requirement that reductions can be relied upon only once.

EPA also disapproved the Program's use of allowable emissions in the netting calculations. 75 Fed. Reg. at 19,477. EPA explained that CAA section 110(a)(2) does *not* prohibit netting to be based upon "allowable" emissions *as long as* the State demonstrates that such netting will not lead to the violation of any applicable control strategy or the exceedance of any NAAQS. *Id.* See 40 C.F.R. 51.160(b). EPA disapproved the Program's use of allowables netting because the State failed to

make this showing. 75 Fed. Reg. at 19,477.^{13/}

As is explained below in response to Industry Petitioner's arguments, EPA also reasonably disapproved the netting provisions exchange methodology with respect to two pollutants.

C. Petitioners' Specific Arguments Regarding EPA's Disapproval of the Program's Minor NSR Netting Provisions Lack Merit.

Petitioners raise several challenges to EPA's identification of specific flaws in the netting provisions of the Program, but none are persuasive. Texas argues that EPA incorrectly found the Program fails to prevent double counting because it provides that there shall be no net increase in emissions. Texas Br. at 42. However, while the no net increase prohibition applies to any single change *presently* under consideration, it is not clear that the prohibition applies in perpetuity to all *future* changes at the same facility in such a way that emissions decreases may be used only once. *See* 30 Tex. Admin. Code § 116.116(e). Indeed, Texas concedes that any prohibition against double counting is implicit, at best, in its netting rules. Texas Br. at 42. EPA therefore reasonably determined the program does not prevent double counting.

^{13/} However, EPA determined that the emissions reductions under the Program were sufficiently quantifiable to be approvable under the guidance of the Major NSR netting principles and it rejected a comment from the University of Texas Environmental Law Clinic to the contrary. 75 Fed. Reg. at 19,477-78.

US EPA ARCHIVE DOCUMENT

Texas selectively quotes from EPA's notice of proposed rulemaking where EPA discussed the State's intent that there would be a separate netting analysis for each project. Texas Br. at 42-3. However, EPA's understanding of Texas' intent came not from the language of the Texas rules, which EPA found did *not* prevent double counting, but rather from statements Texas had made regarding the program. 74 Fed. Reg. at 48,461. Indeed, given that Texas and EPA apparently agree that a separate netting analysis must be required for each project, it is unclear why Texas is so concerned over EPA's disapproval of the State's netting provisions for their failure to clearly prevent double counting on their face. All EPA has said is that Texas should revise the regulatory language to make clear what Texas now claims to be the rules' implicit intent. *See* Texas Br. at 42 (asserting rules implicitly prevent double counting).

Texas' argument that an explicit requirement is unnecessary because it can now bring an enforcement action against an owner or operator who double counts is unpersuasive. The mere possibility that Texas initiate an enforcement action begs the question of whether the State's rules prohibit double counting when the rules themselves do not explicitly do so, and where Texas does not provide for advance authorizations of modifications as required by the approved Texas SIP.

Texas incorrectly argues that EPA impermissibly disapproved the Program

with respect to the netting of allowed, as opposed to actual, emissions because the Program applies only to sources that have already demonstrated their allowed emissions will not violate any applicable control strategy or interfere with the attainment or maintenance of any NAAQS. Texas Br. at 44. A major or a minor Texas NSR SIP permit must contain an analysis of ambient air quality in the area affected by a proposed modification. 40 C.F.R. § 51.166(m); 30 Tex. Admin. Code §§ 116.111(a)(2)(A); 116.160(c)(2)(B). However, EPA determined that the State had not shown that all Qualified Facilities will have undergone an air quality impacts analysis because not all qualified facilities will have previously received a permit under which such an analysis would have been conducted. 75 Fed. Reg. at 19,487/1-2. For example, Qualified Facilities include facilities which have never received a permit of any kind but which use an air pollution control method at least as effective as State BACT that the Texas commission would have required 10 years before the change at issue. 30 Tex. Admin. Code § 116.10(11)(E)(ii). While Texas may assert that these facilities are “well-controlled” because they use an air pollution control method as least as effective as State BACT, and that the netting analysis would include the actual emissions from these facilities, no air quality impacts analysis has ever been performed for these facilities. Therefore, there is no existing air quality impacts analysis from which EPA could determine whether a

US EPA ARCHIVE DOCUMENT

netting equation which includes the emissions from these facilities, along with the allowable emissions from the same or other facilities, will either violate a control strategy or interfere with attainment or maintenance of the NAAQS. Thus, EPA did not disapprove the Program because it used allowable emissions in its netting provision; it disapproved the Program because the overall netting scheme allowed for the use of emissions for which no air quality impacts analysis had ever been performed, and which would not be performed as part of the netting analysis itself. 75 Fed. Reg. at 19,487. *See also, id.* at 19,473 (“Without the assurance that all Qualified Facilities have obtained a Texas NSR SIP permit, EPA cannot determine that all Qualified Facilities must have Federally enforceable emission limitations based on the chosen control technology, and that the Qualified Facility will not interfere with attainment and maintenance of the NAAQS or violate any control strategy”). Texas’ argument should therefore be rejected.

Industry Petitioner’s arguments likewise have no merit. In fact, Industry primarily provides its laudatory understanding of how the Program works, and complains that EPA has usurped Texas’ policy choices, without addressing the reasons EPA disapproved the netting provisions of the Program. Industry Br. at 40-41. Like Texas, Industry Petitioners also complain that EPA based its determination on the language of the State’s rules, in this case regarding the rules’ failure to

provide for a contemporaneous time period, as opposed to what EPA understood to be Texas' intent on that issue. Industry Br. at 38-39. This is yet another instance where EPA reasonably based its decision upon what the State's rules actually provide, as opposed to the State's professed intent that is not founded on sufficient text in the rules. This issue also provides another example of where the State can easily address the basis for EPA's disapproval by making explicit what it claims is already its intent under the rule. 75 Fed. Reg. at 19,478/3 ("Such an approach, if fully delineated in the State's Program rules, would satisfy the minimum requirements for an approvable Minor NSR netting program *provided that the* ambient air is protected in consideration of all changes in the netting.").

Industry Petitioners also assert that EPA misread the Program's treatment of "equivalent" pollutants with respect to EPA's determination regarding the State's interchange methodology vis-a-vis sulfur compounds and particulate matter. Industry Br. at 39-40. However, the State's rules provide without qualification that "[e]missions of different compounds within the same air contaminant category may be interchanged," 30 Tex. Admin. Code § 116.116(e)(3)(B), and define "an air contaminant category" as "a group of related compounds, such as volatile organic compounds, particulate matter, nitrogen oxides, and sulfur compounds." *Id.* at § 116(e)(3)(F). Based on this language, EPA reasonably concluded that the term

“sulfur compounds” is broad enough to include hydrogen sulfide, and that Texas had not shown how allowing decreases of hydrogen sulfide to offset increases in sulfur dioxide would protect the sulfur dioxide NAAQS. 75 Fed. Reg. at 19,479. Likewise, because there is a separate NAAQS for both PM-2.5 and PM-10, EPA reasonably concluded that there had been no showing of how allowing decreases of PM-10 to offset increases of PM 2.5 would protect the PM 2.5 NAAQS. Because Minor NSR netting provisions must ensure that approved modifications do not result in interference with the attainment of any NAAQS, Industry’s argument with respect to “equivalent” contaminants is off the mark with respect to EPA’s determinations regarding sulfur compounds and particulate matter. 40 C.F.R. § 51.160(b)(2).

IV. EPA Reasonably Disapproved the Qualified Facilities Program Because It Could Not Find That the Program Protects the NAAQS and Control Strategies or that the Program Qualifies as a *De Minimis* Exemption.

A. The Program Relaxes the Requirements of the Approved SIP.

EPA’s Minor NSR regulations, 40 C.F.R. § 51.160(b), require that a Minor NSR SIP include means by which a State can approve or disapprove a minor modification to protect the NAAQS and control strategies. The regulations allow States to specify what facilities are subject to review and require the States to “discuss the basis for determining which facilities will be subject to review.” 40

C.F.R. § 51.160(e). In Texas' case, the State's approved SIP requires advance authorizations for all emissions. 30 Tex. Admin. Code 116.110(a); 68 Fed. Reg. 64,543 (Nov. 14, 2003) (approving 30 Tex. Admin. Code 116.110(a)). In contrast, the Program does not require that existing permits be revised when the change occurs.

Texas argues that EPA's Minor NSR regulations do not apply to the Program because it exempts certain modifications that would otherwise be subject to the regulations from the definition of "modification." Texas Br. at 51. Texas also argues that there is nothing in the regulatory scheme that requires a Minor NSR SIP to include provisions for permit applications and revisions. Texas Br. at 48. However, as noted above, Texas' approved SIP applies to *all* facilities that emit air contaminants. 30 Tex. Admin. Code § 116.110(a). Thus, Texas' approved SIP already requires advance authorizations for modifications, and the Program may not relax this requirement unless the State justifies the exemption as truly *de minimis*, or otherwise shows that it meets the criteria of CAA section 110(l), which Texas did not do.^{14/}

^{14/} Texas' reference to EPA's approval of permit alterations under the Texas SIP is likewise not on point. Texas Br. at 48-49. Texas NSR SIP permit alterations are advance authorizations. Such alterations to existing permits cover variations to a representation in a permit application or variations in a general or (continued...)

B. EPA Reasonably Determined That It Lacked Sufficient Information to Determine Whether The Qualified Facilities Program Qualifies as a *De Minimis* Exemption or Otherwise Satisfies the Requirements of CAA Section 110(I).

The Program is an exemption from the otherwise applicable advanced authorization required by the State's SIP. EPA has interpreted the CAA to provide for the exemption of minor sources from the requirements of the regulations when the *de minimis* criteria of *Alabama Power* have been met. App. Tab M at 2-3 ((AR Doc. 42) Letter from Robert E. Hanneschlager of EPA to Mr. Randall Mathis, Director, Arkansas Department of Pollution Control Technology (June 3, 1998).^{14/}

In addition, as described above, EPA may approve a change to an existing SIP if the

^{14/}(...continued)

special condition of a permit that *decreases* the allowable emissions or does not change the character or method of control of emissions. 67 Fed. Reg. 58,697, 58,699 (Sept. 18, 2002). This is entirely unlike the Program, which applies to emissions *increases* that may be netted out through a complicated netting analysis potentially involving emissions that have never been evaluated for their impacts to air quality.

^{15/} In *Alabama Power*, the court laid the groundwork for determining when, and to what extent, an agency may provide for an exemption from regulation for matters that are *de minimis*. 636 F.2d at 360-62. Unless Congress has been extraordinarily rigid, an administrative agency has implicit authority to provide for an exemption from regulation when the burdens of regulation yield a gain of trivial or no value. *Id.* The basis of any implied exemption must be made on congressional intent in the statute in question. *Id.* at 361. The regulatory agency claiming an exemption to exist bears the burden of showing that a *de minimis* exemption is available under the particular circumstances at issue. *Id.* at 360.

revision meets the non-interference criteria of CAA section 110(*l*). 42 U.S.C. § 7410(*l*).

In its notice of proposed rulemaking, EPA made clear that it lacked sufficient information to determine whether the Qualified Facilities Program qualifies as a *de minimis* exemption, and whether the SIP relaxation would interfere with applicable requirements concerning attainment or reasonable further progress or any other applicable requirement of the CAA, in accordance with CAA section 110(*l*), 42 U.S.C. § 7410(*l*). 74 Fed. Reg. at 48,463/1. EPA provided a description of the types of information the State would likely need to submit in order to demonstrate that changes under the Program are truly *de minimis*, or to otherwise show that the Program satisfies the criteria of CAA section 110(*l*). *Id.* at 48,463 n.13. The type of information Texas would need to submit would be specific to the Program and may require modeling. *Id.* The State did not provide this information in its comments to EPA. EPA therefore reasonably determined that the State failed to demonstrate that the changes from the Program were truly *de minimis*, and that the relaxed SIP met the requirements of CAA section 110(*l*). 75 Fed. Reg. at 19,482/1. This determination is supported by the Administrative Record, which does not contain sufficient, specific information for EPA to make the necessary findings despite EPA's request for the information, and the Court should therefore uphold the

determination. *BCAA Appeal Group v. EPA*, 355 F.3d 817, 824 (5th Cir. 2003) (“[A]gency decisions will be upheld so long as the agency ‘examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”) (*Quoting, Burlington Truck Lines, v. United States*, 371 U.S. 156, 168 (1962)).^{16/}

Apparently, Texas has since undertaken a study of the Program, which Industry Petitioners heavily rely upon in their argument that sufficient information exists for EPA to determine that the program meets the regulatory criteria. Industry Br. at 33-37 (citing to “TCEQ 2010 Study”). However, the Texas study was not provided to EPA during the rulemaking proceedings on the final rule challenged here, it is not part of the Administrative Record on review, and the Court should refuse to consider the study or Industry’s arguments based on the study. *Camp v. Pitts*, 411 U.S. at 142-43 (“[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court”).

Industry Petitioners otherwise rely upon the fact that some (though not all) areas in Texas are in attainment status for all the NAAQS, and that EPA has

^{16/} By indicating that it lacked sufficient information to make these findings, EPA has clearly left the door open for Texas to make the necessary showings in its submission of the revised Program.

approved attainment demonstrations and emissions control strategies for some air quality control regions in Texas, to suggest that the Qualified Facilities Program should not be expected to interfere with attainment of the NAAQS. Industry Br. at 34-36. However, the Program is of State-wide applicability, and EPA cannot presume that the Program's continued exemptions from permitting would not result in interference with attainment of the NAAQS in *every* area in Texas. Moreover, none of the attainment demonstrations and control strategies cited by Industry Petitioners provides specific information concerning whether the Program contributes to attainment or maintenance of the NAAQS. Indeed, the Program is not listed as a permanent and enforceable control strategy that has been or will be used in those areas projected to attain the NAAQS in the future. *See* 74 Fed. Reg. 1,903 (Jan. 14, 2009) (concerning Dallas/Fort Worth 8-hour ozone non-attainment area); 71 Fed. Reg. 52,670 (Sept. 6, 2006) and 66 Fed. Reg. 57,230 (Nov. 14, 2001) (concerning the Houston/Galveston/Brazoria 1-hour ozone non-attainment area).^{17/}

^{17/} EPA's final action approving the State's request to determine that the Beaumont/Port Arthur 8-hour ozone non-attainment area is attaining the 8-hour ozone NAAQS occurred after the final rule in this case. *See* Industry Br. at 34 n.40, 36 & n.54. Regardless, in the proposal to approve the 8-hour ozone attainment demonstration for the Beaumont/Port Arthur area, EPA went into detail regarding the types of control strategies that produce permanent and enforceable emissions reductions resulting in air quality improvements leading to attainment of the NAAQS. The Program is not listed as one of those permanent and enforceable
(continued...)

Therefore, contrary to Industry Petitioners' arguments, under these circumstances, EPA reasonably concluded that it lacked sufficient information to determine whether the Program is truly *de minimis*, and whether it meets the non-interference criterion of CAA section 110(l).

While Texas baldly asserted in its comments on EPA's notice of proposed rulemaking that the Program helped to reduce emissions at grandfathered facilities, it also conceded that grandfathered facilities have, since 2001, been required to have permits or be shut down. App. Tab L, Texas Comments at 3. Texas provided no information correlating any emissions reductions from grandfathered facilities to the Program, as opposed to facilities that either shut down or obtained permits under another Texas program. *See id.*^{18/} Thus, the fact that some grandfathered facilities may (or may not) have reduced emissions under the Program does not undercut EPA's determination that it lacked sufficient information to determine whether the Program is truly *de minimis* and whether it meets the non-interference requirement

^{17/}(...continued)
control strategies. 75 Fed. Reg. 27,514, 27,526-529 (May 17, 2010).

^{18/} Certain industry commenters also provided comments and data regarding air quality improvements in certain areas of Texas. However, those comments likewise presented no data with respect to the number or location of Qualified Facilities or their impacts in attainment or non-attainment areas. *See* Industry Br. at 35 & n. 44 (citing Texas Chemical Council and Texas Industry Project comments); App. Tabs J, K. (AR Docs. 24, 18).

of CAA section 110(l), or otherwise does not violate an applicable control strategy as contemplated under 40 C.F.R. § 51.160(b). Therefore, the Court should uphold EPA's determination that it lacked sufficient information to make these critical findings with respect to the Qualified Facilities Program.

C. Petitioners' Arguments Regarding Other Areas and the Practicable Enforceability of the Program Lack Merit.

Industry Petitioners' reliance on EPA's proposed or final actions regarding SIPs governing other geographic areas is misplaced. *See* Industry Br. at 29-31. Industry Petitioners cite to the *proposed* Indian Country Rule, and correctly observes that both it and the Qualified Facilities Program define modifications in terms of increases in the allowable emissions of the affected emissions unit. Industry Br. at 29-30. However, the proposed Indian Country Rule is materially different from Texas' Program because the emissions units regulated under the proposed Indian Country Rule are governed by federal CAA standards and, as a result, can only use allowable emissions netting *after* the source conducts a Major NSR applicability determination and determines it is not subject to Major NSR. *See* 71 Fed. Reg. 48,696, 48,705, 48,709-48,711, 48,728-29 (Aug. 21, 2006). Thus, the proposed Indian Country Rule, unlike the Program, contains requirements that preclude circumvention of Major NSR. Moreover, as discussed above, the Program

fails to meet other guidelines for an approvable minor source netting program.

EPA's final action on a revision to the Nevada SIP for Clark County, Nevada, is not inconsistent with its action on the Qualified Facilities Program, as Industry Petitioners assert. Industry Br. at 37. EPA was there reviewing a proposed SIP revision with respect to one county where it had adequate information to determine whether the proposed revision at issue was consistent with the requirements of CAA section 110(l). 69 Fed. Reg. 54,006, 54,012 (Sept. 7, 2004). This is in contrast to the Program, which applies across the entire State of Texas, including non-attainment areas with and without approved attainment demonstrations. Thus, unlike for Clark County, EPA has not been provided with sufficient information to determine that the Program is consistent with CAA section 110(l) with respect to *all* air quality control regions in the entire State of Texas.

Industry Petitioners' discussion of the Clark County revision as an example of EPA's approval of a *de minimis* exemption, Industry Br. at 30-31, similarly fails to account for key differences between the Nevada SIP and the Qualified Facilities Program. The Nevada SIP submission represented a comprehensive revision of Clark County's NSR program under both PSD and NNSR, and addressed the permitting of major new sources, major modifications, and minor sources. 69 Fed. Reg. 31,056, 31,057-58 (June 2, 2004). Naturally, EPA considered the entire NSR

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program in its review, including pollutant-by-pollutant evaluations, air quality conditions and planning requirements. The presence of a *de minimis* exemption was an inconsequential component of the submitted program, and is mentioned only once in passing throughout the proposed and final rulemakings. *See* 69 Fed. Reg. at 31,063 (only mention of *de minimis* exemption, in a parenthetical). Most significant, Industry Petitioners incorrectly claim (in italicized text) that EPA disapproved the Program based on the assertion that exemptions from permitting requirements are not allowed. Industry Br. at 31. Rather, as discussed above, EPA determined that it lacked sufficient information to determine whether the Program qualified as a *de minimis* exemption and met the requirements of EPA's regulations and CAA section 110(l), because Texas did not provide the necessary information for EPA to make these determinations.

Texas' and Industry Petitioners' arguments that the Program is enforceable because sources must report their use of the Program and because Texas may bring an enforcement action for any violations also miss the mark. Texas Br. at 45-49; Industry Br. at 40-41. All SIPs must have adequate after-the-fact reporting and enforcement measures, 42 U.S.C. § 7410(a)(2), and EPA did not determine that the State lacked the authority to bring enforcement actions for violations of the Qualified Facilities Program. Rather, EPA determined that, unlike the approved

SIP, the Program lacked provisions ensuring practical enforceability and EPA could not determine whether the Program could qualify as a *de minimis* exemption. *See, e.g.* 75 Fed. Reg. at 19,482/3 (determining that the program fails to require a permit that provides enforceable emissions limits and that notification and record-keeping requirements are beneficial but not sufficient to ensure enforceability); *id.* at 19,474-75 (summarizing comments of several members of the Texas House of Representatives that the Qualified Facilities program is difficult to enforce because there are no procedures for up-front approvals or denials of proposed changes under the program). Petitioners have not even attempted to show that the Program's relaxation of the approved SIP's requirement for advance authorizations either qualifies as a *de minimis* exemption or meets the requirements of CAA section 110(l), and their arguments regarding after-the-fact enforcement should therefore be rejected.

Finally, Texas makes much of EPA's determination that the Program is not practically enforceable in part because it allows too long of a lag time before a notification is submitted, and that EPA failed to take into account the State's reasons for having a one-year lag time, as opposed to the six-month notification period preferred by EPA. Texas Br. at 49-50. However, the Court should refuse to consider Texas' argument concerning the lag time requirements because Texas

failed to raise the issue in the rulemaking proceedings, specifically stating “[t]he TCEQ has no comment on the suggested change to the reporting time interval from one year to six months and will consider this change during the [upcoming] rulemaking.” App. Tab L, Texas’ comments at 8. Because Texas did not challenge EPA’s determination that a six-month time period is more consistent with the regulatory requirements in its comments to EPA, it should not be allowed to attack EPA’s final rule on this basis here. *Louisiana Env’tl. Action Network v. EPA*, 382 F.3d at 584 (refusing to consider challenge to EPA rule on grounds not raised during comment period)

If the Court nonetheless considers Texas’ argument, the Court should reject it. The one-year lag time could result in modifications that interfere with attainment and maintenance of the NAAQS and/or violate State control strategies without the State learning of this within an appropriate time-frame. Further, the State may not be aware of such problems until after a source has incurred significant expenses associated with the modifications in question. *See* 74 Fed. Reg. 48,462. Therefore, EPA reasonably found that a one year lag time is too long, and a shorter period of six months is more appropriate to prevent or minimize these potential negative consequences.

V. EPA Reasonably Disapproved The Qualified Facilities Program, Based In Part, On Its Determination That Texas' Definition of "Facility" Is Vague.

EPA determined that the term "facility" as it applies to the Program is overly vague, and therefore unenforceable. 75 Fed. Reg. at 19,489. EPA reasonably reached this conclusion because Texas' various NSR rules use more than one definition of the term "facility," and because some definitions specifically limit the definition of facility to "emissions units," while the Program does not. *Id.* See also 30 Texas Admin Code § 116.10(6) (defining "facility" for purposes of the Program). The difference is important to the Program as a Minor NSR program because it must be clear under the Program which specific "facilities" are subject to it, and how the varying definitions apply to its netting provisions.

Petitioners argue that there is one definition of facility for all purposes under the State's varying NSR programs, and that the definition is equivalent to the Federal definition of "emissions unit." Texas Br. at 52-54; Industry Br. at 42-43. However, while the Program includes a definition of the term "facility," it does not include a definition of the term "emissions unit," nor does the Program expressly limit the term "facility" to the Federal definition of "emissions unit." See generally 30 Texas Admin Code § 116.10. Because other Texas NSR programs do clearly limit the definition of "facility" to the Federal definition of "emissions unit," EPA

reasonably concluded that the definition of “facility” in the Program is vague and it disapproved the Program, in part, on this lack of clarity. 75 Fed. Reg. at 19,489 (comparing definition of “facility” in the Program to the definition of “facility” in the non-plant-wide applicability limit NSR SIP at 30 Texas Admin Code § 116.160(c)(3)).

Moreover, the fact that some Texas NSR programs explicitly limit the definition of “facility” to the Federal definition of “emissions unit,” while the Program contains its own non-limited definition of “facility,” belies Petitioners’ contention that there is one overarching definition of “facility” for all Texas NSR programs. Regardless, this is another instance where Texas has failed to provide sufficient regulatory text in its rules to say what it claims it has meant all along. Texas can easily resolve this issue by adding regulatory text to carry out its intentions.

VI. EPA’S Failure to Meet the Statutory Deadline for Final Action on the SIP Revision Is Not a Basis to Overturn the Final Rule.

Industry Petitioners argue that EPA’s disapproval of the Program is arbitrary and capricious because EPA missed the 18-month deadline for final action on the SIP submission under CAA section 110(k), 42 U.S.C. § 7410(k). Industry’s Br. at 44-45. These arguments are wrong.

As the Supreme Court succinctly stated in similar circumstances:

We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.

General Motors Corp. v. United States, 496 U.S. at 542 (internal quotations marks and citations omitted). Indeed, the Court's decision in *General Motors* is controlling here. In that case, the Court held that EPA could not be barred from enforcing an existing Federally enforceable SIP even if EPA had unreasonably delayed action on a proposed SIP revision. *Id.* at 540-42. The Court reasoned that the existing SIP remains the applicable implementation plan even after the State submits a proposed revision, and it found nothing in the CAA to suggest that Congress intended to limit EPA's authority to enforce the currently applicable SIP when it has unreasonably delayed acting on a SIP revision. *Id.* at 540-41. The Court specifically noted that the statutory remedy for EPA inaction is a mandatory duty claim in Federal district court under 42 U.S.C. § 7604(a)(2). *Id.* at 541-42 n.4.

The same reasoning applies here. Nothing in the CAA suggests that EPA loses its authority to disapprove a SIP revision if it misses the statutory deadline for final action on the SIP revision. Had Congress wanted to impose such a limitation,

US EPA ARCHIVE DOCUMENT

it would have done so in CAA section 110(k), the CAA provision establishing the deadline. 42 U.S.C. § 7410(k). In fact, Congress there provided that a SIP submission will be deemed complete by operation of law within 6-months of its submission if EPA has not made a completeness determination by that time. *Id.* at § 7410(k)(1)(B). However, Congress did *not* provide that a SIP submission will be deemed approved by operation of law if EPA has not acted on the submission within the eighteen-month deadline for final EPA action on the submission. *See id.* at § 7410(k)(2) (establishing deadline for action). Instead, it provided an alternative statutory remedy for any EPA delay through a mandatory duty suit in Federal district court under 42 U.S.C. § 7604(a)(2), which some of the Industry Petitioners availed themselves of with respect to EPA's delay in acting on the Program. *See BCCA Appeal Group v. EPA*, No. 3:08-cv-01491-G (N.D. Tex.). Under *General Motors*, this Court should not presume that Congress intended EPA should lose its power to act when Congress has provided a less dramatic remedy for EPA's delay. *Id.* at 542. Therefore, the Court should reject Industry Petitioners' argument that EPA's disapproval action in this case should be overturned due to EPA's delay in acting on the Program.

The Supreme Court's decision in *General Motors* also dispenses with Industry Petitioners' assertions that Industry and Texas were required to implement

the Program pending EPA's final action on it, and that Texas and Industry reasonably relied upon EPA's express and tacit encouragement of the Program.^{19/} As the Court made clear, "the approved SIP is the applicable [SIP] during the time a SIP revision proposal is pending." 496 U.S. at 540. Moreover, under CAA section 116, a State may not implement any emission limitation that is less stringent than the applicable, approved SIP. 42 U.S.C. § 7416. CAA section 116 clearly applies to the Qualified Facilities Program because it establishes a new exemption from NSR permitting, and therefore is less stringent than the existing, approved SIP. Thus, Texas and Industry unreasonably assumed the risk of moving forward with the Program pending EPA's final action on it.

Finally, Industry Petitioners' assertion that EPA acted without citing any empirical data puts the cart before the horse. As noted above, Texas failed to submit any empirical data demonstrating that the Program would not result in a violation of any control requirement or not interfere with the attainment of any NAAQS. Accordingly, EPA acted reasonably when it determined that the Administrative Record does not support a conclusion that the Program meets the statutory and regulatory requirements for approval.

^{19/} Industry Petitioners cite nothing in the Administrative Record showing that EPA expressly or tacitly encouraged the Program. Thus, their assertion is also factually incorrect.

CONCLUSION

For all these reasons, the Court should deny the Petitions for Review.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

JOHN C. CRUDEN
Deputy Assistant Attorney General

s/David A. Carson
DAVID A. CARSON
ALAN D. GREENBERG
United States Department of Justice
Environment and Natural Resources
Division
999 18th Street
South Terrace, Suite 370
Denver, Colorado 80202
(303) 844-1349
(303) 844-1366

OF COUNSEL

SCOTT JORDAN
EPA Office of General Counsel
Washington, D.C.

CARRIE THOMAS
LUCINDA WATSON
EPA Office of Regional Counsel
Dallas, TX

Date: December 20, 2010

CERTIFICATE OF SERVICE

It is hereby certified 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 20th day of December, 2010. Any other counsel of record will be served by first class U.S. mail on this same day.

s/David A. Carson

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. 32(a)(7)(C), the undersigned certifies that this brief is proportionally spaced, uses 14-point type, and contains 13,817 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/David A. Carson

ADDENDUM

Citation

5 U.S.C. § 706

42 U.S.C. § 7410(a)(2)

42 U.S.C. § 7410(k)

42 U.S.C. § 7410(l)

42 U.S.C. § 7416

42 U.S.C. § 7604(a)(2)

40 C.F.R. §§ 51.160-51.163

40 C.F.R. § 51.165(a)(1)(iv)

40 C.F.R. § 51.165(a)(1)(vi)

40 C.F.R. § 51.166(b)(3)

40 C.F.R. § 51.166(b)(5)

40 C.F.R. § 51.166(b)(6)

40 C.F.R. § 51.281

75 Fed. Reg. 19,468 (Apr. 14, 2010)

Tex. Health & Safety Code § 382.003

Tex. Health & Safety Code § 382.05196

30 Tex. Admin. Code § 101.1(1)

30 Tex. Admin. Code § 106.4

30 Tex. Admin Code § 116.10

30 Tex. Admin. Code § 116.110

30 Tex. Admin. Code § 116.111

30 Tex. Admin. Code § 116.116

30 Tex. Admin. Code § 116.117

30 Tex. Admin. Code § 116.118

30 Tex. Admin. Code §116.610

C

Effective:[See Text Amendments]

United States Code Annotated [Currentness](#)Title 5. Government Organization and Employees ([Refs & Annos](#)) [Ⓜ] [Part I](#). The Agencies Generally [Ⓜ] [Chapter 7](#). Judicial Review ([Refs & Annos](#))

→ § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to [sections 556](#) and [557](#) of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

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Title 42. The Public Health and Welfare

Chapter 85. Air Pollution Prevention and Control ([Refs & Annos](#))▢ [Subchapter I. Programs and Activities](#)▢ [Part A. Air Quality and Emissions Limitations](#) ([Refs & Annos](#))→ **§ 7410. State implementation plans for national primary and secondary ambient air quality standards**

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under [section 7409](#) of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall--

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to--

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions--

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will--

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of [sections 7426](#) and [7415](#) of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under [section 7428](#) of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator--

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in [section 7603](#) of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan--

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of [section 7421](#) of this title (relating to consultation), [section 7427](#) of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for--

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover--

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated

Except for a primary nonferrous smelter order under [section 7419](#) of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under [section 7418](#) of this title (relating to certain Federal facilities), an order under [section 7413\(d\)](#) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in [section 7506a](#) of this title or [section 7511c](#) of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination

and the basis thereof shall be provided to the State and public.

(l) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in [section 7501](#) of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in [section 7509\(b\)](#) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of [section 7509\(a\)](#) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in [section 7509\(a\)](#) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in [section 7509\(a\)](#) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State--

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of Novem-

**Effective:[See Text Amendments]**United States Code Annotated [Currentness](#)

Title 42. The Public Health and Welfare

Chapter 85. Air Pollution Prevention and Control ([Refs & Annos](#))▢ [Subchapter I. Programs and Activities](#)▢ [Part A. Air Quality and Emissions Limitations](#) ([Refs & Annos](#))➔ **§ 7416. Retention of State authority**

Except as otherwise provided in [sections 1857c-10\(c\)](#), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under [section 7411](#) or [section 7412](#) of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 116, formerly § 109, as added Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 497, renumbered and amended Dec. 31, 1970, Pub.L. 91-604, § 4(a), (c), 84 Stat. 1678, 1689; June 22, 1974, [Pub.L. 93-319](#), § 6(b), 88 Stat. 259; Nov. 16, 1977, [Pub.L. 95-190](#), § 14(a)(24), 91 Stat. 1400.)

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Title 42. The Public Health and Welfare

[⌵] [Chapter 85](#). Air Pollution Prevention and Control ([Refs & Annos](#)) [⌵] [Subchapter III](#). General Provisions → **§ 7604. Citizen suits**

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf-

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(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in [section 7607\(b\)](#) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under [section 7607\(b\)](#) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

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Title 40. Protection of Environment

Chapter I. Environmental Protection Agency
([Refs & Annos](#))

Subchapter C. Air Programs

 [Part 51](#). Requirements for Preparation,
Adoption, and Submittal of Implementa-
tion Plans ([Refs & Annos](#))

 [Subpart I](#). Review of New Sources
and Modifications ([Refs & Annos](#))

 **§ 51.160 Legally enforceable pro-
cedures.**

(a) Each plan must set forth legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure or installation, or combination of these will result in--

(1) A violation of applicable portions of the control strategy; or

(2) Interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

(b) Such procedures must include means by which the State or local agency responsible for final decisionmaking on an application for approval to construct or modify will prevent such construction or modification if--

(1) It will result in a violation of applicable portions of the control strategy; or

(2) It will interfere with the attainment or maintenance of a national standard.

(c) The procedures must provide for the submission, by the owner or operator of the building, facility, structure, or installation to be constructed or modified, of such information on--

(1) The nature and amounts of emissions to be emitted by it or emitted by associated mobile sources;

(2) The location, design, construction, and operation of such facility, building, structure, or installation as may be necessary to permit the State or local agency to make the determination referred to in paragraph (a) of this section.

(d) The procedures must provide that approval of any construction or modification must not affect the responsibility to the owner or operator to comply with applicable portions of the control strategy.

(e) The procedures must identify types and sizes of facilities, buildings, structures, or installations which will be subject to review under this section. The plan must discuss the basis for determining which facilities will be subject to review.

(f) The procedures must discuss the air quality data and the dispersion or other air quality modeling used to meet the requirements of this subpart.

(1) All applications of air quality modeling involved in this subpart shall be based on the applicable models, data bases, and other requirements specified in appendix W of this part (Guideline on Air Quality Models).

(2) Where an air quality model specified in appendix W of this part (Guideline on Air Quality Models) is inappropriate, the model may be modified or another model substituted. Such a modification or substitution of a model may be made on a case-by-case basis or, where appropriate, on a generic basis for a specific State program. Written approval of the Administrator must be obtained for any modification or substitution. In addition, use of a modified or substituted model must be subject to notice and opportunity for public comment under procedures set forth in § 51.102.

[58 FR 38822, July 20, 1993; 60 FR 40468, Aug. 9, 1995; 61 FR 41840, Aug. 12, 1996]

SOURCE: 36 FR 22398, Nov. 25, 1971; 51 FR 40669, Nov. 7, 1986; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 72 FR 28613, May 22, 2007, unless otherwise noted.

AUTHORITY: 23 U.S.C. 101; 42 U.S.C. 7401-7671q.

40 C. F. R. § 51.160, 40 CFR § 51.160

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Title 40. Protection of Environment

Chapter I. Environmental Protection Agency
([Refs & Annos](#))

Subchapter C. Air Programs

▢ [Part 51](#). Requirements for Preparation,
Adoption, and Submittal of Implementa-
tion Plans ([Refs & Annos](#))

▢ [Subpart I](#). Review of New Sources
and Modifications ([Refs & Annos](#))

→ **§ 51.161 Public availability of in-
formation.**

(a) The legally enforceable procedures in [§ 51.160](#) must also require the State or local agency to provide opportunity for public comment on information submitted by owners and operators. The public information must include the agency's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval.

(b) For purposes of paragraph (a) of this section, opportunity for public comment shall include, as a minimum--

(1) Availability for public inspection in at least one location in the area affected of the information submitted by the owner or operator and of the State or local agency's analysis of the effect on air quality;

(2) A 30-day period for submittal of public comment; and

(3) A notice by prominent advertisement in the

area affected of the location of the source information and analysis specified in paragraph (b)(1) of this section.

(c) Where the 30-day comment period required in paragraph (b) of this section would conflict with existing requirements for acting on requests for permission to construct or modify, the State may submit for approval a comment period which is consistent with such existing requirements.

(d) A copy of the notice required by paragraph (b) of this section must also be sent to the Administrator through the appropriate Regional Office, and to all other State and local air pollution control agencies having jurisdiction in the region in which such new or modified installation will be located. The notice also must be sent to any other agency in the region having responsibility for implementing the procedures required under this subpart. For lead, a copy of the notice is required for all point sources. The definition of point for lead is given in [§ 51.100\(k\)\(2\)](#).

SOURCE: 36 FR 22398, Nov. 25, 1971; [51 FR 40669](#), Nov. 7, 1986; [52 FR 24712](#), July 1, 1987; [55 FR 14249](#), April 17, 1990; [56 FR 42219](#), Aug. 26, 1991; [57 FR 32334](#), July 21, 1992; [57 FR 52987](#), Nov. 5, 1992; [58 FR 38821](#), July 20, 1993; [60 FR 40100](#), Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; [62 FR 44903](#), Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; [65 FR 45532](#), July 24, 2000; [72 FR 28613](#), May 22, 2007, unless otherwise noted.

AUTHORITY: [23 U.S.C. 101](#); [42 U.S.C. 7401-7671q](#).

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Title 40. Protection of Environment

Chapter I. Environmental Protection Agency
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Subchapter C. Air Programs

▢ [Part 51](#). Requirements for Preparation,
Adoption, and Submittal of Implementa-
tion Plans ([Refs & Annos](#))▢ [Subpart I](#). Review of New Sources
and Modifications ([Refs & Annos](#))**→ § 51.162 Identification of re-
sponsible agency.**

Each plan must identify the State or local agency which will be responsible for meeting the requirements of this subpart in each area of the State. Where such responsibility rests with an agency other than an air pollution control agency, such agency will consult with the appropriate State or local air pollution control agency in carrying out the provisions of this subpart.

SOURCE: 36 FR 22398, Nov. 25, 1971; [51 FR 40669](#), Nov. 7, 1986; [52 FR 24712](#), July 1, 1987; [55 FR 14249](#), April 17, 1990; [56 FR 42219](#), Aug. 26, 1991; [57 FR 32334](#), July 21, 1992; [57 FR 52987](#), Nov. 5, 1992; [58 FR 38821](#), July 20, 1993; [60 FR 40100](#), Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; [62 FR 44903](#), Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; [65 FR 45532](#), July 24, 2000; [72 FR 28613](#), May 22, 2007, unless otherwise noted.

AUTHORITY: [23 U.S.C. 101](#); [42 U.S.C. 7401-7671q](#).



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Title 40. Protection of Environment

Chapter I. Environmental Protection Agency
([Refs & Annos](#))

Subchapter C. Air Programs

▢ [Part 51](#). Requirements for Preparation,
Adoption, and Submittal of Implementa-
tion Plans ([Refs & Annos](#))▢ [Subpart I](#). Review of New Sources
and Modifications ([Refs & Annos](#))**→ § 51.163 Administrative proced-
ures.**

The plan must include the administrative proced-
ures, which will be followed in making the determ-
ination specified in [paragraph \(a\)](#) of § 51.160.

SOURCE: 36 FR 22398, Nov. 25, 1971; [51 FR 40669](#), Nov. 7, 1986; [52 FR 24712](#), July 1, 1987; [55 FR 14249](#), April 17, 1990; [56 FR 42219](#), Aug. 26, 1991; [57 FR 32334](#), July 21, 1992; [57 FR 52987](#), Nov. 5, 1992; [58 FR 38821](#), July 20, 1993; [60 FR 40100](#), Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; [62 FR 44903](#), Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; [65 FR 45532](#), July 24, 2000; [72 FR 28613](#), May 22, 2007, unless otherwise noted.

AUTHORITY: [23 U.S.C. 101](#); [42 U.S.C. 7401-7671q](#).

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Title 40. Protection of Environment

Chapter I. Environmental Protection Agency ([Refs & Annos](#))

Subchapter C. Air Programs

▢ [Part 51](#). Requirements for Preparation, Adoption, and Submittal of Implementation Plans ([Refs & Annos](#))

▢ [Subpart I](#). Review of New Sources and Modifications ([Refs & Annos](#))

→ **§ 51.165 Permit requirements.**

(a) State Implementation Plan and Tribal Implementation Plan provisions satisfying sections 172(c)(5) and 173 of the Act shall meet the following conditions:

(1) All such plans shall use the specific definitions. Deviations from the following wording will be approved only if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition below:

(i) Stationary source means any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.

(ii) Building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of 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 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 4101-0065 and 003-005-00176-0, respectively).

(iii) 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 only 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.

(iv)(A) Major stationary source means:

(1) Any stationary source of air pollutants that emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant, except that lower emissions thresholds shall apply in areas subject to subpart 2, subpart 3, or subpart 4 of part D, title I of the Act, according to paragraphs (a)(1)(iv)(A)(1)(i) through (vi) of this section.

(i) 50 tons per year of volatile organic compounds in any serious ozone nonattainment area.

(ii) 50 tons per year of volatile organic compounds in an area within an ozone transport region, except for any severe or extreme ozone nonattainment area.

(iii) 25 tons per year of volatile organic compounds in any severe ozone nonattainment area.

(iv) 10 tons per year of volatile organic compounds in any extreme ozone nonattainment area.

(v) 50 tons per year of carbon monoxide in any serious nonattainment area for carbon monoxide, where stationary sources contribute significantly to carbon monoxide levels in the area (as determined under rules issued by the Administrator).

(vi) 70 tons per year of PM-10 in any serious nonattainment area for PM-10;

(2) For the purposes of applying the requirements of paragraph (a)(8) of this section to stationary sources of nitrogen oxides located in an ozone nonattainment area or in an ozone transport region, any stationary source which emits, or has the potential to emit, 100 tons per year or more of nitrogen oxides emissions, except that the emission thresholds in paragraphs (a)(1)(iv)(A)(2)(i) through (vi) of this section shall apply in areas subject to subpart 2 of part D, title I of the Act.

(i) 100 tons per year or more of nitrogen oxides in any ozone nonattainment area classified as marginal or moderate.

(ii) 100 tons per year or more of nitrogen oxides in any ozone nonattainment area classified as a transitional, submarginal, or incomplete or no data area, when such area is located in an ozone transport region.

(iii) 100 tons per year or more of nitrogen oxides in any area designated under section 107(d) of the Act as attainment or unclassifiable for ozone that is located in an ozone transport region.

(iv) 50 tons per year or more of nitrogen oxides in any serious nonattainment area for ozone.

(v) 25 tons per year or more of nitrogen oxides in any severe nonattainment area for ozone.

(vi) 10 tons per year or more of nitrogen oxides in any extreme nonattainment area for ozone; or

(3) Any physical change that would occur at a stationary source not qualifying under paragraphs (a)(1)(iv)(A)(1) or (2) of this section as a major stationary source, if the change would constitute a major stationary source by itself.

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

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

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

(2) Kraft pulp mills;

(3) Portland cement plants;

(4) Primary zinc smelters;

(5) Iron and steel mills;

(6) Primary aluminum ore reduction plants;

(7) Primary copper smelters;

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

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

(10) Petroleum refineries;

(11) Lime plants;

(12) Phosphate rock processing plants;

- (13) Coke oven batteries;
- (14) Sulfur recovery plants;
- (15) Carbon black plants (furnace process);
- (16) Primary lead smelters;
- (17) Fuel conversion plants;
- (18) Sintering plants;
- (19) Secondary metal production plants;
- (20) Chemical process plants--The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;
- (21) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;
- (22) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
- (23) Taconite ore processing plants;
- (24) Glass fiber processing plants;
- (25) Charcoal production plants;
- (26) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input; and
- (27) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(v)(A) Major modification means any physical change in or change in the method of operation of a major stationary source that would result in:

- (1) A significant emissions increase of a regulated NSR pollutant (as defined in paragraph (a)(1)(xxvii) of this section);

and

- (2) A significant net emissions increase of that pollutant from the major stationary source.

(B) Any significant emissions increase (as defined in paragraph (a)(1)(xxvii) of this section) from any emissions units or net emissions increase (as defined in paragraph (a)(1)(vi) of this section) at a major stationary source that is significant for volatile organic compounds shall be considered significant for ozone.

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

- (1) Routine maintenance, repair and replacement. Routine maintenance, repair and replacement shall include, but not be limited to, any activity(s) that meets the requirements of the equipment replacement provisions contained in paragraph (h) of this section;

Note to paragraph (a)(1)(v)(C)(1): On December 24, 2003, the second sentence of this paragraph (a)(1)(v)(C)(1) is stayed indefinitely by court order. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the Federal Register advising the public of the termination of the stay.

- (2) 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 plan pursuant to the Federal Power Act;

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

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

(5) Use of an alternative fuel or raw material by a stationary source which;

(i) The source was capable of accommodating before December 21, 1976, unless such change would be prohibited under any federally enforceable permit condition which was established after December 12, 1976 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or § 51.166, or

(ii) The source is approved to use under any permit issued under regulations approved pursuant to this section;

(6) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to 40 CFR 52.21 or regulations approved pursuant to 40 CFR part 51 subpart I or 40 CFR 51.166.

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

(8) [Reserved]

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

(i) The State Implementation Plan for the State in which the project is located, and

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

(D) This definition shall not apply with respect to a particular regulated NSR pollutant when the major stationary source is complying with the requirements under paragraph (f) of this

section for a PAL for that pollutant. Instead, the definition at paragraph (f)(2)(viii) of this section shall apply.

(E) For the purpose of applying the requirements of (a)(8) of this section to modifications at major stationary sources of nitrogen oxides located in ozone nonattainment areas or in ozone transport regions, whether or not subject to subpart 2, part D, title I of the Act, any significant net emissions increase of nitrogen oxides is considered significant for ozone.

(F) Any physical change in, or change in the method of operation of, a major stationary source of volatile organic compounds that results in any increase in emissions of volatile organic compounds from any discrete operation, emissions unit, or other pollutant emitting activity at the source shall be considered a significant net emissions increase and a major modification for ozone, if the major stationary source is located in an extreme ozone nonattainment area that is subject to subpart 2, part D, title I of the Act.

<Text of subsection (a)(1)(v)(G) stayed effective April 1, 2010 until Oct. 3, 2011.>

(G) Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section.

(vi)(A) Net emissions increase means, with respect to any regulated NSR pollutant emitted by a major stationary source, the amount by which the sum of the following exceeds zero:

(1) The increase in emissions from a particular physical change or change in the method of operation at a stationary source as calculated pursuant to paragraph

(a)(2)(ii) of this section; and

(2) Any other increases and decreases in actual emissions at the major stationary source that are contemporaneous with the particular change and are otherwise creditable. Baseline actual emissions for calculating increases and decreases under this paragraph (a)(1)(vi)(A)(2) shall be determined as provided in paragraph (a)(1)(xxxv) of this section, except that paragraphs (a)(1)(xxxv)(A)(3) and (a)(1)(xxxv)(B)(4) of this section shall not apply.

(B) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs before the date that the increase from the particular change occurs;

(C) An increase or decrease in actual emissions is creditable only if:

(1) It occurs within a reasonable period to be specified by the reviewing authority; and

(2) The reviewing authority has not relied on it in issuing a permit for the source under regulations approved pursuant to this section, which permit is in effect when the increase in actual emissions from the particular change occurs; and

<Text of subsection (a)(1)(vi)(C)(3) stayed effective April 1, 2010 until Oct. 3, 2011.>

(3) As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or it occurs at an emissions unit that is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or de-

creases are not creditable for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category.

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

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

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

(2) It is enforceable as a practical matter at and after the time that actual construction on the particular change begins; and

(3) The reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR part 51 subpart I or the State has not relied on it in demonstrating attainment or reasonable further progress;

(4) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and

(5) [Reserved]

(F) 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.

(G) Paragraph (a)(1)(xii)(B) of this section shall not apply for determining creditable increases and decreases or after a change.

(vii) Emissions unit means any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant and includes an electric steam generating unit as defined in paragraph (a)(1)(xx) of this section. For purposes of this section, there are two types of emissions units as described in paragraphs (a)(1)(vii)(A) and (B) of this section.

(A) A new emissions unit is any emissions unit which is (or will be) newly constructed and which has existed for less than 2 years from the date such emissions unit first operated.

(B) An existing emissions unit is any emissions unit that does not meet the requirements in paragraph (a)(1)(vii)(A) of this section. A replacement unit, as defined in paragraph (a)(1)(xxi) of this section, is an existing emissions unit.

(viii) 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. For the purpose of this section, 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 offsite 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.

<Text of subsection (a)(1)(ix) stayed effective April 1, 2010 until Oct. 3, 2011.>

(ix) Fugitive emissions means those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening. Fugitive emissions, to the extent quantifiable, are addressed as follows for the purposes of this section:

(A) In determining whether a stationary source or modification is major, fugitive emissions from an emissions unit are included only if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or the emissions unit is located at a stationary source that belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (a)(1)(iv)(C) and (a)(1)(v)(G) of this section.)

(B) For purposes of determining the net emissions increase associated with a project, an increase or decrease in fugitive emissions is creditable only if it occurs at an emissions unit that is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not creditable for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraph (a)(1)(vi)(C)(3) of this section.)

(C) For purposes of determining the projected actual emissions of an emissions unit after a project, fugitive emissions are included only if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of

C

Effective: August 2, 2010

Code of Federal Regulations [Currentness](#)

Title 40. Protection of Environment

Chapter I. Environmental Protection Agency ([Refs & Annos](#))

Subchapter C. Air Programs

▢ [Part 51](#). Requirements for Preparation, Adoption, and Submittal of Implementation Plans ([Refs & Annos](#))

▢ [Subpart I](#). Review of New Sources and Modifications ([Refs & Annos](#))

→ **§ 51.166 Prevention of significant deterioration of air quality.**

(a)(1) Plan requirements. In accordance with the policy of section 101(b)(1) of the Act and the purposes of section 160 of the Act, each applicable State Implementation Plan and each applicable Tribal Implementation Plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.

(2) Plan revisions. If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph (a)(4) of this section, shall review the expected impact to the applicable increment(s).

(3) Required plan revision. If the State or the Ad-

ministrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(4) Plan assessment. The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

(5) Public participation. Any State action taken under this paragraph shall be subject to the opportunity for public hearing in accordance with procedures equivalent to those established in [§ 51.102](#).

(6) Amendments.

<Text of subsection (a)(6)(i) effective until Dec. 20, 2010.>

(i) Any State required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph (a)(6)(i), shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the Federal Register.

<Text of subsection (a)(6)(i) effective Dec. 20, 2010.>

(i) Any State required to revise its implementation plan by reason of an amendment to this section, with the exception of amendments to add new maximum allowable increases or other measures pursuant to section 166(a) of the Act, shall adopt and submit such plan revision to the Administrator for approval no later than 3 years after such amendment is published in the Federal Register. With re-

gard to a revision to an implementation plan by reason of an amendment to paragraph (c) of this section to add maximum allowable increases or other measures, the State shall submit such plan revision to the Administrator for approval within 21 months after such amendment is published in the Federal Register.

(ii) Any revision to an implementation plan that would amend the provisions for the prevention of significant air quality deterioration in the plan shall specify when and as to what sources and modifications the revision is to take effect.

(iii) Any revision to an implementation plan that an amendment to this section required shall take effect no later than the date of its approval and may operate prospectively.

(7) Applicability. Each plan shall contain procedures that incorporate the requirements in paragraphs (a)(7)(i) through (vi) of this section.

(i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements.

(iv) Each plan shall use the specific provisions of paragraphs (a)(7)(iv)(a) through (f) of this section. Deviations from these provisions will be approved only if the State specifically demonstrates that the

submitted provisions are more stringent than or at least as stringent in all respects as the corresponding provisions in paragraphs (a)(7)(iv)(a) through (f) of this section.

(a) Except as otherwise provided in paragraphs (a)(7)(v) and (vi) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases--a significant emissions increase (as defined in paragraph (b)(39) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

<Text of subsection (a)(7)(iv)(b) stayed effective April 1, 2010 until Oct. 3, 2011.>

(b) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(7)(iv)(c) through (f) of this section. For these calculations, fugitive emissions (to the extent quantifiable) are included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. The procedure for calculating (before beginning actual construction) whether

a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(c) Actual-to-projected-actual applicability test for projects that only involve existing emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (b)(40) of this section) and the baseline actual emissions (as defined in paragraphs (b)(47)(i) and (ii) of this section) for each existing emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(d) Actual-to-potential test for projects that only involve construction of a new emissions unit(s). A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in paragraph (b)(4) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (b)(47)(iii) of this section) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(e) [Reserved]

(f) Hybrid test for projects that involve multiple types of emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(7)(iv)(c) through (d) of this section as applicable with respect to each emissions unit, for each type of

emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(v) The plan shall require that for any major stationary source for a PAL for a regulated NSR pollutant, the major stationary source shall comply with requirements under paragraph (w) of this section.

(vi) [Reserved]

(b) Definitions. All State plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

(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 regulated NSR pollutant: 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 (with thermal dryers), 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 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 (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), 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)(a) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant; 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 change would constitute a major stationary source by itself.

(ii) A major source that is major for volatile organic compounds or NO_x 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--The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

(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.

(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 emissions increase (as defined in paragraph (b)(39) of this section) of a regulated NSR pollutant

(as defined in paragraph (b)(49) of this section); and a significant net emissions increase of that pollutant from the major stationary source.

(ii) Any significant emissions increase (as defined at paragraph (b)(39) of this section) from any emissions units or net emissions increase (as defined in paragraph (b)(3) of this section) at a major stationary source that is significant for volatile organic compounds or NO_X 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. Routine maintenance, repair and replacement shall include, but not be limited to, any activity(s) that meets the requirements of the equipment replacement provisions contained in paragraph (y) of this section;

Note to paragraph (b)(2)(iii)(a): On December 24, 2003, the second sentence of this paragraph (b)(2)(iii)(a) is stayed indefinitely by court order. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the Federal Register advising the public of the termination of the stay.

(b) Use of an alternative fuel or raw material by reason of any 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 plan 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 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 § 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 § 51.166.

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

(h) [Reserved]

(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 exemption shall apply on a pollutant-by-pollutant basis.

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

(iv) This definition shall not apply with respect to a particular regulated NSR pollutant when the major stationary source is complying with the requirements under paragraph (w) of this section for a PAL for that pollutant. Instead, the definition at paragraph (w)(2)(viii) of this section shall apply.

<Text of subsection (b)(2)(v) stayed effective April 1, 2010 until Oct. 3, 2011.>

(v) Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section.

(3)(i) Net emissions increase means, with respect to any regulated NSR pollutant emitted by a major stationary source, the amount by which the sum of the following exceeds zero:

(a) The increase in emissions from a particular physical change or change in the method of operation at a stationary source as calculated pursuant to paragraph (a)(7)(iv) of this section; and

(b) Any other increases and decreases in actual emissions at the major stationary source that are contemporaneous with the particular change and are otherwise creditable. Baseline actual emissions for calculating increases and decreases under this paragraph (b)(3)(i)(b) shall be determined as provided in paragraph (b)(47), except that paragraphs (b)(47)(i)(c) and (b)(47)(ii)(d) of this section shall not apply.

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

period (to be specified by the State) before the date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if:

(a) It occurs within a reasonable period (to be specified by the reviewing authority); and

(b) The reviewing authority has not relied on it in issuing a permit for the source under regulations approved pursuant to this section, which permit is in effect when the increase in actual emissions from the particular change occurs; and

<Text of subsection (b)(3)(iii)(c) stayed effective April 1, 2010 until Oct. 3, 2011.>

(c) The increase or decrease in emissions did not occur at a Clean Unit, except as provided in paragraphs (t)(8) and (u)(10) of this section; and

<Text of subsection (b)(3)(iii)(d) stayed effective April 1, 2010 until Oct. 3, 2011.>

(d) As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or it occurs at an emission unit that is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category.

(iv) An increase or decrease in actual 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.

(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 enforceable as a practical matter at and after the time that actual construction on the particular change begins;

(c) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and

(d) [Reserved]

(vii) 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.

(viii) Paragraph (b)(21)(ii) of this section shall not apply for determining creditable increases and decreases.

(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 a regulated NSR pollutant.

(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 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 that emits or would have the potential to emit any regulated NSR pollutant and includes an electric utility steam generating unit as defined in paragraph (b)(30) of this section. For purposes of this section, there are two types of emissions units as described in paragraphs (b)(7)(i) and (ii) of this section.

(i) A new emissions unit is any emissions unit that is (or will be) newly constructed and that has existed for less than 2 years from the date such emissions unit first operated.

(ii) An existing emissions unit is any emissions unit that does not meet the requirements in paragraph (b)(7)(i) of this section. A replacement unit, as defined in paragraph (b)(32) of this section, is an existing emissions unit.

(8) Construction means any physical change or change in the method of operation (including fab-

C

Effective:[See Text Amendments]Code of Federal Regulations [Currentness](#)

Title 40. Protection of Environment

Chapter I. Environmental Protection Agency
([Refs & Annos](#))

Subchapter C. Air Programs

☞ [Part 51](#). Requirements for Preparation, Adoption, and Submittal of Implementation Plans ([Refs & Annos](#))

☞ [Subpart O](#). Miscellaneous Plan Content Requirements

→ **§ 51.281 Copies of rules and regulations.**

Emission limitations and other measures necessary for attainment and maintenance of any national standard, including any measures necessary to implement the requirements of Subpart L must be adopted as rules and regulations enforceable by the State agency. Copies of all such rules and regulations must be submitted with the plan. Submittal of a plan setting forth proposed rules and regulations will not satisfy the requirements of this section nor will it be considered a timely submittal.

[[51 FR 40674](#), Nov. 7, 1986]

SOURCE: 36 FR 22398, Nov. 25, 1971; [52 FR 24712](#), July 1, 1987; [55 FR 14249](#), April 17, 1990; [56 FR 42219](#), Aug. 26, 1991; [57 FR 32334](#), July 21, 1992; [57 FR 52987](#), Nov. 5, 1992; [58 FR 38821](#), July 20, 1993; [60 FR 40100](#), Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; [62 FR 44903](#), Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; [65 FR 45532](#), July 24, 2000; [72 FR 28613](#), May 22, 2007, unless otherwise noted.

AUTHORITY: [23 U.S.C. 101](#); [42 U.S.C. 7401-7671q](#).

40 C. F. R. § 51.281, 40 CFR § 51.281

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Federal Register

**Wednesday,
April 14, 2010**

Part II

Environmental Protection Agency

40 CFR Part 52

**Approval and Promulgation of
Implementation Plans; Texas; Revisions to
the New Source Review (NSR) State
Implementation Plan (SIP); Modification
of Existing Qualified Facilities Program
and General Definitions; Final Rule**

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52**

[EPA-R06-OAR-2005-TX-0025; FRL-9135-7]

Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Modification of Existing Qualified Facilities Program and General Definitions**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final Rule.

SUMMARY: EPA is taking final action to disapprove revisions to the SIP submitted by the State of Texas that relate to the Modification of Existing Qualified Facilities (the Qualified Facilities Program or the Program). EPA is disapproving the Texas Qualified Facilities Program because it does not meet the Minor NSR SIP requirements nor does it meet the NSR SIP requirements for a substitute Major NSR SIP revision.

EPA is also approving three definitions that are severable from the Qualified Facilities submittals. These three definitions we are approving are, “grandfathered facility,” “maximum allowable emission rate table (MAERT),” and “new facility.” Moreover, we are making an administrative correction to the SIP-approved definition of “facility.”

We are taking this action under section 110, part C, and part D of the Federal Clean Air Act (the Act or CAA).

DATES: This rule is effective on May 14, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R06-OAR-2005-TX-0025. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m.

and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal, which is part of the EPA record, is also available for public inspection at the State Air Agency listed below during official business hours by appointment: Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

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

SUPPLEMENTARY INFORMATION:

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

- “we,” “us,” and “our” refer to EPA.
- “Act” or “CAA” means Federal Clean Air Act.
- “40 CFR” means Title 40 of the Code of Federal Regulations—Protection of Environment.
- “SIP” means State Implementation Plan as established under section 110 of the Act.
- “NSR” means new source review, a phrase intended to encompass the statutory and regulatory programs that regulate the construction and modification of stationary sources as provided under CAA section 110(a)(2)(C), CAA Title I, parts C and D, and 40 CFR 51.160 through 51.166.
- “Minor NSR” means NSR established under section 110 of the Act and 40 CFR 51.160.
- “Major NSR” means any new or modified source that is subject to NNSR and/or PSD.
- “NNSR” means nonattainment NSR established under Title I, section 110 and part D of the Act and 40 CFR 51.165.
- “PSD” means prevention of significant deterioration of air quality established under Title I, section 110 and part C of the Act and 40 CFR 51.166.
- “Program” means the SIP revision submittals from the TCEQ concerning the Texas Qualified Facilities Program.

- “NAAQS” means any national ambient air quality standard established under 40 CFR part 50.

Table of Contents

- I. What Action Is EPA Taking?
- II. What Submittals Is EPA Taking No Action On?
 - A. Subparagraph (F) under the definition of “federally enforceable”
 - B. Definition of “best available control technology (BACT)”
 - C. Subparagraphs (A) and (B) of the submitted definition of “modification of existing facility”
 - D. Subparagraph (G) of the submitted definition of “modification of existing facility”
 - E. Trading Provision in 30 TAC 116.116(f)
- III. What Is the Background for This Action?
 - A. Summary of Our Proposed Action
 - B. Summary of the Submittals Addressed in this Final Action
 - C. Other Relevant Actions on the Texas Permitting SIP Revision Submittals
- IV. What Are the Grounds for This Disapproval Action of the Texas Qualified Facilities Program?
 - A. Why the Qualified Facilities Program Submittal Is Unclear Whether It Is for a Major or Minor NSR SIP Revision
 - B. Why the Submitted Texas Qualified Facilities Program Is Not Approvable as a Substitute Major NSR SIP Revision
 - C. Why the Submitted Texas Qualified Facilities Program Is Not Approvable as a Minor NSR SIP Revision
 - D. Definition of “facility”
- V. Response to Comments
 - A. General Comments
 - B. Comment That This Action Is Inconsistent With the CAA
 - C. Comments Addressing Whether the Qualified Facilities Rules Allow Sources to “Net Out” of Major and Minor NSR Through Rules that Are Not Adequate To Protect the NAAQS and State Control Strategies
 - D. Comments Addressing Whether the Qualified Facilities Rules Are Practically Enforceable
 - E. Comments Addressing Whether the Qualified Facilities Rules Meet Federal Requirements for Major NSR
 - F. Comments Addressing Whether the Qualified Facilities Rules Meet Federal Requirements for Minor NSR
 - G. Comments Addressing Whether Existing Qualified Facilities Have Undergone an Air Quality Analysis
 - H. Comments on the Definitions of “Grandfathered Facility,” “Maximum Allowable Emission Rate Table,” and “New Facility”
 - I. Comments on the Definitions of “Actual Emissions,” “Allowable Emissions,” “Modification of Existing Facility” at (E), and “Qualified Facility”
 - J. Comments on the Definition of “Best Available Control Technology” (“BACT”)
 - K. Comments on Severable Portions of the Definition of “Modification of Existing Facility” at 30 TAC 116.10(11)(A) and (B)
 - L. Comments on the Definition of Severable Subsection of “Modification of

Existing Facility” at 30 TAC 116.10(11)(G)

M. Comments on the Reinstatement of the Previously Approved Definition of “Facility”

N. Comments on the Definition of the Term “Air Quality Account Number”

O. Comments on Whether the Qualified Facilities Rules Meet NSR Public Participation Requirements

VI. Final Action

VII. Statutory and Executive Order Reviews

I. What Action Is EPA Taking?

EPA is taking final action to disapprove the Texas Qualified Facilities Program, as submitted by Texas on March 13, 1996, and July 22, 1998, in Title 30 of the Texas Administrative Code (30 TAC) at 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction or Modification. This includes the following regulations under Chapter 116: 30 TAC 116.116(e), 30 TAC 116.117, 30 TAC 116.118, and the following definitions under 30 TAC 116.10—General Definitions: 30 TAC 116.10(1)—definition of “actual emissions,” 30 TAC 116.10(2)—definition of “allowable emissions,” 30 TAC 116.10(11)(E) under the definition of “modification of existing facility,” and 30 TAC 116.10(16)—definition of “qualified facility.” These regulations and definitions do not meet the requirements of the Act and EPA’s NSR regulations. It is EPA’s position that none of these identified elements for the submitted Qualified Facilities Program is severable from each other.

Secondly, in an action separate from the above action on the submitted Texas Qualified Facilities Program, we are approving the following severable definitions: 30 TAC 116.10(8)—definition of “grandfathered facility,” 30 TAC 116.10(10)—definition of “maximum allowable emission rate table (MAERT),” and 30 TAC 116.10(12)—definition of “new facility.” It is EPA’s position that these definitions are severable from those in the submitted Texas Qualified Facilities Program; moreover, each is severable from each other.

EPA proposed the above actions on September 23, 2009 (74 FR 48450). We accepted comments from the public on this proposal from September 23, 2009, until November 23, 2009. A summary of the comments received and our evaluation thereof is discussed in section V below. In the proposal and in the Technical Support Document (TSD), we described our basis for the actions identified above. The reader should refer to the proposal, the TSD, section IV of this preamble, and the Response to Comments in section V of this

preamble for additional information relating to our final action.

We are disapproving the submitted Texas Qualified Facilities Program as not meeting the requirements for a substitute Major NSR SIP revision. Our grounds for disapproval as a substitute Major NSR SIP revision include the following:

- It is not clearly limited to Minor NSR thereby allowing major modifications to occur without a Major NSR permit;

- It has no regulatory provisions clearly prohibiting the use of this Program from circumventing the Major NSR SIP requirements thereby allowing changes at existing facilities to avoid the requirement to obtain preconstruction permit authorizations for projects that would otherwise require a Major NSR preconstruction permit;

- It does not require that first an applicability determination be made whether the modification is subject to Major NSR thereby exempting new major stationary sources and major modifications from the EPA Major NSR SIP requirements;

- It does not include a demonstration from the TCEQ, as required by 40 CFR 51.166(a)(7)(iv), showing how the use of “modification” is at least as stringent as the definition of “modification” in the EPA Major NSR SIP program

- It does not include the requirement to make Major NSR applicability determinations based on actual emissions and on emissions increases and decreases (netting) that occur within a major stationary source;

- It fails to meet the statutory and regulatory requirements for a SIP revision;

- It is not consistent with applicable statutory and regulatory requirements as interpreted in EPA policy and guidance on SIP revisions; and

- EPA lacks sufficient available information to determine that the requested relaxation to the Texas Major NSR SIP will not interfere with any applicable requirement concerning attainment and reasonable further progress (RFP), or any other applicable requirement of the Act.

In addition to the failures to protect Major NSR SIP requirements, EPA cannot find that the submitted Program, as an exemption to the State’s Minor NSR SIP program, will ensure noninterference with NAAQS attainment, and there will not be a violation of applicable portions of a Texas SIP control strategy, as required by section 110(a)(2)(D) and 40 CFR 51.160(a)–(b). EPA cannot approve the exempting of certain modifications from obtaining a Minor NSR SIP permit as

part of the Texas Minor NSR SIP because the Act and EPA regulations are not met and the State has not shown that the sources will have only a *de minimis* effect. The Program fails to include legally enforceable procedures to ensure that the State will not permit a modification that will violate the control strategies or interfere with NAAQS attainment. Our grounds for disapproval as a Minor NSR SIP revision include the following:

- It is not clearly limited to Minor NSR thereby allowing major modifications to occur without a Major NSR permit;

- It has no regulatory provisions clearly prohibiting the use of this Program from circumventing the Major NSR SIP requirements thereby allowing sources to avoid the requirement to obtain preconstruction permit authorizations for projects that would otherwise require a Major NSR preconstruction permit;

- It does not require that first an applicability determination be made whether the modification is subject to Major NSR thereby exempting new major stationary sources and major modifications from the EPA Major NSR SIP requirements;

- It fails to meet the statutory and regulatory requirements for a SIP revision;

- It is not consistent with applicable statutory and regulatory requirements as interpreted in EPA policy and guidance on SIP revisions;

- It is not an enforceable Minor NSR permitting program;

- It lacks legally enforceable safeguards to ensure that the exempted changes will not violate a Texas control strategy and will not interfere with NAAQS attainment;

- EPA lacks sufficient available information to determine that the requested relaxation to the Texas Minor NSR SIP will not interfere with any applicable requirement concerning attainment and RFP, or any other applicable requirement of the Act.

The provisions in these submittals relating to the Texas Qualified Facilities State Program that include the Chapter 116 regulatory provisions and the nonseverable definitions in the General Definitions were not submitted to meet a mandatory requirement of the Act. Therefore, this final action to disapprove the submitted Texas Qualified Facilities State Program does not trigger a sanctions or Federal Implementation Plan clock. *See* CAA section 179(a).

II. What Submittals Is EPA Taking No Action On?

A. Subparagraph (F) Under the Definition of “Federally Enforceable”

On September 18, 2002 (67 FR 58697), EPA approved the definition of “federally enforceable” in 30 TAC 116.10(7), introductory paragraph and subparagraphs (A) through (E), as submitted July 22, 1998. We proposed to take no action on the submitted severable new subparagraph (F) under the SIP-approved definition of “federally enforceable,” submitted September 11, 2000, because it is outside the scope of the SIP. *See* 74 FR 48450, at 48466. EPA is not finalizing action today on the proposal concerning the submitted 30 TAC 116.10(7)(F). This subparagraph (F) is severable from the final rulemaking on the Qualified Facilities Program

B. Definition of “Best Available Control Technology (BACT)”

On September 23, 2009, EPA proposed to disapprove the definition “best available control technology (BACT)” under 30 TAC 116.10(3). 74 FR 48450, at 48463–48464. EPA is still reviewing approvability of this definition; therefore, we are not taking final action on the proposal today. This definition is severable from the final rulemaking on the Qualified Facilities Program. We will take final action on the definition of BACT when we take action on Texas’s submission concerning NSR Reform (Rule Project Number 2005–010–116–PR), which also addresses BACT. *See* 74 FR 48450, at 48472.¹ Under the Consent Decree entered on January 21, 2010 in *BCCA Appeal Group v. EPA*, Case No. 3:08–cv–01491–N (N.D. Tex.), EPA’s final action concerning NSR Reform will be finalized by August 31, 2010.

C. Subparagraphs (A) and (B) of the Submitted Definition of “Modification of Existing Facility”

Also, on September 23, 2009, EPA proposed to disapprove 30 TAC 116.10(11) subparagraphs (A) and (B) of the submitted definition of “modification of existing facility,” which are severable from the other submissions addressed in this notice but not severable from each other. 74 FR 48450, at 48464–48465. EPA is not taking final action today on the proposed disapproval of these

submitted subparagraphs under the submitted definition of “modification of existing facility” at 30 TAC 116.0(11)(A) and (B). We are still reviewing the proposed disapproval of these subparagraphs 30 TAC 116.10(11)(A) and (B) which relate to “insignificant increases.” These subparagraphs are severable from this final rulemaking on the Qualified Facilities Program. We will take final action on 30 TAC 116.10(11)(A) and (B) when we act on Texas’s submission concerning Air Permits (SB 766) Phase II (Rule Project Number 99029B–116–A1). Under the Settlement Agreement in *BCCA Appeal Group v. EPA*, Case No. 3:08–cv–01491–N (N.D. Tex.), that action will be finalized by December 31, 2012. Additionally, we have received petitions requesting EPA review of the State’s implementation of Texas Commission on Environmental Quality’s (TCEQ) permit by rule (PBR) program under Subchapter K (30 TAC Chapter 106).² EPA intends to review TCEQ’s PBR program and its implementation in response to those petitions.

D. Subparagraph (G) of the Submitted Definition of “Modification of Existing Facility”

On September 23, 2009, EPA proposed to disapprove the subparagraph (G) at 30 TAC 116.10(11) of the submitted definition of “modification of existing facility.” *See* 74 FR 48450, at 48465. EPA is not taking final action today on the proposed disapproval of the submitted subparagraph (G) of the definition of “modification of existing facility.” We are still reviewing the proposed disapproval of this definition. This subparagraph states that changes to certain natural gas processing, treating, or compression facilities are not modifications if the change does not result in an annual emissions rate of any air contaminant in excess of the volume emitted at the maximum design capacity for grandfathered facilities. This definition is severable from this rulemaking on the Qualified Facilities Program. *See* 74 FR 48450, at 48452. We will take final action on 30 TAC 116.10(11)(G) when we act on Texas’s submission concerning Air Permits (SB 766) Phase II (Rule Project Number

99029B–116–A1). Under the Settlement Agreement in *BCCA Appeal Group v. EPA*, Case No. 3:08–cv–01491–N (N.D. Tex.), that action will be finalized by December 31, 2012.

E. Trading Provision in 30 TAC 116.116(f)

EPA proposed to take no action on the submitted portion of 30 TAC 116.116(f) that includes, among other things, a trading provision containing a cross-reference that is no longer in Texas’s rules. *See* 74 FR 48450, at 48465–48466. EPA is not taking final action today on this submitted portion because we are still reviewing approvability of the provision. This portion of the provision is severable from this rulemaking on the Qualified Facilities Program. We will take final action on 30 TAC 116.116(f) when we take action on Texas’s submission concerning NSR Rules Revisions; 112(g) Revisions (Rule Project No. 98001–116–A1). Under the Settlement Agreement in *BCCA Appeal Group v. EPA*, Case No. 3:08–cv–01491–N (N.D. Tex.), that action will be finalized by October 31, 2011.

III. What Is the Background?

A. Summary of Our Proposed Action

Also on September 23, 2009 (74 FR 48450), EPA proposed to disapprove revisions to the SIP submitted by the State of Texas that relate to the Modification of Qualified Facilities. These affected provisions include regulatory provisions at 30 TAC 116.116(e) and definitions of “actual emissions,” “allowable emissions,” a nonseverable portion of the definition at subparagraph (E) of “modification of existing facility,” and “qualified facility” under Texas’s General Definitions in Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. *See* 30 TAC 116.10(1), (2), (11)(E), and (16), respectively. EPA finds that these submitted provisions and definitions in the submittals affecting the Texas Qualified Facilities Program are not severable from each other.

In the September 23, 2009, EPA also proposed to take action on revisions to the SIP submitted by Texas that relate to the General Definitions in Chapter 116. EPA proposed to approve three of these submitted definitions, “grandfathered facility,” “maximum allowable emissions rate table (MAERT),” and “new facility” at 30 TAC 116.10(8), (10), and (12), respectively. These definitions are severable from the Qualified Facilities Program.

EPA proposed to make an administrative correction to the severable submittal for the SIP-approved

¹ EPA made this determination in a separate proposed action published at 74 FR 48467, September 23, 2009. This proposal relates to Prevention of Significant Deterioration (PSD), Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit.

² Petitions, August 28, 2008, from the Environmental Integrity Project on behalf of the Galveston-Houston Association for Smog Prevention, Environmental Integrity Project, Texas Campaign for the Environment, Sierra Club, and Public Citizen; and January 5, 2009, supplementing the August 28, 2008, petition (the supplemental petition added the Environmental Defense Fund as an additional petitioner).

definition of “facility” under 30 TAC 116.10(6). Consistent with our proposal, EPA is finalizing this administrative correction in today’s action. Specifically, EPA corrects a typographical error at 72 FR 49198 (August 28, 2007), to clarify that the definition of “facility,” as codified at 30 TAC 116.10(6), was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP. 74 FR 48450, at 48465.

See Sections I and IV for further information on EPA’s final action on the above submittals.

Further, EPA proposed to disapprove the following severable definitions: (1) the submitted definition of “best available control technology (BACT)”

and (2) subparagraphs (A) and (B) of the submitted definition of “modification of existing facility,” which are severable from the other submissions but not severable from each other, and (3) subparagraph (G) of the submitted definition of “modification of existing facility.” EPA proposed to take no action on the severable submitted subparagraph (F) for the SIP-approved severable definition of “federally enforceable” under 30 TAC 116.10(7) because the submitted paragraph relates to a federal program that is implemented separately from the SIP. In addition, EPA proposed to take no action on the severable submitted portion of a provision at 30 TAC

116.116(f) that includes, among other things, a trading provision containing a cross-reference that no longer is in Texas’s rules. See Section II for further information on why EPA is not taking final action today on these submittals.

B. Summary of the Submittals Addressed in this Final Action

Table 1 below summarizes the changes that are in the SIP revision submittals. A summary of EPA’s evaluation of each section and the basis for this action is discussed in Sections IV through VI of this preamble. The Technical Support Document includes a detailed evaluation of the submittals.

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

Section	Title	Submittal dates	Description of change	Proposed action
30 TAC 116.10	General Definitions			
30 TAC 116.10(1)	Definition of “actual emissions”.	3/13/1996	Added new definition	Disapproval.
		7/22/1998	Repealed and a new definition submitted as paragraph (1).	
30 TAC 116.10(2)	Definition of “allowable emissions”.	3/13/1996	Added new definition	Disapproval.
		7/22/1998	Repealed and a new definition submitted as paragraph (2).	
		9/11/2000	Revised paragraphs (2)(A) through (D).	
30 TAC 116.10(6)	Definition of “facility”	3/13/1996	Added new definition	Administrative correction to clarify the definition of “facility” is in the SIP.
		7/22/1998	Repealed and a new definition submitted as paragraph (4). Approved 9/6/2006 (71 FR 52698).	
		9/4/2002	Redesignated to paragraph (6). Inadvertently identified as non-SIP provision in 8/28/2007 SIP revision.	
30 TAC 116.10(8)	Definition of “grandfathered facility”.	3/13/1996	Added new definition	Approval.
		7/22/1998	Repealed and a new definition submitted as paragraph (6).	
		7/31/2002	Revised definition.	
30 TAC 116.10(10)	Definition of “maximum allowable emission rate table”.	9/4/2002	Redesignated to paragraph (8).	
		3/13/1996	Added new definition	Approval.
		7/22/1998	Repealed and a new definition submitted as paragraph (8).	
		9/4/2002	Redesignated to paragraph (10).	
30 TAC 116.10(11)	Definition of “modification of existing facility”.	3/13/1996	Added new definition	Disapproval of subparagraph (E).
		7/22/1998	Repealed and a new definition submitted as paragraph (9).	
		9/4/2002	Redesignated to paragraph (11).	
30 TAC 116.10(12)	Definition of “new facility” ...	3/13/1996	Added new definition	Approval.
		7/22/1998	Repealed and a new definition submitted as paragraph (10).	
		9/04/2002	Redesignated to paragraph (12).	
30 TAC 116.10(16)	Definition of “qualified facility”.	3/13/1996	Added new definition	Disapproval.
		7/22/1998	Repealed and a new definition submitted as paragraph (14).	
		9/4/2002	Redesignated to paragraph (16).	
30 TAC 116.116	Changes to Facilities	3/13/1996	Added subsection (e)	Disapproval.
		7/22/1998	Repealed and a new 116.116(e) submitted.	Disapproval.

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

Section	Title	Submittal dates	Description of change	Proposed action
30 TAC 116.117	Documentation and Notification of Changes to Qualified Facilities.	3/13/1996	Added new section	Disapproval.
		7/22/1998	Repealed and a new 116.117 re-submitted.	
30 TAC 116.118	Pre-Change Qualification	3/13/1996	Added new section	Disapproval.
		7/22/1998	Repealed and a new 116.118 submitted.	

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

The Settlement Agreement in *BCCA Appeal Group v. EPA*, Case No. 3:08–cv–01491–N (N.D. Tex), as amended, currently provides that EPA will take final action on the State's Public Participation SIP revision submittal on October 29, 2010. EPA intends to take final action on the submitted Texas Flexible Permits State Program by June 30, 2010, and the NSR SIP by August 31, 2010, as provided in the Consent Decree entered on January 21, 2010 in *BCCA Appeal Group v. EPA*, Case No. 3:08–cv–01491–N (N.D. Tex).

Additionally, EPA acknowledges and appreciates that TCEQ is developing a proposed rulemaking package to address EPA's concerns with the current Qualified Facilities rules. We will, of course, consider any rule changes if and when they are submitted to EPA for review. However, the rules before us today are those of the current Qualified Facilities program, and we have concluded that the current program is not approvable for the reasons set out in this notice.

IV. What Are the Grounds for This Disapproval Action of the Texas Qualified Facilities Program?

EPA is disapproving revisions to the SIP submitted by the State of Texas that relate to the Modification of Qualified Facilities, identified in the above Table 1. Sources are reminded that they remain subject to the requirements of the Federally- approved Texas SIP and may be subject to enforcement actions for violations of the SIP. *See* EPA's Revised Guidance on Enforcement During Pending SIP Revisions, (March 1, 1991). However, because the Qualified Facilities Program is a permitting exemption, not a permit amendment, this final disapproval action does not affect Federal enforceability of Major and Minor NSR SIP permits.

The provisions affected by this disapproval action include regulatory

provisions at 30 TAC 116.116(e), 116.117, and 116.118; and definitions at 30 TAC 116.10(1), (2), (11)(E), and (16) under 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. EPA finds that these submitted provisions and definitions in the submittals affecting the Texas Qualified Facilities Program are not severable from each other. Specifically, EPA is making the following findings and taking the following actions as described below:

A. Why the Qualified Facilities Program Submittal Is Unclear Whether It Is for a Major or Minor NSR SIP Revision

While the TCEQ and other commenters asserted that the program was intended to be limited to Minor NSR, we continue to be concerned that the program is not explicitly limited to Minor NSR. Specifically, EPA finds that the submittals contain no applicability statement or regulatory provision that limits applicability to minor modifications. The Program is analogous to two other Minor NSR programs in Texas's SIP because although they do not exempt facilities from NSR, as does the Qualified Facilities Program, they do exempt facilities from obtaining source-specific (*i.e.*, case-by-case) permits. However, both of the State's other Minor NSR programs include an applicability statement and a regulatory provision that expressly limits applicability to minor modifications.³ Moreover, the Texas Clean Air Act clearly prohibits the use of these two other Minor NSR programs for Major NSR. *See* Texas Health and Safety Code 382.05196 and .057. Therefore, the absence of these provisions in the Qualified Facilities rules creates an unacceptable ambiguity in the SIP. Without a clear statement of applicability of the Program, the

Program as submitted is confusing to the public, regulated sources, government agencies, or a court, because it can be interpreted as an alternative to evaluating the new modification as a major modification under Major NSR requirements. Because of the overbroad nature of the regulatory language in the State's SIP revision submittal, we find that the State has failed to limit its submitted Program only to Minor NSR. *See* 74 FR 48450, at 48456–48457 and Section V.E.1 below for further information.

Consequently, we evaluated this submitted Program as being a substitute for the Texas Major NSR SIP. We also evaluated it for approvability as a Minor NSR SIP. Accordingly, we evaluated whether the submitted Program meets the requirements for a Major NSR SIP revision, the general requirements for regulating construction of any stationary sources contained in Section 110(a)(2)(C) of the CAA, and the applicable statutory and regulatory requirements for an approvable SIP revision. *See* 74 FR 48450, at 48457.

B. Why the Submitted Texas Qualified Facilities Program Is Not Approvable as a Substitute Major NSR SIP Revision

EPA finds that the State failed to submit information sufficient to demonstrate that the submitted Program's regulatory text explicitly prevents the circumvention of Major NSR. Therefore, EPA is disapproving the Program as not meeting the Major NSR SIP requirements to prevent circumvention of Major NSR. *See* 74 FR 48450, at 48458; Sections V.C.2. and E. below for further information.

EPA finds that the State failed to submit information sufficient to demonstrate that the submitted Program's regulatory text requires an evaluation of Major Source NSR applicability before a change is exempted from permitting. Therefore, EPA is disapproving the Program as not meeting the Major NSR SIP requirements that require the Major NSR applicability requirements be met. *See*

³ The Standard Permits rules require a Major NSR applicability determination at 30 TAC 116.610(b), and prohibit circumvention of Major NSR at 30 TAC 116.610(c). Likewise, the Permits by Rule provisions require a Major NSR applicability determination at 30 TAC 106.4(a)(3), and prohibit circumvention of Major NSR at 30 TAC 106.4(b).

74 FR 48450, at 48458; Section V.C.2 below for further information.

We find that the Program is deficient for Major NSR netting for two main reasons. First, the Program may allow an emission increase to net out by taking into account emission decreases outside of the major stationary source and, in other circumstances, allow an evaluation of emissions of a subset of units at a major stationary source. Therefore, the Program does not meet the CAA's definition of "modification" and the Major NSR SIP requirements and is inconsistent with *Alabama Power v. Costle*, 636 F.2d 323, 401–403 (DC Cir. 1980) and *Asarco v. EPA*, 578 F.2d 320 (DC Cir. 1978). 74 FR 48450, at 48458–48459; Section V.C.1 below. Second, the Program authorizes existing allowable emissions, rather than actual emissions, to be used as a baseline to determine applicability. This use of allowables is inconsistent with the requirements of the Act for Major NSR and is contrary to *New York v. EPA*, 413 F.3d 3, 38–40 (DC Cir. 2005) ("New York I"). 74 FR 48450, at 48459; Section V.C.1 below.

EPA finds that it lacks sufficient available information to determine, pursuant to section 110(l) that the requested relaxation to the Texas NSR SIP would not interfere with any applicable requirement concerning attainment and RFP, or any other applicable CAA requirement. See 74 FR 48450, at 48459 for further information.

C. Why the Submitted Texas Qualified Facilities Program Is Not Approvable as a Minor NSR SIP Revision

EPA finds that the Program is not clearly limited to Minor NSR. The submitted Program also does not prevent circumvention of the Major NSR SIP requirements. The Program lacks requirements necessary for enforcement of the applicable emissions limitations, including a permit application and issuance process. Overall, the Program fails to include sufficient legally enforceable safeguards to ensure that the NAAQS and control strategies are protected. Furthermore, the Program provides a *de minimis* exemption from the Texas Minor NSR SIP, and therefore, it is a SIP relaxation, which creates a risk of interference with NAAQS attainment, RFP, or any other requirement of the Act. EPA lacks sufficient information to determine that this SIP relaxation would not interfere with these requirements. 74 FR 48450, at 48463. Additionally, the legal test for whether a *de minimis* threshold can be approved is whether it is consistent with the need for a plan to include legally enforceable procedures to ensure

that the State will not permit a source that will violate the control strategy or interfere with NAAQS attainment, as required by 40 CFR 51.160(a)–(b). 74 FR 48450, at 48460. The State failed to demonstrate that this exemption will not permit changes that will violate the Texas control strategies or interfere with NAAQS attainment. Therefore, we are disapproving the submitted Qualified Facilities Program as a Minor NSR SIP revision because it does not meet sections 110(a)(2)(C) and 110(l) of the Act and 40 CFR 51.160.

The Qualified Facilities Program does not ensure protection of the NAAQS and prevent violations of any State control strategy. First, the Program fails to ensure that all participating Qualified Facilities must have obtained a Texas NSR SIP permit. Without the assurance that all Qualified Facilities have obtained a Texas NSR SIP permit, EPA cannot determine that all Qualified Facilities must have Federally enforceable emission limitations based on the chosen control technology, and that the Qualified Facility will not interfere with attainment and maintenance of the NAAQS or violate any control strategy. Therefore, EPA finds that the Qualified Facilities Program is inadequate to ensure that all Qualified Facilities have an appropriate allowable limit to prevent interference with attainment and maintenance of the NAAQS or violations of any State control strategy that is required by the Texas NSR SIP. See Section V.G.1 for further information. In addition, the Program does not require the owner or operator to maintain the information and analysis showing how it concluded that there will be no adverse impact on ambient air quality before undertaking the change. Therefore, EPA finds that the Qualified Facilities Program is inadequate to ensure that all changes under the Program that are exempted from permitting will not prevent interference with attainment and maintenance of the NAAQS or violations of any State control strategy that is required by the Texas NSR SIP. 74 FR 48450, at 48462; Section V.F.1.

Regarding the State's use of minor source netting in the Qualified Facilities Program, EPA makes the following findings:

The Qualified Facilities Program is inadequate because it fails to provide clear and enforceable requirements for a basic netting program. Therefore, this Program, as submitted, does not meet the fundamental requirements for an approvable Minor NSR netting program. To analyze the Program's Minor NSR netting for approvability, we used the fundamental principles of Major NSR

and NSR netting because these principles are designed to ensure that there is no interference with the NAAQS and control strategies.⁴ The Major NSR netting program requires the following: (1) An identified contemporaneous period, (2) the reductions must be contemporaneous and creditable, (3) the reductions must be of the same pollutant as the change, (4) the reductions must be real, (5) the reductions must be permanent, and (6) the reductions must be quantifiable. See 40 CFR 51.165(a)(1)(vi) (the definition of "net emissions increase"); 40 CFR 51.166(b)(3). To be considered creditable, the reduction's old level of emissions must exceed the new level of emissions, the reduction must be enforceable as a practical matter at and after the time the actual change begins, and the reduction must have approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change. See 74 FR 48450, at 48461.

As discussed below, the Program's netting provisions do not meet all of the requirements; therefore, the Qualified Facilities netting is disapproved as a Minor NSR netting program.

- The Program fails to define a contemporaneous or other period for the netting and that the emission reductions must occur within that specified period. 74 FR 48450, at 48461; Section V.C.1 below.

- Emissions reductions under the Qualified Facilities program are not enforceable as a practical matter at and after the time of the actual change begins; and therefore, not sufficiently creditable. First, the Program fails to ensure a separate netting analysis is performed for each proposed change because the rules are not clear that reductions can only be relied upon once. Therefore, we find that the Program fails to prevent double counting; and consequently these types of reductions are not creditable. Second, the Program does not require that each Qualified Facility involved in the netting transaction must submit a permit application and obtain a permit revision reflecting all of the changes made to reduce emissions (relied upon in the netting analysis) as well as reflecting the change itself that increased emissions. As a result, emissions reductions are not enforceable; and therefore, not

⁴ However, our analysis of the netting provisions in the Qualified Facilities Program under Minor NSR is not intended to create a binding Agency position on evaluating the approvability of Minor NSR netting.

sufficiently creditable. 74 FR 48450, at 48462; Section V.C.1.

- EPA proposed to find that the State's "interchange" methodology, submitted 30 TAC 116.116(e)(3), is consistent with the Federal requirement that reductions must be of the same pollutant as the change.⁵ 74 FR 48450, at 48461. However, after evaluation of received comments, EPA finds that the term "sulfur compounds" in 30 TAC 116.116(e)(3)(F), is broad enough to include hydrogen sulfide. Hydrogen sulfide is a regulated NSR pollutant (*see* 40 CFR 52.21(b)(23)(i) and 52.21(i)(5)(i)) and, in certain instances, may require separate analysis from sulfur oxides in a netting analysis. Therefore, the interchange methodology may not ensure the health impacts of all sulfur compounds will be equal. The State failed to demonstrate that such use of hydrogen sulfide would protect the sulfur dioxides NAAQS. Additionally, this provision allows PM-2.5 to be interchanged with PM-10. However, because PM-10 and PM-2.5 are two separate pollutants and the State failed to demonstrate that such use of PM-10 would protect the PM-2.5 NAAQS, this interchange is inappropriate. Therefore, this provision is unapprovable for the sulfur dioxides and PM NAAQS. Section V.C.1 below.

- The Program also lacks any provisions that require the reductions to be permanent. Specifically, the submitted Program does not include provisions that either prohibit future increases at the Qualified Facility, or ensure that any future increase at a Qualified Facility at which a previous netting reduction occurred is analyzed in totality to assure that the NAAQS remains protected from the original increase. 74 FR 48450, at 48461; Section V.C.1 below.

Section 30 TAC 116.117(b) lacks any provisions that require a permit application to be submitted to TCEQ for a change under the Program. There are no provisions in 30 TAC 116.117(b) that clearly indicate that TCEQ must issue a revised permit for the changes made by all of the participating Qualified Facilities. Thus, EPA finds that the Program is not approvable because it lacks this requirement and therefore is not enforceable. *See* 74 FR 48450, at 48462, Section V.D.1 below.

The Qualified Facilities SIP submittal is a relaxation under CAA section 110(l) because it provides an exemption from NSR permitting not previously available

to facilities. As such, this revision creates a risk of interference with NAAQS attainment, RFP, or any other requirement of the Act. EPA lacks information sufficient to make a determination that the requested SIP revision relaxation does not interfere with any applicable requirements concerning attainment and RFP, or any other applicable requirement of the Act, as required by section 110(l). *See* 74 FR 48450, at 48463.

For the reasons discussed above in this section and as further discussed below in Section V (Response to Comments), EPA is disapproving the submitted Qualified Facilities Program as not meeting section 110(a)(2)(C) and 110(l) of that Act and 40 CFR 51.160. *See* 74 FR 48450, at 48462.

D. Definition of "Facility"

EPA proposed to make an administrative correction to the severable submittal for the SIP-approved definition of "facility" under 30 TAC 116.10(6). Consistent with our proposal, EPA is finalizing this administrative correction in today's action. Specifically, EPA corrects a typographical error at 72 FR 49198 to clarify that the definition of "facility," as codified at 30 TAC 116.10(6), was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP. 74 FR 48450, at 48465.

However, EPA wishes to note that each part of the Texas NSR program depends greatly upon the definition of "facility" that is applicable to it and upon how that definition is used in context within each part of the program. There are instances where a specific part of the Texas NSR program does not meet the Act and EPA regulations due to the definition of "facility" that applies to that part of the program. For example Texas's PSD non-PAL rules explicitly limit the definition of "facility" to "emissions unit," but the NNSR non-PAL rules fail to include such a limitation. 74 FR 48450, at 48475; *compare* 30 TAC 116.10(6) to 30 TAC 116.160(c)(3). TCEQ did not provide information to demonstrate that the lack of this explicit limitation in the NNSR SIP non-PALs revision is at least as stringent as the revised Major NSR SIP requirements. 74 FR 48450, at 48455; Section V.M. below.

V. Response to Comments

In response to our September 23, 2009, proposal, we received comments from the following: Sierra Club—Houston Regional Group; Sierra Club Membership Services (including 2,062 individual comment letters); Harris County Public Health and

Environmental Services; Texas Commission on Environmental Quality; Members of the Texas House of Representatives; Office of the Mayor—City of Houston, Texas; University of Texas at Austin School of Law—Environmental Clinic; Baker Botts, L.L.P., on behalf of BCCA Appeal Group; Baker Botts, L.L.P., on behalf of Texas Industrial Project; Bracewell & Guiliani, L.L.P., on behalf of the Electric Reliability Coordinating Council; Gulf Coast Lignite Coalition; Texas Chemical Council.

A. General Comments

1. Comments Generally Supporting Proposal

Comment: Harris County Public Health & Environmental Services (HCPHES) acknowledges that EPA takes issue with the TCEQ regulations because of the lack of specificity regarding definitions and general lack of checks and balances to ensure that Federal requirements are met during the State's permitting processes, and because they do not meet the Minor NSR SIP and Major NSR SIP, including the Major NSR Nonattainment SIP requirements. Those concerns, currently unaddressed by the TCEQ, have ultimately resulted in EPA's proposed disapproval of portions of the TCEQ's most recent SIP submittal. HCPHES views a TCEQ program that meets the Federal requirements as being critical to ensuring that air quality in the Houston Galveston Brazoria (HGB) area returns to levels compliant with the NAAQS. HCPHES is very concerned that the TCEQ programs fall short of Federal requirements and encourages EPA to aggressively pursue the timely correction of these deficiencies to ensure the health, safety, and well being of the citizens of Harris County. HCPHES supports EPA's conclusion to disapprove portions of the SIP as proposed until such time as TCEQ addresses all of the specifics noted in the **Federal Register**.

Comment: Several members of the Texas House of Representatives support EPA's proposed disapproval of the Qualified Facilities Program. While the Qualified Facilities Program was a legislative creation, these members of the Texas House recognize that the statutory language and associated regulations are inconsistent with current CAA requirements regarding modifications and public participation. Particular concerns are:

- *Inadequate TCEQ oversight.* The rules authorize many changes at facilities without any pre-approval by TCEQ or procedures for denial for

⁵ *See* 40 CFR 51.165(a)(1)(vi)(A) and 51.166(b)(3)(i), which define net emissions increase "with respect to any regulated NSR pollutant." Emphasis added.

cause. These off-permit changes are difficult to track and enforce and may threaten ambient air quality.

- *The lack of understandable and traceable permits.* Texas industry, regulators, and the public should be able to obtain a permit, read it, and know what quantity of what pollutants the facility is authorized to emit. The off-permit changes authorized through the Qualified Facilities rules prevent such transparency.

Comment: Houston Regional Group of the Sierra Club (Sierra Club) supports EPA's analysis and agrees that all of the September 23, 2009, proposals (including the Qualified Facilities Program) should be disapproved. The commenter generally supported EPA's proposed disapproval of the Qualified Facilities Program; Flexible Permits Program; and Texas Major and Minor NSR SIP for 1997 8-hour and 1-hour ozone NAAQS, Prevention of Significant Deterioration (PSD) SIP, and Standard Permit for Pollution Control Projects. The commenter provided additional comments on our proposed disapproval of the Flexible Permits Program, which EPA will address in its separate action on the Flexible Permits Program.

Response: Generally, these comments support EPA's analysis of Texas's Qualified Facilities Program as discussed in detail at 74 FR 48450, at 48455–48463, and further support EPA's action to disapprove the Qualified Facilities submission.

Comment: The Sierra Club Membership Services (SCMS) sent numerous similar letters via e-mail that relate to this action. These comments include 1,789 identical letters (sent via e-mail), which included the following comments:

- The TCEQ is broken and the commenters applaud EPA's proposed ruling that major portions of the TCEQ air permitting program does not adhere to the CAA and should be thrown out;
- While agreeing that the proposed disapprovals are a good first step, the commenters state that EPA should take bold actions as follows:
 - Halting any new air pollution permits being issued by TCEQ utilizing TCEQ's current illegal policy;
 - Creating a moratorium on the operations of any new coal fired power plants in Texas until TCEQ cleans up its act by operating under the Federal CAA;
 - Requiring coal companies clean up their old, dirty plants—no exceptions, no bailouts, and no special treatment—by reviewing all permits issued since TCEQ adopted its illegal

policies and requiring that these entities resubmit their applications in accordance with the Federal CAA; and

- Put stronger rules in place in order to reduce global-warming emissions and to make sure new laws and rules do not allow existing coal plants to continue polluting with global warming emissions.

- The commenters further state that Texas: (1) Has more proposed coal and pet coke fired power plants than any other state in the nation; (2) Is number 1 in carbon emissions; and (3) Is on the list for the largest increase in emissions over the past five years.

- The commenters do not want coal to stand in the way of a clean energy future in Texas. Strong rules are needed to make sure the coal industry is held responsible for their mess and that no permits are issued under TCEQ's illegal permitting process. Strong regulations are vital to cleaning up the energy industry and putting Texas on a path to clean energy technology that boosts economic growth, creates jobs in Texas, and protects the air quality, health, and communities.

In addition, SCMS sent 273 similar letters (sent via e-mail) that contained additional comments. These additional comments include the following:

- Commenters suggest that Texas rely on wind power, solar energy, and natural gas as clean alternatives to coal.
- Other comments expressed general concerns related to: Impacts on global warming, lack of commitment by TCEQ to protect air quality, the need for clean energy efficient growth, impacts of upon human health, endangerment of wildlife, impacts on creation of future jobs in Texas, plus numerous other similar concerns.

Response: To the extent the SCMS letters comment on the proposed disapproval of the Qualified Facility program, they support EPA's action to disapprove the Qualified Facilities submission. The remaining comments are outside the scope of our proposed action relating to the Qualified Facilities Program.

Comment: The Environmental Clinic, the University of Texas at Austin School of Law (UT Environmental Clinic) commented that EPA should disapprove several other sections of 30 TAC Chapter 116.

Response: This final rulemaking only addresses the Qualified Facilities Program. Therefore, issues related to other portions of Texas's regulations are outside the scope of this rulemaking.

2. Comments Generally Opposing Proposal

Comment: TCEQ provided several general comments on the proposal. The TCEQ commented that the Qualified Facilities Program was developed by the 74th Texas Legislature through Senate Bill (SB) 1126, which became effective May 19, 1995. SB 1126 amended the Texas Clean Air Act by revising the definition of “modification of existing facility,” which changed the factors used to determine whether a modification for State permitting (*i.e.* Minor NSR) has occurred. In 1996, 30 TAC Chapter 116 was revised to incorporate this legislative directive. These changes provide that modifications may be made to existing facilities without triggering the State's Minor NSR requirements whenever: (1) The facility to be modified has received a permit, permit amendment, or has been exempted from permitting requirements no earlier than 120 months from when the change will occur; or (2) uses air pollution control methods that are at least as effective as the Minor NSR SIP best available control technology (BACT) that the Commission required 120 months before the change will occur. Such facilities are designated as “qualified facilities.”

TCEQ has always considered the Qualified Facilities Program to be applicable only to Minor NSR and not applicable to Major NSR, although this is not specifically stated in the rule. In summary, under the Qualified Facilities Program, TCEQ: (1) Determines Federal applicability as a first step in processing a Qualified Facilities request; and uses actual emissions, not allowable emission rates; (2) applies Federal NSR requirements when triggered; (3) does not circumvent Federal requirements applicable to major stationary sources or major modifications; (4) considers the use of “modification” to be separate and severable from the Federal definition of “modification” as reflected in the SIP-approved Major NSR Program; and (5) does not violate the approved SIP with regard to Major NSR or Minor NSR Program requirements.

Comment: The Texas Chemical Council (TCC) comments that it would be short-cited to analyze the three programs (Qualified Facilities, Flexible Permits, and NSR Reform) apart from the dramatic improvements in the air quality in Texas in the past 15 years. TCC goes on to describe these improvements. TCC supports full approval of Qualified Facilities. The Qualified Facilities Program is not intended to shield a source from major NSR. The Program is a robust, Federally enforceable program. The Qualified

Facilities Program is authorized by the TCAA, promotes flexibility, and allows sources to make certain changes without triggering NSR. If Major NSR is triggered, a facility cannot be a Qualified Facility. The definition of a Qualified Facility makes it clear that a Qualified Facility is an existing facility. A Qualified Facility may make a physical change in or change the operation of that facility as long as the change does not result in a net increase in allowable emissions of any air contaminant and does not result in the emission of any air contaminant not previously emitted. Additionally, the facility must be using equipment at least as effective as the BACT required by TCEQ. TCC supports full approval of the three Texas air permitting program submittals. The SIP revisions submitted to EPA by TCEQ over the last 15 years are critical components to Texas air permitting program. Texas should not be punished for EPA's failure to act within the statutory timeframe in the CAA. EPA offers little or no legal justification for proposing disapproval of these programs. EPA's proposed action will have an enormous impact on the country's largest industrial state. The SIP revision submittals for these programs are at least as stringent as the applicable Federal requirements and should be fully approved.

Comment: Bracewell & Giuliani LLP, counsel to the Electric Reliability Coordinating Council (ERCC), commented that Qualified Facilities provides incentives to implement pollution reduction measures at existing facilities. EPA's proposed disapproval does not provide any evidence that this authorization is actually used for major modifications or in fact interferes with air quality improvements. Discontinuance of this program could deter or delay many pollution reduction measures because the cost and resources associated with a full notice and comment case-by-case permit would outweigh the economic benefits of the additional controls. EPA should determine that the Qualified Facilities Program satisfies the CAA requirements for a state minor source program and retract the SIP disapproval and approve this SIP revision. EPA should recognize the validity of permits issued under the Texas permitting program and refrain from taking enforcement actions to address EPA concerns.

Comment: Jackson Walker, LLP, counsel to Gulf Coast Lignite Coalition GCLC, provided the following general comments on all three proposed disapprovals (Qualified Facilities, Flexible Permits, and NSR Reform): (1) Commenters disagree with all the

proposed disapprovals because the SIP as implemented by TCEQ meets or exceeds CAA requirements and has met the goals of the CAA; (2) EPA has a history of focusing on results; so, EPA should look beyond immaterial differences in the rule provisions and focus on the positive results that Texas has achieved under the TCAA and the State's submittals; (3) Texas sources have relied on the submitted rules for as long as 15 years in some cases. To disapprove the submittals after so long puts too much burden on the regulated community, creates regulatory uncertainty, hurts the vulnerable economy by potentially increasing compliance costs, and may discourage future business expansion; and (4) GCLC requests that EPA work collaboratively, not combatively, with TCEQ to resolve any issues under the CAA.

Comment: Baker Botts, LLP, counsel for Texas Industry Project (TIP) and Business Coalition for Clean Air (BCCA) provided the following comments. TIP and BCCA support full approval of Qualified Facilities because the submittal will strengthen Texas's permitting program. EPA should work expeditiously with TCEQ to approve the Qualified Facilities Program. Further, under Texas's integrated air permitting regime, air quality in the state is demonstrating strong, sustained improvement. Commenters describe the air quality improvements in Texas in the recent past. Finally, commenters describe their understanding of how the Qualified Facilities Program operates. Qualified Facilities is a Minor NSR applicability trigger that allows existing emissions facilities that employ BACT to make changes without Minor NSR review as long as the changes do not result in net emissions increases. The Qualified Facilities Program is authorized by the TCAA and applies only to existing facilities. The term "facility" is analogous to the Federal definition of "emissions unit," under Texas's Title V program. See 30 TAC 122.10(8). The Texas Legislature created the Qualified Facilities Program as an incentive for sites to implement BACT. To be "qualified," the source must (1) have a permit or permit amendment or exempt from pre-construction permit requirements no earlier than 120 months before the change will occur, or (2) use air pollution control methods that are at least as effective as the BACT that was required or would have been required for the same class or type of facility by a permit issued 120 months before the change will occur. See 30 TAC 116.116(e). A qualified facility may

lose its status as "qualified" if its permit, exemption, or control method falls outside the 10-year window. See Texas Nat'l Res. Conservation Comm'n, *Modification of Existing Facilities under Senate Bill 1126: Guidance for Air Quality*, (April 1996), 5 [hereinafter *Modification of Existing Facilities Guidance*].

Comment: Texas Oil & Gas Association (TxOGA) is encouraged that EPA is taking action to provide certainty in the regulatory process for businesses. TxOGA supports the ongoing goal of improved air quality; however, commenters do not believe that the proposed disapproval does anything to improve air quality in Texas. Further, the proposal may discourage future business expansion in Texas.

Response: EPA understands TCEQ's explanation of the origination of the Program in SB 1126. Nonetheless, the Qualified Facilities Program must meet all Federal requirements under the CAA in order to be approvable. The fact that EPA failed to act on the Qualified Facilities Program SIP revision within the statutory timeframe does not dictate the action EPA must take on the Program at this time. We cannot approve a program that fails to meet the requirements of the CAA. As discussed throughout our proposal and this final notice, the current Qualified Facilities Program fails to meet all requirements. We disagree with commenters that the Qualified Facilities Program is exclusively a Minor NSR program, based upon the ambiguities in the Program's rules. Furthermore, EPA need not prove that the Program is actually used for major modifications. EPA is required to review a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3); *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (DC Cir. 1995); *American Cyanamid v. EPA*, 810 F.2d 493, 495 (5th Cir. 1987). This includes an analysis of the submitted regulations for their legal interpretation. The Program's rules are ambiguous and therefore do not adequately prohibit use under Major NSR. We recognize that TCEQ considers the Program to be a Minor NSR Program; however, the State admits that its rules are insufficient to limit the Program to Minor NSR. See 74 FR 48450, at 48456–48457; Section V.F. below for further information.

EPA enforcement of Federal requirements in Texas is outside the scope of this rulemaking. Additionally, comments on the Flexible Permits Program and the NSR Reform submittal are outside the scope of this notice. EPA will address the comments on its

proposed disapprovals of Flexible Permits and NSR Reform in separate actions on these programs.

B. Comments That This Action Is Inconsistent With the CAA

Comment: ERCC commented that EPA's proposed disapprovals are not rationally supported by case law and are inconsistent with the CAA. Congress placed primary responsibility for developing SIPs on the states, so permitting programs among states can vary greatly. EPA determines whether the state SIP satisfies the minimum requirements of the CAA. *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), *rehearing denied* 429 U.S. 873 (1976); *Train v. NRDC*, 421 U.S. 60 (1975); *Florida Power and Light Co. v. Costle*, 650 F.2d 586 (5th Cir. 1979); 71 FR 48696, 486700 (August 21, 2006) (Proposed rule to promulgate a FIP under the CAA for tribes in Indian country). The Fifth Circuit Court of Appeals recently stated that "EPA has no authority to question the wisdom of a State's choice of emission limitations if they are part of a SIP that otherwise satisfies the standards set for in 42 U.S.C. 7410(a)(2)." *Clean Coalition v. TXU Power*, 536 F.3d 469 Fn.3 (5th Cir. Tex. 2008). Texas's permitting programs are based on the recognized Minor NSR flexibility and consistent with prior EPA approvals of other state SIPs. EPA must review other approved state programs to ensure that Texas's sources are not put at a competitive disadvantage. See Memorandum from John Seitz, Director, OAQPS, *SIP Consistency Process* (April 4, 10, 1996). EPA's proposed disapprovals could have dramatic impact on industries in Texas. EPA should solicit comments from all EPA regions on whether the proposed actions are inconsistent with other state SIPs and compare the stringency of the Texas programs to those of other states. ERCC is confident that EPA will realize that the Texas programs are consistent and possibly more stringent than other permitting programs throughout the country.

Response: EPA continues to recognize that permitting programs among states can vary greatly and provide some flexibility for Minor NSR SIP programs. However, in order to be approved as part of the SIP, the Qualified Facilities Program must meet all applicable Federal requirements. Here, the commenter's reliance on the Fifth Circuit's dicta in *Clean Coalition* is misplaced because the Qualified Facilities Program does not meet the standard set in 42 U.S.C. 7410(a)(2)(C). Section 42 U.S.C. 7410(a)(2)(C) requires the State to have a permitting program

that complies with PSD and Nonattainment New Source Review (NNSR) permit requirements (at 42 U.S.C. 7475 and 7503, respectively), as well as Minor NSR permit requirements. As part of the State's permitting program, the Qualified Facilities Program fails to meet these requirements of the Act. As discussed throughout our proposal and this final action, the submitted Program fails to meet all requirements for an approvable permitting program, including submitting information sufficient to demonstrate that the Program is restricted only to Minor NSR. Commenters argue that the Qualified Facilities Program is consistent with other SIP approved programs; however, they fail to cite any specific examples.

C. Comments Addressing Whether the Qualified Facilities Rules Allow Sources to "Net Out" of Major and Minor NSR Through Rules That Are Not Adequate To Protect the NAAQS and State Control Strategies

1. Comments Generally Supporting Proposal

Comment: UT Environmental Clinic commented that the Qualified Facilities Program fails to meet the netting requirements for several reasons. The commenter notes that the Qualified Facilities Program netting calculations can be based on allowable emissions. Allowables netting violates Major NSR because it is inconsistent with *State of New York v. EPA*, 413 F.3d 3, 40 (DC Cir. 2005) and violates the CAA; it violates Minor NSR because it fails to require an evaluation of the actual emissions impacts on maintenance of the NAAQS.

Response: Generally, these comments support EPA's analysis of Texas's Qualified Facilities Program as a substitute for a Major NSR SIP program as discussed in detail at 74 FR 48450, at 48459, and further support EPA's action to disapprove the Qualified Facilities submission.

We find that the Program authorizes existing allowable, rather than actual emissions, to be used as a baseline to determine applicability. This use of allowables violates the Act for Major NSR SIP requirements and is contrary to *New York v. EPA*, 413 F.3d 3, 38–40 (DC Cir. 2005) ("New York I"). 74 FR 48450, at 48459. Under the submitted Program, the project's increases in emissions are calculated based upon its projected allowable emissions. The baseline uses the permitted allowable emission rate (lowered by any applicable state or Federal requirement) if the facility "qualified" under 30 TAC

116.10(11)(E)(i). If the facility "qualified" under 30 TAC 116.10(11)(E)(ii), the baseline uses the actual emission rate (minus any applicable state or Federal requirement). In the applicability netting analysis, the baseline for all the other participating minor and major existing Qualified Facilities is calculated in the same way. The emission reductions are calculated similarly, *i.e.*, reductions beyond the permitted allowable or actual emission rates (minus the applicable state and Federal requirements). Thus, this submitted Program allows an evaluation using allowable, not actual emissions, as the baseline to calculate the project's proposed emission increase and for many of the netting emission reductions, thereby in many cases possibly circumventing the major modification applicability requirements under the Major NSR rules. Therefore, the Program fails to meet the CAA and Major NSR requirements to use baseline actual emissions for major source netting as the starting point from which the amount of creditable emission increases or decreases is determined. 74 FR 48450, at 48459.

EPA agrees that the reductions in the Program's netting are not based on actual emissions. Such netting may be permissible for a Minor NSR Program; *provided* that the netting provisions assure protection of the NAAQS and the SIP control strategies as required by section 110(a)(2)(C) of the CAA. Allowables netting is acceptable because CAA section 110(a)(2)(c) does not explicitly prohibit the use of allowables netting for Minor NSR programs. However, Texas failed to submit sufficient information to demonstrate that the use of allowable emissions in a Minor NSR netting program continues to protect the NAAQS and control strategies; therefore, EPA cannot determine if this requirement is met. Today's rulemaking disapproves netting under the Qualified Facilities Program as a Minor NSR program, in part because the Program fails to ensure that ambient air is protected in consideration of all changes in the netting.

Comment: UT Environmental Clinic commented that the definitions in section 116.10 do not adequately specify how to calculate emissions reductions for purposes of the netting analysis. For example, the Texas definition of actual emissions is the "highest rate" actually achieved within the past 10 years. It is unclear whether this is the highest emission rate achieved at a single point in time or averaged over some period.

Response: We disagree that the reductions are not quantifiable. The

netting is based on the most stringent of the permitted emissions rate (which includes the highest achievable actual emission rate) or any applicable state or Federal rule. Nothing in the State's definition of "actual emissions" implies at all that there is any averaging involved in the calculations. The reduction is based upon the highest rate the facility achieved at a single point in time, looking back the past 10 years.

While we proposed to find that the reductions were quantifiable, we requested comments on two aspects of the Program as it relates to this principle. 74 FR 48450, at 48461–48462. First, we requested comment on whether the regulatory provisions at 30 TAC 116.10(1) and (2) provide clear direction on the appropriate calculation procedures sufficient to ensure the reductions are quantifiable. As stated above, we disagree with the commenter's argument that the definitions in section 116.10 do not adequately specify how to calculate emissions reductions for purposes of the netting analysis.

Second, the submitted rules provide that a Qualified Facility nets its emissions increase on the same basis as its allowable emissions limitation. 30 TAC 116.116(e)(3)(A). We requested comment on whether netting on such a basis is sufficiently quantifiable, and whether any additional provisions are necessary to ensure that the entire emissions increase is properly netted against reductions from the other Qualified Facility. We did not receive any comments on this second aspect of quantifiability under the Program. Because no comments were submitted showing the basis was not sufficiently quantifiable, we continue to believe that netting for a Minor NSR SIP program on the adequacy of the Program's netting of emissions increases on the same basis as its allowable emissions limitation, is sufficiently quantifiable.

Comment: UT Environmental Clinic commented that the Qualified Facilities rules allow all emission reductions at the same account number to be considered in the net emission calculation. In fact, the rules could be read to allow the "offsetting" of emissions above allowables by decreases in emissions at any "different facility." 30 TAC 116.110(3). Because an account number can include multiple sources, the Texas rules allow consideration of emission decreases from outside the major stationary source in violation of 42 U.S.C. 7411(a).

Response: Generally, these comments support EPA's analysis of Texas's Qualified Facilities Program as a substitute for a Major NSR SIP program

as discussed in detail at 74 FR 48450, at 48458–48459, and further support EPA's action to disapprove the Qualified Facilities submission.

We find the Program is deficient for Major NSR netting because it may allow an emission increase to net out by taking into account emission decreases outside of the major stationary source⁶ and, in other circumstances, allow an evaluation of emissions of a subset of units at a major stationary source.⁷ The State failed to submit information sufficient to demonstrate that the Program includes the necessary replicability and accountability to prevent such circumvention. Therefore, the Program does not meet the CAA's definition of "modification" and the Major NSR SIP requirements and is inconsistent with *Alabama Power v. Costle*, 636 F.2d 323, 401–403 (DC Cir. 1980) and *Asarco v. EPA*, 578 F.2d 320 (DC Cir. 1978). 74 FR 48450, at 48458–48459.

Comment: UT Environmental Clinic commented that the Qualified Facilities netting rules only allow consideration of the increase in allowable emissions from the Qualified Facility undergoing a change, but consider the decreases from any other Qualified Facilities at the same account number. There is no consideration of all the emission increases so there is no adequate impacts analysis from the source.

Response: Generally, these comments support EPA's analysis of Texas's Qualified Facilities Program as a substitute for a Major NSR SIP program as discussed in detail at 74 FR 48450, at 48458–48459, and further support EPA's action to disapprove the Qualified Facilities submission.

Major NSR netting is based upon all contemporaneous increases and decreases at the same major stationary source that occur within a reasonable period that the states must define in their approved SIPs. The submitted Program's netting is not based upon all contemporaneous increases at the same major stationary source and not all decreases at the same major stationary source. However, the State contends that the Program is not intended to

⁶ The Texas SIP defines an "account" to include an entire company site, which could include more than one plant and certainly more than one major stationary source. SIP rule 30 TAC 101.1(1), second sentence.

⁷ Under the submitted Program, not all emission points, units, facilities, major stationary sources, or minor modifications at the site or their increases in emissions are required to be evaluated in the applicability netting analysis. So the Program fails to require the evaluation of emissions changes at the entire major stationary source correctly as required by the Major NSR SIP regulations. 74 FR 48459.

apply for Major NSR netting but only for Minor NSR netting. Moreover, the Program is not intended to allow contemporaneous netting. Instead, one looks to the increases from the proposed change and to decreases made at the same time as the proposed change. Such an approach, if fully delineated in the State's Program rules, would satisfy the minimum requirements for an approvable Minor NSR netting program *provided* that the ambient air is protected in consideration of all changes in the netting. Today's rulemaking disapproves netting under the Qualified Facilities Program as a Minor NSR program, in part because the Program fails to ensure that ambient air is protected.

Comment: UT Environmental Clinic commented that the Qualified Facilities rules do not define a contemporaneous period nor require that emission reductions occur within a specified period. EPA notes in the **Federal Register** that Texas intended that any relied-upon reductions occur simultaneously with the increase. However, the commenter argues that nothing in the rule requires this.

Response: We agree with the comment insofar as it asserts that the Program fails to define a contemporaneous period or require that emission reductions occur within a specified period. EPA finds that, while Texas intended that any relied-upon reductions occur simultaneously at the time of the increase,⁸ the Program is deficient because it does not expressly define the applicable period in which the reductions must occur. See our response to the previous comment. 74 FR 48450, at 48461.

Comment: UT Environmental Clinic commented that because the Qualified Facilities rules allow reductions to be based upon allowable emissions, they do not ensure that reductions are real.

Response: We disagree that just because the reductions are based upon allowable emissions, these reductions are not real. For example, reviewing authority may presume that source-specific allowable emissions may be equivalent to the actual emissions. See 40 CFR 51.165(a)(1)(xii)(C) and 51.166(b)(21)(iii). The commenter fails to discuss why the use of allowable emissions makes the reductions not real.

Comment: The UT Environmental Clinic commented that the rules fail to ensure that netted reductions are permanent.

Response: We agree with the commenter that the Program lacks any provisions that require that the

⁸ See 21 Tex. Reg. 1573 (February 27, 1996).

reductions are permanent. For reductions to meet the netting requirement to be permanent, the rules must include a prohibition against future increases at the Qualified Facility, or include regulatory language that assures that any future increase at a Qualified Facility at which a previous netting reduction occurred is analyzed in totality to assure that the NAAQS remains protected from the original increase. However, the submitted Program does not include such provisions. Consequently, the Qualified Facilities rules are inadequate because they fail to ensure that the reductions are permanent.

Comment: UT Environmental Clinic commented that the rules do not prevent double counting of emission reductions.

Response: For an additional *separate* project, it appears that the state intended that the reductions must occur at the time of that *additional* project that will need to obtain additional reductions to net out. If the regulatory text was consistent with this approach, this limitation would prevent double counting of the netting reductions. The State's intent is that the holder of the permit is required to perform a new, separate netting analysis and rely upon reductions not relied upon in the first netting analysis. See 74 FR 48450, at 48461 (*citing* 21 Tex. Reg. 1573 (February 27, 1996); page 154 of the 1996 SIP revision submittal). We agree that the rules are not clear that a subsequent change at a Qualified Facility that previously relied upon netting must conduct a separate netting analysis that relies upon reductions that were not relied upon in the first netting analysis. EPA cannot find any provisions in the Program to ensure a separate netting analysis performed for each proposed change. Therefore, the Program fails to prevent double counting; and consequently these types of netting reductions are not enforceable as a practical matter at and after the time of the actual change begins; and therefore, not sufficiently creditable. 74 FR 48450, at 48461.

Comment: UT Environmental Clinic commented that the Qualified Facilities rules fail to ensure that the emission reductions are enforceable. Facilities provide notice of changes to Qualified Facilities on Form PI-E, which is not enforceable, and Qualified Facility changes that affect permitted facilities are not required to be incorporated into a permit until renewal or amendment. TCEQ noted in its Qualified Facility guidance that the form is not Federally enforceable "but is simply a form to provide information to demonstrate that

the change meets qualified facility flexibility." Consequently, Qualified Facility reductions are allowed to remain unenforceable for years. Further, Texas rules make it unclear whether emission reductions are ever made enforceable because a portion of the definition of "allowable emissions" states that "[t]he allowable emissions for a qualified facility shall not be adjusted by the voluntary installation of controls." 30 TAC 116.10(2)(F). This portion of the definition of "allowable emissions" states that "[t]he allowable emissions for a qualified facility shall not be adjusted by the voluntary installation of controls." Additionally, there are no monitoring requirements in the Qualified Facilities rules to track compliance with commitments to reduce emissions of limitations on emissions increases.

Response: We agree that the Qualified Facilities rules fail to ensure that the emission reductions relied upon in a netting analysis are enforceable. We noted at 74 FR 48450, at 48462 that the rules do not require permits for these relied-upon reductions. We also agree that the Program does not require monitoring because no permit is required for each change. See Section V.D.1 below.

We disagree that 30 TAC 116.10(2)(F) makes the rules vague as to enforceability. This provision of the rule is defining how to calculate the baseline from which reductions occur. When calculating the allowable emissions for a Qualified Facility participating in the Program, one cannot count any reductions occurring as a result of the voluntary installation of controls. However, a facility can become "qualified" to use the Program by voluntarily installing controls. The reductions achieved by this voluntary installation of controls are not counted in the Qualified Facility's allowable emissions.

Comment: UT Environmental Clinic states that the Qualified Facilities rules do not ensure that emission reductions have the same health and welfare effects as the emission increase. Because the program allows the emission increase to be offset inside and outside the facility, it allows for emission increases close to the fence line, potentially affecting health and welfare of the surrounding community.

Moreover, the Qualified Facilities Program allows Qualified Facilities to offset emissions increases of one pollutant with emission decreases of another pollutant, as long as the pollutants are in the same "air contaminant category." The interchange

methodology established by TCEQ⁹ to ensure that compounds within the VOCs air contaminant category, as interchanged, will have an equivalent impact on air quality, is not included in the Texas rules or statute. The rule merely defines an "air contaminant category" as a group of related compounds, such as volatile organic compounds, particulate matter, nitrogen oxides, and sulfur compounds. 30 TAC 116.116(e)(3)(F). Clearly emissions of all sulfur compounds, say sulfur dioxide and hydrogen sulfide, are not equal in terms of health impacts. Likewise, the health impacts of fine PM emissions are of significantly greater concern than the impacts of larger particles.

Response: With regard to VOCs and nitrogen oxides, EPA disagrees with the comment above that the Program is deficient because the State's rules allow an offset of an emission increase pollutant with emission decrease of another pollutant, as long as the pollutants are in the same "air contaminant category." The State's interchange methodology goes beyond the fundamental principle to determine whether the interchange of different compounds within the same air contaminant category will result in an equivalent decrease in emissions; e.g., one VOC for another VOC; for VOCs and nitrogen oxides. See 74 FR 48450, at 48461.

On the other hand, the term "sulfur compounds" in 30 TAC 116.116(e)(3)(F), is broad enough to include hydrogen sulfide. The State failed to demonstrate that use of hydrogen sulfide would protect the sulfur dioxides NAAQS. Therefore, we agree with the commenter that the interchange methodology does not ensure the health impacts of all sulfur compounds will be equal. With regard to the comment concerning particulate matter, the definition of "air contaminant category" allows PM-2.5 to be interchanged with PM-10. However, because PM-10 and PM-2.5 are two separate pollutants and the State failed to demonstrate that such use of PM-10 would protect the PM-2.5 NAAQS, this interchange is inappropriate. Therefore, we agree that the interchange methodology does not ensure the health impacts of all particulate matter will be equal.

We, however, disagree with the comment above that the Program fails to ensure that emission reductions have the same health and welfare effects as the emission increases. The State has established a methodology to use whenever there is a different location of emissions because of the intraplant

⁹ See 74 FR 48455, n.3.

trading. For example, where the netting has the effect of moving emissions closer to the plant property line than the Qualified Facility to be changed, the State uses this methodology to analyze whether there could be an increase in off-site impacts. See 30 TAC

116.117(b)(5). We continue to believe that this will ensure the reductions have approximately the same qualitative significance for public health and welfare, which is required to ensure the reductions are creditable. Nevertheless, as stated above, we are disapproving the Qualified Facilities netting program as a substitute for a Major NSR SIP program and as a Minor NSR SIP program because the Program is inadequate to protect ambient air quality.

Comment: The UT Environmental Clinic commented that the Qualified Facilities netting Program does not adequately protect air quality under Minor NSR. Specifically, the Qualified Facilities netting provisions do not meet Federal netting standards, which are in place precisely to ensure that air quality is protected. The Program's failure to meet almost all of those basic netting requirements renders the rules inadequate.

Response: Generally, these comments support EPA's analysis of Texas's Qualified Facilities Program as a Minor NSR SIP program as discussed in detail at 74 FR 48450, at 48460–48462, and further support EPA's action to disapprove the Qualified Facilities submission.

Comment: The UT Environmental Clinic commented that the Program is clearly inadequate to ensure protection of the NAAQS and to prevent violations of control strategies. The rules cannot be approved as an exemption from Minor NSR permitting because they in no way ensure that the emission increases authorized pursuant to the rules will have a *de minimis* impact on air quality.

Response: We agree with the commenter that the Program is inadequate to ensure protection of the NAAQS for several reasons. As discussed below in Section V.G.1, we find that the Qualified Facilities rules are not clear that all Qualified Facilities must have obtained a Texas NSR SIP permit. Without the assurance that all Qualified Facilities have obtained a Texas NSR SIP permit, EPA cannot make the finding that each permit for a Qualified Facility includes an emission limitation based on the chosen control technology, with a determination that the Qualified Facility will not interfere with attainment and maintenance of the NAAQS or violate any control strategy. Therefore, the Program fails to ensure that all Qualified Facilities can operate

up to a permitted allowable limit such that they do not interfere with attainment and maintenance of the NAAQS and do not violate any State control strategy, as required by the Texas NSR SIP.

Additionally, the Program fails to ensure that the NAAQS are protected because 30 TAC 116.117 lacks language requiring the owner or operator to maintain the information and analysis showing how it concluded that there will be no adverse impact on ambient air quality before undertaking the change.

We agree with the commenter that the Program does not qualify as a *de minimis* exemption from Minor NSR. The State has not provided sufficient information to demonstrate that the exempted changes from the Minor NSR requirements will have only a *de minimis* effect. See Section V.D.1 below for more information.

2. Comments Generally Opposing Proposal

Comment: TCEQ commented that the Qualified Facilities Program can only be used if a physical or operational change complies with Federal NSR requirements. In order to make a physical or operational change to a Qualified Facility, an owner or operator must demonstrate that the change does not result in a net increase in allowable emissions of any air contaminant previously authorized under state minor source review. 30 TAC 116.116(e)(1). Keeping in mind the State definition of "facility," 30 TAC 116.116(e)(2) and (3) allow a Qualified Facility to demonstrate that a state modification has not occurred by comparing allowable emissions to allowable emissions before and after a proposed change. Allowable emissions (both hourly and annual rates) are one of the criteria to provide "state qualified" flexibility because the facilities must exist and be authorized, and thereby have undergone appropriate permit review. In addition, no existing level of control can be reduced. 30 TAC 116.116(e)(8). The commenter states that for *major sources*, in addition to State requirements, the evaluation of emissions related to physical and/or operational changes is conducted on a baseline actual to either a projected actual or potential to emit base if applicable. 30 TAC 116.116(e)(4). This comparison is used to determine if an emission increase above the appropriate significance threshold for a particular Federal permitting program has occurred. From the Federal NSR standpoint, if a proposed physical or operational change would result in an

emissions increase that exceeds a significance threshold, the appropriate analysis (netting) is triggered. If the results of the netting analysis indicate that a major modification has occurred, the appropriate Federal program(s) is triggered and Federal authorization must be obtained. In such a case, the Qualified Facilities Program would not be an applicable authorization pathway, and a State Minor NSR amendment must be obtained, along with the appropriate Federal NSR authorization. The exemption from the definition of "modification of an existing facility" under the Qualified Facilities Program does not relieve an owner or operator from conducting an evaluation to determine if a Federal major modification has occurred. TCEQ states that from the Federal standpoint, only the project's emission increases are evaluated (without consideration of emission decreases) to determine if a Federal applicability analysis (netting) has been triggered. If the project increases equal or exceed the netting threshold for the pollutant and this program, then a full contemporaneous netting exercise is conducted in an effort to determine if the modification is a major modification. If the project is a major modification, then the appropriate Federal NSR program, either PSD or nonattainment review, is triggered. A permit holder cannot use the "no net emissions increase" concept that is described in the Qualified Facilities Program rules as a mechanism to avoid a Federal NSR applicability analysis (netting).

Comment: TxOGA commented that the Qualified Facilities Program establishes an allowables-based trigger and has no effect on a permit holder's compliance obligations under Federal requirements. Texas rules clearly require compliance with Federal requirements. 30 TAC 116.117(a)(4) and (d). This interpretation is also supported by TCEQ guidance.

Comment: The TCC commented in response to EPA's assertion that a Major NSR applicability determination must be based on actual emissions, not allowables. TCC argues that the Qualified Facilities rules do not circumvent any Federal requirements for major stationary sources. TCC reiterates that a qualified facility must demonstrate that the change does not result in a net increase in allowables, the source must follow notification requirements, and the source cannot relax controls at the qualified facility.

Response: We acknowledge TCEQ's description of how the State intends to implement the Qualified Facilities Program; however, we have determined

that TCEQ's current rules are insufficient to prevent circumvention of Major NSR. EPA disagrees with the comments from TxOGA and TCC. The submitted Program lacks specific requirements that would require an owner or operator who proposes a change under the Qualified Facilities program to first conduct a Major NSR applicability analysis (netting) prior to receiving (or asserting) authorization under the Qualified Facilities Program.

Comment: TCEQ commented that for facilities undergoing an intraplant trade, where the allowable emissions at one facility are increased while allowable emissions at another facility are reduced an allowable-to-allowable comparison is used only to determine if a new emissions increase has occurred for State purposes. The emissions are reviewed simultaneously, which is more stringent than the Federal requirement that only requires contemporaneous emissions. If a net emissions increase has occurred, an owner or operator cannot use the Qualified Facilities Program to authorize the proposed project, and must find another State mechanism to obtain proper authorization. In addition, the commenter states that the owner or operator must submit pre-change notification if the intraplant trade moves emissions from the interior of a plant site closer to a property line. This gives TCEQ staff the ability to evaluate public protectiveness and evaluate any potential changes in off property impacts as they relate to all contaminants and pollutants with national standards, *i.e.* the NAAQS. This intraplant trade capability only exists to the extent that the project is a Minor NSR action, and does not apply if a major modification has been triggered under Federal NSR requirements.

Response: EPA disagrees with the commenter that under the Texas rules the Program's intraplant trading does not apply if a major modification has been triggered. As stated above, the program fails to require a Major NSR applicability analysis and is insufficient to prevent circumvention of Major NSR. Intraplant trading based on allowables to allowables netting is prohibited under Major NSR. *See State of New York et al., v. EPA*, 413 F.3d 3, 40 (DC Cir. 2005). However, such netting may be permissible for a Minor NSR program, provided that the netting provisions assure protection of the NAAQS. *See* 74 FR 48450, at 48462. As discussed above, Texas's Qualified Facilities Program does not meet this requirement. EPA also finds that the Program does not adequately define a

contemporaneous (or simultaneous) period or require that emission reductions occur within a specified period. As discussed above, we find that the Program fails to meet the Minor NSR netting requirement for a defined period in which the reductions must occur.

Comment: TIP and BCCA commented that the Qualified Facilities program exceeds Federal benchmarks for allowable-based Minor NSR triggers. This program is one of the mechanisms that EPA encouraged in its Flexible Air Permitting Rule (FAP) (74 FR 51418, 15423). Further, the program is more stringent than the Federal FAP Program because it requires up-to-date BACT. The Qualified Facilities Program is also comparable to the proposed allowables-based minor NSR trigger in EPA's proposed Indian Country rule, in which EPA allows the use of allowables to allowables netting. To justify the use of an allowables test, EPA distinguished the definition of "modification" under Minor NSR from that used for Major NSR. 71 FR 48696, 48701 (*citing State of New York, et al., v. EPA* (DC Cir. Jun. 24, 2005)). The Qualified Facilities rules meet these criteria and are more stringent than the Federal model because it only extends this flexibility to well-controlled facilities.

The commenter reiterates that the Qualified Facilities Program does not effect a permit holder's obligation to comply with Federal requirements. An allowables-based trigger is permissible because the CAA and Federal regulations do not mandate a method for determining minor NSR. The Environmental Appeals Board confirmed that there is no mandated methodology for the emissions test used for minor NSR. *In re Tennessee Valley Authority*, 9 EAD 357, 461 (EAB September 15, 2000). Again, EPA employed an allowables-to-allowables test in its proposed Indian Country rule. States have great flexibility to determine applicability for Minor NSR and that includes the authority to use an allowables-based trigger. TCEQ rules articulate an overriding obligation to comply with Federal requirements. 30 TAC 116.117(a)(4) and (d). Therefore, the current Qualified Facilities rules prevent circumvention of Major NSR.

Response: EPA disagrees with the commenter. This rulemaking disapproves netting under the Qualified Facilities Program for Major NSR, in part because the Program fails to first require a Major NSR applicability demonstration to show that a proposed change does not trigger Major NSR before the source can take advantage of the Program. In contrast to the Qualified Facilities Program, under the proposed

Indian Country rule, 40 CFR 49.153 would explicitly require the proposed new source or modification to determine applicability to Major NSR before taking advantage of the program. The source could only use allowables netting under the proposed Indian Country rule after a Major NSR applicability determination. *See* 71 FR 48696, at 48705, 48728–48729. The Qualified Facilities rules are deficient because they lack such a requirement. Further, as described above, the Program fails to meet several other netting requirements for an approvable Minor NSR netting program.

EPA's FAP rule is an Operating permit under Title V, not Title I. 74 FR 51418, 51419. While the FAP rule recognizes the use of advance approval programs under Minor NSR, the use of such programs must ensure environmental protection and compliance with applicable laws. "[FAPs] cannot circumvent, modify, or contravene any applicable requirement and, instead, by their design must assure compliance with each one as it would become applicable to any authorized changes." *See* 74 FR 51418, 51422. Further, advance approval under the FAP must be made at the time of permit issuance, and consider the alternate operating scenarios for air quality impacts, control technology, compliances with applicable requirements, etc. Under Major and Minor NSR, advance approval must ensure compliance with control strategy and non-interference with attainment and maintenance of NAAQS for each operating scenario as required by 40 CFR 51.160. We do not see how the Texas Qualified Facility Rule meets these requirements.

D. Comments Addressing Whether the Qualified Facilities Rules Are Practically Enforceable

1. Comments Generally Supporting Proposal

Comment: The UT Environmental Clinic commented that the rules fail to ensure that netted reductions are enforceable.

Response: We agree with the commenter that the Program is unenforceable because it fails to explicitly require that a permit application must be submitted for the change and for any relied-upon emissions reductions in the netting analysis. Because the Program is an exemption from a preconstruction permit, and does not require a permit, the Program must qualify as a *de minimis* exemption to be approvable. We find that the Program does not

qualify as a *de minimis* exemption from Minor NSR. The legal test for whether a *de minimis* threshold can be approved is whether it is consistent with the need for a plan to include legally enforceable procedures to ensure that the State will not permit a source that will violate the control strategy or interfere with NAAQS attainment, as required by 40 CFR 51.160(a)–(b). 74 FR 48450, at 48460. The State failed to demonstrate that this exemption will not permit changes that will violate the Texas control strategies or interfere with NAAQS attainment. Therefore all of the requirements under 40 CFR 51.160(a)–(b) apply to the Program.

Additionally, the Program allows too long of a lag time before a revised permit is issued in certain circumstances that can lead to a violation of a NAAQS, RFP, or control strategy without the TCEQ becoming aware of it in a timely manner. We proposed that the lag time for reporting a change under the Program should be no longer than six months, rather than a year, but we requested comment on whether six months is an acceptable lapse of time to ensure noninterference with the NAAQS and control strategies. 74 FR 48450, at 48462. We received no comments on this issue except that TCEQ stated they will consider this change during rulemaking. Therefore, we find that the Program allows too long of a lag time before reporting “qualified” changes.

Comment: The UT Environmental Clinic commented that the Program is clearly inadequate to ensure protection of the NAAQS and PSD increments and to prevent violations of control strategies.

Response: EPA agrees a Minor NSR SIP must include legally enforceable procedures enabling the State to determine whether construction or modification would violate a control strategy or interfere with attainment or maintenance of the NAAQS. 40 CFR 51.160(a)–(b). Furthermore, any Minor NSR SIP revision submittal that is a SIP relaxation, such as this Qualified Facilities Program, must meet section 110(l). The Qualified Facilities SIP submittal is a relaxation under CAA section 110(l) because it provides an exemption from NSR permitting not previously available to sources. This SIP relaxation creates a risk of interference with NAAQS attainment, RFP, or any other requirement of the Act. EPA lacks sufficient available information to determine that this SIP relaxation would not interfere with any applicable requirement concerning attainment and RFP, or any other requirement of the Act. See 74 FR 48450, at 48463.

2. Comments Generally Opposing Proposal

Comment: ERCC commented that the Qualified Facilities Program is enforceable for several reasons. The program’s regulations include enforceable registration and recordkeeping requirements. Documentation must be maintained for all Qualified Facility changes that describes the change and demonstrates compliance with the Qualified Facility Program as well as state and Federal law. See 30 TAC 116.117(a). TCEQ regulations also require that, at a minimum, an annual submission is made to the agency documenting any qualified facility changes not incorporated into a facility permit. See 30 TAC 116.117(b). Pre-change qualification and approval are required for certain changes including: changes that affect BACT or where MAERT is not available (30 TAC 116.118); certain intraplant trading (30 TAC 116.117(4)); or if the change will affect compliance with a permit condition (30 TAC 116.117(3)). EPA’s general comments questioning the proper permit application or registration for qualified facility authorization are unclear given the minor source nature of the program and its function as an exemption from a preconstruction permit. See 74 FR 48450, at 48462. The Program adequately imposes recordkeeping, reporting, notification and approval regulations to satisfy the minor NSR enforceability requirements.

Comment: TIP and BCCA also commented in response to EPA’s argument that the Qualified Facilities Program is not enforceable because changes are not reflected in a permit. The program is a minor NSR triggering program. Instead of permit revision, a facility qualified to invoke the program must notify TCEQ of changes under the Qualified Facilities rules. 30 TAC 116.118. The commenters explain the scenarios when notification is required and the requirements for effective notification under the rules. Commenters also state that if a change implicates a permit special condition, the permit holder must revise its permit special condition using the procedures specified in Chapter 116, New Source Review. 30 TAC 116.116(b)(3).

Comment: The TxOGA commented that the Qualified Facilities Program is a minor NSR triggering provision that requires facilities to retain documentation and notify TCEQ of changes under the program. A facility must be qualified at the time the change is to occur. The program is enforceable

because the rules contain notification and recordkeeping requirements.

Response: EPA disagrees with the commenters. The Program does not meet the Federal requirements for practical enforceability. To be approvable, a Minor NSR program must include enforceable emissions limits. See 74 FR 48450, at 48462. The Program is not clear that each Qualified Facility involved in the netting transaction must submit a permit application and obtain a permit revision reflecting all of the changes made to reduce emissions (relied upon in the netting analysis) as well as reflecting the change itself that increased emissions. See 74 FR 48450, at 48462. Therefore, the Program is unenforceable. Additionally, the Program allows too long of a lag time before a revised permit is issued in certain circumstances that can lead to a violation of a NAAQS, RFP, or control strategy without the TCEQ becoming aware of it in a timely manner. Because the Program is an exemption from a preconstruction permit, and does not require a permit, the Program must qualify as a *de minimis* exemption to be approvable. We find that the Program does not qualify as an approvable *de minimis* exemption from Minor NSR. See 74 FR 48450, at 48462; Section V.D.1. above. Therefore all of the requirements under 40 CFR 51.160(a)–(b) apply to the Program. As described throughout this notice, the Qualified Facilities Program fails to meet all of these requirements. See 74 FR 48450, at 48460. As stated above, the Program fails to require a permit that reflects all of the changes that occurred in the netting process and provides enforceable emissions limits. The notification and recordkeeping requirements, while beneficial, are not sufficient under Federal requirements to ensure enforceability.

E. Comments Addressing Whether the Qualified Facilities Rules Meet Federal Requirements for Major New Source Review

1. Comments Generally Supporting Proposal

Comment: The UT Environmental Clinic comments that nothing in the Qualified Facility statute or rules limits applicability to minor modifications. The rules require documentation at the plant site sufficient to comply with Nonattainment NSR and PSD, but do not clarify that changes that constitute a major modification cannot be made through a Qualified Facility change.

The commenter further stated that because the Qualified Facilities rules can be used to authorize major

modifications, the rules fail to meet the substantive requirements of Nonattainment NSR and PSD. For emission increases associated with PSD, the Qualified Facilities rules fail to require: (1) Best Available Control Technology; (2) an air quality analysis of impacts on the NAAQS and PSD increments; and (3) additional impact analysis associated with the implementation of the new source or modification. For emission increases associated with Nonattainment NSR, the Qualified Facilities rules fail to require: (1) Lowest Achievable Emission Rate; (2) emission offsets; and (3) demonstration of compliance by other facilities in the State.

Response: These comments are consistent with EPA's analysis concluding that Texas's Qualified Facilities Program does not meet Major NSR Substantive requirements as discussed at 74 FR 48450, at 48458–48459.

EPA agrees that the Program is deficient because it lacks provisions that require a Major NSR applicability determination for a change at a Qualified Facility before it is exempted from the permitting requirements. The Program's regulations do not contain any emission limitations, applicability statement, or regulatory provision restricting the change to Minor NSR. This lack of such express provisions distinguishes the Qualified Facilities Program from the Texas Minor NSR SIP rules for Permits by Rule in Chapter 106 and Standard Permits in Chapter 116, Subchapter F. The Standard Permits rules require a Major NSR applicability determination at 30 TAC 116.610(b), and prohibit circumvention of Major NSR at 30 TAC 116.610(c). Likewise, the Permits by Rule provisions require a Major NSR applicability determination at 30 TAC 106.4(a)(3), and prohibit circumvention of Major NSR at 30 TAC 106.4(b). The absence of these provisions in the Qualified Facilities rules creates an unacceptable ambiguity in the SIP. Therefore, the Program could allow circumvention of Major NSR. *See* 74 FR 48450, at 48456–48458.

EPA also agrees that the Program fails to address the required air quality impacts analysis. The comments concerning BACT, LAER, emissions offsets and a demonstration of compliance by other facilities in the State go beyond EPA's analysis in the proposal and are outside the scope of this rulemaking.

Additionally, section 110(l) of the Act prohibits EPA from approving any revision of a SIP if the revision would interfere with any requirement concerning attainment and RFP, or any

other requirement of the Act. There is not sufficient available information to enable EPA to determine that the submitted Program would not interfere with any requirement concerning attainment and RFP, or any other requirement of the Act. *See* 74 FR 48450, at 48459; and response above.

Comment: The Office of the Mayor, City of Houston, Texas, recognizes that the Qualified Facilities Program has no regulatory provisions that clearly prevent the Program from circumventing Major NSR SIP requirements thereby allowing changes at existing facilities to avoid the requirement to obtain preconstruction authorizations. Therefore, major sources of emissions are making major modifications to their facilities without going through the permitting process. The commenter states that this is a fatal flaw in the program, it is inconsistent with the CAA and should not be included in the SIP.

Response: The comments by the Office of the Mayor, City of Houston, Texas, are consistent with EPA's conclusions as discussed at 74 FR 48450, at 48456–48457 and response above.

2. Comments Generally Opposing Proposal

Comment: The TCC comments that Qualified Facilities is a Minor NSR Program because TCEQ's rules clearly require sources making changes under the Program to submit specific documentation, including "sufficient information as necessary to show that the project will comply with 40 CFR 116.150 and 116.151 of this title (relating to Nonattainment Review) and 40 CFR 116.160–116.163 of this title (relating to Prevention of Significant Deterioration Review) and with Subchapter C of this Chapter 116 (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (CAA 112(g), 40 CFR Part 63))." 30 TAC 116.117(a)(4).¹⁰

Response: As stated in the above, TCEQ's rules for Qualified Facilities are insufficient to prevent circumvention of major NSR. *See* 74 FR 48450, at 48456–48458.

Comment: ERCC commented that the Qualified Facilities Program is limited to Minor NSR. Qualified Facilities mandates compliance with 40 CFR 51.165 and 51.166, by clearly stating

that any change authorized by Qualified Facilities shall not "limit the application of otherwise applicable state or Federal requirements." TCAA 382.0512(c). TCEQ regulations require that Qualified Facilities changes must be documented minor source modifications. *See* 30 TAC 116.117(a)(4); 30 TAC 116.117(d). EPA's dismissal of Section 116.117(a)(4) as a recordkeeping provision is unjustified. 74 FR 48450, at 48457. This Qualified Facilities regulatory reference to the PSD and NNSR programs requires the regulated entity to document that the change is in compliance with the Federal major source permitting programs and in compliance with state and Federal law.

Response: As stated above, the Qualified Facilities rules are insufficient to prevent circumvention of Major NSR. 74 FR 48450, at 48456–48458.

Although there are recordkeeping requirements in the Program at submitted 40 TAC 116.117(a)(4) requiring owners and operators to maintain documentation containing sufficient information as may be necessary to demonstrate that the project will comply with the Federal CAA, Title I, parts C and D, these are the same general provisions as those in the SIP at 30 TAC 116.111(a)(2)(H) and (I) for Minor and Major NSR SIP permits. These recordkeeping requirements, although necessary for NSR SIP approvability, cannot substitute for clear and enforceable provisions, consistent with Texas's other Minor NSR programs, that limit applicability in the submitted Program to Minor NSR only. 74 FR 48450, at 48456–48457.

Comment: TIP and BCCA comment that sources cannot use the Qualified Facilities Program to circumvent Major NSR. 30 TAC 116.117(a)(4) and (d); *Modification of Existing Facilities Guidance*, at 2. Senate Bill 1126, which authorized the Qualified Facilities program, does not supersede any Federal requirements. Further, "[i]f a change made under the qualified facility flexibility would result in the violation of a permit special condition, the permit holder must revise the permit special conditions to stay in compliance with the permit," through either the permit alteration process under 30 TAC 116.116(c) or the notification process of 30 TAC 116.117(d). *Modification of Existing Facilities Guidance*, at 9. Therefore, any changes to a facility must comply with Federal NSR and PSD rules. To further show that the current Qualified Facilities rules are sufficient to prevent circumvention, commenter cites to EPA's proposed Indian Country rule and recently approved state SIPs that do not contain explicit language

¹⁰In a separate SIP submittal dated February 1, 2006, Texas recodified the provisions of Subchapter C into Subchapter E. TCEQ's rules also state that nothing in the rules governing the Program shall limit the applicability of any Federal requirement. 30 TAC 116.117(d).

calling for a major NSR applicability determination before use of the minor NSR tools. ALASKA ADMIN. CODE tit. 18, § 50.502, approved 72 FR 45378 (August 14, 2007); 7 DEL. CODE REGS. § 1102, 65 FR 2048 (January 13, 2000) (granting limited approval based on EPA's concerns about public participation provisions). Further, no Federal requirement mandates such language. Therefore, it is arbitrary for EPA to require Texas to include additional language. *CleanCoalition v. TXU Power*, 536 F.3d 469, 472 (5th Cir. 2008).

Response: As stated above, EPA finds that the Qualified Facilities regulatory provisions are inadequate to prevent circumvention of Major NSR and limit the Program to minor modifications. TCEQ's rules and guidance are not clear on their face that circumvention of Major NSR requirements is prohibited. EPA does not understand how the permit alteration and notification requirements are relevant to the issue of circumvention of Major NSR. EPA disagrees with the commenter's analogy to the proposed Indian Country Minor NSR rule. Today's rulemaking disapproves the Qualified Facility Program for Major NSR, in part because the Program fails to first require a Major NSR applicability demonstration to show that a proposed change does not trigger Major NSR before the source can take advantage of the Program. In contrast, under the proposed Indian Country rule, 40 CFR 49.153 would explicitly require the proposed new source or modification to determine applicability to Major NSR before taking advantage of the program. 71 FR 48696, at 48705, 48728–48729. The source could only use allowances netting under the proposed Indian Country rule after it determined that Major NSR does not apply to the project. The Qualified Facilities rules are deficient because they lack such a requirement, *i.e.*, that Major NSR does not apply to the change.

Comment: The ERCC commented that EPA sent a comment letter on the Qualified Facilities proposed rule and agreed that it “adequately addresses the applicability of major sources and major modifications with respect to PSD and NA permitting requirements.” 21 Tex. Reg. 1569 (February 27, 1996).

Response: We acknowledge our 1995 comment letter stating that Texas adequately satisfied our concern that the Qualified Facilities Program, as proposed, would not circumvent or supersede any Major NSR SIP requirements. Since we sent that letter, however, the Texas Legislature has revised the Texas Clean Air Act significantly. Specifically, in 1999, the

Texas legislature added an explicit statutory prohibition against the use of an Exemption or Permit by Rule or a Standard Permit for major modifications. See Texas Health and Safety Code 382.05196 and .057. These 1999 legislative actions required a new legal review of the statutory definition for “modification of existing facility” to see if it was still limited to minor modifications. It is EPA's interpretation that the 1999 legislative changes made this statutory definition ambiguous. 74 FR 48450, at 48456–48457.

F. Comments Addressing Whether the Qualified Facilities Rules Meet Federal Requirements for Minor New Source Review

1. Comments Generally Supporting Proposal

Comment: The UT Environmental Clinic commented that the CAA requires SIPs to include a program for “regulation of the modification and construction of any stationary source.” 42 U.S.C. 110(a)(2)(C). The program must prohibit any sources, including minor sources, from emitting pollution in amounts that contribute significantly to nonattainment and maintenance of the NAAQS or interfere with measures included in the SIP. 42 U.S.C. 110(a)(2)(D)(i)(I)–(II). EPA has recognized the valuable role that Minor NSR programs play in ensuring that air quality is protected from emissions that are not subject to Major NSR. Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations, U.S. EPA, Nov. 2002, at I–5–I–12. The Qualified Facilities Program is deficient as a Minor NSR program because:

- The Qualified Facility rules do not require enforceable limits. Qualified Facilities provide notification of “qualified” changes on form PI-E,¹¹ which TCEQ acknowledges is not enforceable. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY *Guidance for Air Quality, Qualified Changes Under Senate Bill 1126* (Dec. 2000), 27 [hereinafter *Qualified Facilities Guidance*]. Without enforceable limits, facilities can use emission reductions as part of a netting analysis and subsequently increase those emissions or rely on these reductions to offset other increases. Some Qualified Facility representations are consolidated into a preexisting permit upon revision or renewal at the discretion of the source. Even if representations in the PI-E were

enforceable, there are no monitoring or reporting requirements to demonstrate compliance. 30 TAC 116.117(a). See 74 FR 48450 (Sept. 23, 2009), Docket, *Technical Support Document*, pg. 22.

- The Qualified Facility Rules do not include a pre-approval mechanism for all authorized emission increases. The rules have no mechanism that prevents implementation of Qualified Facility changes that may violate a control strategy or interfere with attainment or maintenance of the NAAQS. The Program only requires Qualified Facilities to obtain pre-approval of a Qualified Facility change if it involves interplant¹² trading above a “reportable limit.” 30 TAC 116.117(b)(4). Facilities that do not rely on interplant trading are only required to report their changes on an annual basis. 30 TAC 116.117(b)(1).

Response: As stated above at Section V.D.1, EPA agrees with the first point that the submitted rules are practically unenforceable because the reductions are not incorporated into a permit. 74 FR 48450, at 48462.

EPA agrees with the commenter that the Program does not include a pre-approval mechanism for all authorized emission increases. Under section 110(a)(2)(A) and (C) of the Act, a Minor NSR SIP must require enforceable emission limits for all minor modifications. The Texas Program is not clear that for each Qualified Facility involved in the netting transaction, the owner or operator must submit a permit application and obtain a permit revision reflecting all of the changes made to reduce emissions (relied upon in the netting analysis) as well as reflecting the change itself that increased emissions. Furthermore, the Program's rules at 30 TAC 116.116(e)(4) and 116.117(b)(1)–(4) are not clear that the PI-E form is a *permit application or registration* that must be submitted and that a revised permit must be issued by TCEQ to reflect the changes made by all of the participating Qualified Facilities. There is no discussion of when TCEQ issues the revised permit. See the submittals at 30 TAC 116.117(b); 74 FR 48450, at 48462.

2. Comments Generally Opposing Proposal

Comment: The TCEQ commented that it has always considered the Qualified Facilities Program to be a Minor NSR Program although it is not stated in the rule. The rule requires the person making a change to maintain sufficient documentation to demonstrate that the

¹¹ 30 TAC § 116.117(b). See regulation text on pages 23–24 of the TSD for this action, which refer to 30 TAC 116.117(b)(2) and (4).

¹² Although the commenter refers to “interplant” trading, the Texas rules referred to by the commenter relates to “intraplant” trading.

project will comply with 30 TAC 116.150 and 116.161 (Nonattainment NSR), 116.160–116.163 (Prevention of Significant Deterioration Review), and Chapter 116, Subchapter C (relating to implementing section 112(g) of the Act. 30 TAC 116.117(a)(4). A major modification may not occur without going through nonattainment or PSD review. If a project is determined to be a major modification, under PSD and/or nonattainment rules,¹³ the owner/operator must obtain a Federal NSR permit/major modification. Then Qualified Facilities Program does not impair TCEQ's authority to control air pollution and take action to control a condition of air pollution if TCEQ finds that such a condition exists. Texas Water Code section 5.514. TCEQ commits to work with EPA to improve and clarify the rule language to ensure that the Qualified Facilities Program is specifically limited to Minor NSR changes. Texas comments that it does not apply the Qualified Facilities program to projects that are subject to Major NSR or subject to section 112(g) of the Act.

Response: We appreciate TCEQ's willingness to work with EPA to improve and clarify its rules to ensure that the Qualified Facilities Program does not apply to projects that are subject to Major NSR or subject to section 112(g). However, the Program is deficient because it fails to include specific provisions in its rules that assure that the Qualified Facilities Program does not apply to projects that are subject to Major NSR or subject to section 112(g). *See* 74 FR 48450, at 48456–48457.

Comment: ERCC commented that EPA has failed to demonstrate the proposed revisions interfere with Texas's ability to achieve the NAAQS. Specifically:

- Texas requires all air emissions from stationary sources (including minor sources) receive authorization from the State. Texas has developed an extensive program to meet the permitting and resource challenges of this requirement and the State's numerous and varied emission sources. States have discretion under the CAA to implement the state minor source program as long as it does not "interfere with attainment of the NAAQS. Aside from this requirement, which is stated in broad terms, the Act includes no specifics regarding the structure or functioning of minor NSR programs * * * as a result, SIP-approved minor NSR programs can vary quite widely from State to State." *Operating Permit Programs; Flexible Air Permitting Rule;*

Final Rule, 74 FR 51,418 at 51,421 (Oct. 6, 2009). Therefore, ERCC requests that EPA re-evaluate and withdraw the proposed disapprovals. Texas air quality has shown dramatic improvement because of the three submitted programs. EPA fails to recognize that these programs are similar to other approved state minor NSR programs.

- EPA's proposed disapprovals do not meet Congress' or the Courts' documented standards for SIP disapproval. The CAA grants EPA authority to disapprove a SIP revision if such revision would interfere with the state's SIP. A revision interferes with the SIP if it impedes the state's ability to achieve the NAAQS. 42 U.S.C. 7410(l); S. Rep. No. 101–228, at 9, 1990 U.S.C.C.A.N. 3385, 3395; and *Train v. NRD*, 421 U.S. 60, 79 (1975). The commenter argues that EPA has the burden to demonstrate that the submittals interfere with the NAAQS, but EPA's proposals shift this burden to Texas. *See Hall v. EPA*, 273 F.3d 1146, 1161 (9th Cir. Cal. 2001) (*citing Train*, 421 U.S. at 93 and *Ober v. Whitman*, 243 F.3d 1190, 1195 (9th Cir. 2001)) (requiring EPA's analysis to "rationally connect" approval of a revision to an area's likelihood of meeting the NAAQS).

- Since their submittal to EPA, the State's implementation of these rules has significantly reduced statewide emissions. These improvements can be demonstrated by reviewing both the records of emissions reductions and the reductions measured by Texas ambient air quality monitors.

ERCC further commented that Qualified Facilities is protective of air quality by limiting the use of this authorization under 30 TAC 116.116(e) and 30 TAC 116.10 (11)(E) and providing incentives to implement emission reductions. Like the Qualified Facilities Program, EPA's proposed Indian Country Minor NSR program is based upon an increase of allowable and not actual emissions. 71 FR 48696, at 48701. The EPA-developed Minor NSR program also utilizes emission rates in lieu of air quality impacts to determine exemptions from the Minor NSR definition of modification because "applicability determinations based on projected air quality impacts would be excessively complex and resource intensive." *Id.* at 48701.

Response: We agree that states have great flexibility to create their own Minor NSR SIP programs. However, at a minimum, those Minor NSR SIP programs must meet all of the Federal requirements. Likewise, the Qualified Facilities Program must meet all Federal requirements under the CAA in order to

be approvable. Section V.C.1–2. As discussed throughout our proposal and this final notice, the current Qualified Facilities Program fails to meet all requirements. Moreover, the Qualified Facilities Program would be an exemption from the Texas Minor NSR SIP. The Program does not provide an alternative Minor NSR permit authorization process but instead exempts facilities from obtaining a NSR permit for changes. The State failed to demonstrate that this exemption is *de minimis* and thus that the exempted changes will not violate the Texas control strategies or interfere with NAAQS attainment, as required by section 110(a)(2)(c) and 40 CFR 51.160. 74 FR 48450, at 48460; *see also* Section V.C.1–2, D.1, and G. of this Response to Comments. Additionally, EPA lacks sufficient available information to determine that the requested SIP revision relaxation does not interfere with any applicable requirements concerning attainment and RFP, or any other applicable requirement of the Act, as required by section 110(l) of the Act. 74 FR 48450, at 48463; *see also* Section V.D.1.

EPA disagrees with the commenter's analogy to the proposed Indian Country Minor NSR rule. Today's rulemaking disapproves netting under the Qualified Facilities Program for Minor NSR, in part because the Program fails to first require a Major NSR applicability demonstration to show that a proposed change does not trigger Major NSR before the Qualified Facility can take advantage of the Program. The proposed Indian Country rule would explicitly require the proposed new source or modification first determine applicability to Major NSR before taking advantage of the program. 71 FR 48696, at 48705, 48728–48729. The source could only use allowables netting under the proposed Indian Country rule after it determined that Major NSR does not apply to the project. The Qualified Facilities rules are deficient because they lack the requirement for a Major NSR applicability determination, not because the Program allows allowables netting under Minor NSR. Further, while the commenter is correct that the proposed Indian Country rule would allow the use of emissions rates in lieu of air quality impacts, the use of emissions rates is only to establish applicability under Minor NSR. Such an approach is acceptable as long as the program assures protection of the NAAQS. 71 FR 48696, at 48701.

Comment: TIP and BCCA commented that SIP revisions are approvable if they do not interfere with the NAAQS. States have the primary responsibility for

¹³ 40 CFR 51.165(a)(1)(v).

developing plans for attainment and maintenance of the NAAQS. *See CleanCOALition v. TXU Power*, 536 F.3d 469, 472 n.3 (5th Cir. 2008) (stating that “EPA has no authority to question the wisdom of a State’s choices of emissions limitations if they are part of a SIP that otherwise satisfies the standards set forth in 42 U.S.C. 7401(a)(2)”). The last ten years have seen unprecedented improvement in Texas air quality, and Texas has been implementing the Qualified Facilities program during that time. The submittal does not raise interference concerns because it strengthens the existing SIP; therefore the Qualified Facilities program should be fully approvable. The proposal states that Qualified Facilities lacks safeguards to prevent interference with attainment and maintenance of the NAAQS. The commenters correlate this deficiency with EPA’s comments on two facets of the submittal that EPA proposed to find approvable as long as ambient air is protected in the trading: (1) netting is not based on contemporaneous trading; and (2) the Program’s netting is not based totally on changes in actual emissions. TIP states that the existing Qualified Facilities rules contain adequate safeguards of the NAAQS. Additionally, changes are sufficiently documented and quantified to ensure that a decrease at a facility will only be used in one netting analysis. The provision requires that sources must document compliance with Federal requirements safeguards the NAAQS. Commenter states that Qualified Facilities could be viewed as an exemption to Minor NSR requirements; however, the rules prevent changes that will violate the Texas control strategies or interfere with NAAQS attainment. Qualified Facilities flexibility is only allowed where the change will not result in a net increase above existing BACT, and BACT limits were set to protect the NAAQS. Qualified Facilities incorporates Texas’s control strategies, and therefore, safeguards the NAAQS.

Response: As stated above, in order to be approved as part of the SIP, the Qualified Facilities Program must meet all applicable Federal requirements. Here, the commenter’s argument is not supported by the Fifth Circuit’s language in *CleanCOALition*, 536 F.3d at 472 n.3, because the Qualified Facilities Program does not meet 42 U.S.C. 7410(a)(2)(C). EPA agrees with the commenter that the Qualified Facilities Program is an exemption to the Texas Minor NSR SIP (and can be construed to be an exemption to the Texas Major NSR SIP). A requirement

for approval of an exemption to a Minor NSR SIP is a demonstration that the exemption will not permit changes that will violate a state’s control strategies or interfere with NAAQS attainment. Texas failed to submit such a demonstration. In addition, EPA lacks sufficient available information to determine that this SIP relaxation would not interfere with NAAQS attainment, RFP, or any other requirement of the Act. *See* Section V.D.1 above. Furthermore, EPA cannot find any provisions in the Program that require a separate netting analysis be performed for each such change. *See* 74 FR 48450, at 48461–48462. We also find that the Program does not prohibit future increases at a Qualified Facility, or include regulatory language that assures that any future increase at a Qualified Facility at which a previous netting reduction occurred is analyzed in totality to assure that the NAAQS are protected. The Qualified Facilities rules are deficient to protect the NAAQS for the reasons stated above, not because the Program allows allowables netting under Minor NSR. The commenter asserts that these safeguards exist in the Qualified Facilities Program but provides no citation or other basis to support its assertion. Finally, EPA finds that the Texas rules do not specifically require maintenance of information and analysis showing how a source concluded that there will be no adverse impact on air quality. 74 FR 48450, at 48462. The commenter provides no citation or other basis to show how the Qualified Facilities Program meets this requirement.

Comment: TxOGA commented that the documentation and notification requirements of 30 TAC 116.117 provide safeguards to ensure that changes will not violate the control strategy or interfere with attainment and maintenance of the NAAQS. Also, Qualified Facilities flexibility is only available where the change will not result in a net increase above BACT levels at well controlled facilities.

Response: As stated above, there is not sufficient available information to enable EPA to make a determination pursuant to section 110(l) that the Qualified Facilities Program, as a whole, would not interfere with any applicable requirement concerning attainment and RFP or any other requirement of the Act. Additionally, as required by section 110(a)(2)(C) and 40 CFR 51.160, the State failed to submit information to demonstrate that the Program, as an exemption from the Texas Minor NSR SIP, would not permit a source that will violate the control strategy or interfere

with NAAQS attainment. *See* Section V.D.1 above for more information.

G. Comments Addressing Whether Existing Qualified Facilities Have Undergone an Air Quality Analysis

Comment: The UT Environmental Clinic disagrees with EPA’s statement in the proposal that any Qualified Facility will have a Major or Minor NSR SIP permit, will have been subject to an air quality analysis, and will have demonstrated that its emissions have no adverse air quality impact. 74 FR 48450, at 48560 (Sept. 23, 2009). A facility can qualify as a Qualified Facility if it uses technology at least as effective as 10-year old BACT, “regardless of whether the facility has received a preconstruction permit or permit amendment or has been exempted under the TCCA, 382.057.” 30 TAC 116.11(E)(ii). Likewise, the Qualified Facility rules specifically provide for preapproval of Qualified Status of those facilities that do not have an allowable emissions limit in a permit, PI-8 or PI-E form.

The commenter further states that, while Texas rules generally require emissions to have some sort of authorization, the rules do exempt some increases from the definition of “modification,” thereby allowing these emissions to avoid any review. 30 TAC 116.10(11). For emissions that must be permitted, TCEQ’s rules allow the use of various permitting mechanism that do not assure protection of the NAAQS and control strategy requirements. 30 TAC 116.110(a).

The commenter states that the rules additionally provide that unless one “facility” at an account has been subject to public notice under the Chapter 116 permitting or renewal provisions, total emissions from all facilities permitted by rules at an account shall not exceed the limits referenced in 30 TAC 106(a)(4). Because it is rare that at least one facility at an account has not been through public notice, companies are allowed to use multiple permits-by-rule to authorize emissions at a source. *See* UT Environmental Clinic Comment Letter, Attachment 5: Chart of facility PBR authorizations. TCEQ does not analyze the cumulative air quality impact of these multiple authorizations. TCEQ rules require permits-by-rule and standard permits to be “incorporated” into the facility’s permit after the permit is renewed or amended; and there are no rules regarding procedures or modeling for such “incorporation.”

Finally, the commenter stated that TCEQ has issued guidance that requires standard permits and PBRs that “directly affect the emissions of

permitted facilities” to be “consolidated by reference” at renewal or amendment. Texas Commission on Environmental Quality, *Permit by Rule and Standard Permit Consolidation Into Permits* (Sept 1, 2006), 3. Any PBRs and standard permits that do not affect emissions permitted facilities can be incorporated at the discretion of the permittee. *Id.* at 4. The TCEQ guidance requires such PBRs and standard permits that are consolidated by incorporation to undergo an impacts review. Because these permits are renewed every ten years, this review may not occur for many years. Furthermore, PBRs do not require Texas BACT.

Response: We agree with the commenter’s assertion that the submitted regulations do not explicitly require an air quality impacts analysis whenever a facility uses technology at least as effective as 10-year old Minor NSR BACT, “regardless of whether the facility has received a preconstruction permit or permit amendment or has been exempted under the TCCA 382.057.” Further, facilities “qualified” using technology at least as effective as 10-year old Minor NSR BACT, must use actual emissions as a baseline. *See* 30 TAC 116.10(2) and 116.116(e)(2)(C). Presumably, this provision exists because facilities “qualified” under 30 TAC 116.10(11)(E)(ii), would not have a permitted allowable emissions limit because they lack an underlying permit. If a facility could be “qualified” without having a pre-construction permit, then the facility could net-out of permit requirements without ever having an air quality analysis of the baseline allowables limit. TCEQ’s comments, which are summarized below, imply that State law requires all sources in Texas to get an underlying permit, and therefore, receive an air quality impact analysis. However, we view the State’s comment to be vague as to whether a permit is a pre-requisite under the Program itself. Therefore, the Qualified Facilities rules are deficient because they fail to require an underlying Texas NSR SIP permit and air quality impact analysis in order to be “qualified” under the Program.

Comments concerning the State’s permit-by-rule and standard permit programs are outside the scope of this rulemaking.

Comment: TCEQ commented that the Texas Legislature created the Qualified Facilities Program to provide flexibility to permitted facilities and to provide a means by which grandfathered facilities could apply control technology and become “qualified” grandfathered facilities without triggering Federal NSR. Subsequently, in 2001, the

legislature required all grandfathered facilities to obtain authorization or shutdown. The program remains in effect as emissions are controlled, no new emissions above existing allowable limits are allowed, and Federal requirements are considered and met.

In summary, the Program reinforced the TCEQ’s duties under the Texas Clean Air Act to protect air quality and control air contaminant emissions by *practical and economically feasible methods*. Tex. Health & Safety Code 382.002, 382.003(9)(e). Therefore, the environment has benefitted from the Program because emissions were controlled prior to the Texas Legislature mandating shut down or obtaining authorization; air quality benefitted as demonstrated by monitoring which measured continued improvement; regulated entities benefitted because they were given flexibility; and the State benefitted by reasonable regulation that encourages responsible economic development.

TCEQ also commented that allowable emissions (both hourly and annual rates) are one of the criteria used to provide “state qualified” flexibility because the facilities must exist and be authorized, and thereby undergone appropriate permit review.

Response: As stated above, we find that the Qualified Facilities rules fail to explicitly require a permit before a facility can be “qualified” under the Program. While TCEQ asserts that to become a Qualified Facility, a facility must undergo permit review and be authorized, the State does not cite to any regulatory provision in the Program that explicitly requires such permitting authorization. EPA recognizes that State legislation subsequent to the Qualified Facilities Program required grandfathered facilities to obtain permit authorizations or shut down. There is nothing sufficiently explicit, however, in the Qualified Facilities Rules that ensures all Qualified Facilities received an air quality impacts analysis through an initial permit application review process. It is commendable that TCEQ intends to implement its Qualified Facilities Program in a manner that may benefit the environment, but Texas failed to incorporate these procedures into its regulations; therefore, these procedures are not Federally enforceable.

H. Comments on the Definitions of “Grandfathered Facility,” “Maximum Allowable Emission Rate Table,” and “New Facility”

Comment: TCEQ and TCC agree with EPA’s proposal to approve the definitions of “grandfathered facility,”

“maximum allowable emission rate table,” and “new facility.” The TCEQ urges EPA to take final action to approve these definitions.

Response: These comments further support EPA’s action to approve these definitions.

I. Comments on the Definitions of “Actual Emissions,” “Allowable Emissions,” “Modification of Existing Facility” at (E), and “Qualified Facility”

Comment: TCEQ confirmed that Senate Bill 1126 amended the Texas Clean Air Act by revising the definition of “modification of existing facility,” which changed the factors used to determine whether a modification for State permitting (*i.e.* Minor NSR) has occurred. In 1996, 30 TAC Chapter 116 was revised to incorporate this legislative directive. These changes provide that modifications may be made to existing facilities without triggering the State’s Minor NSR requirements whenever:

- Authorization for the facility to be modified was issued a permit, permit amendment, or was exempted from permitting requirements within 120 months from when the change will occur; or
- Uses air pollution control methods that are at least as effective as the BACT that was required within 120 months from when the change will occur.

Such facilities are designated as “qualified facilities.” TCEQ considers the use of “modification” to be separate and severable from the Federal definition of “modification” as reflected in the SIP-approved Major NSR Program.

TCEQ further asserts that the definitions of “actual emissions,” “allowable emissions,” “modification of existing facility” at (E) “qualified facility,” respectively at 30 TAC 116.10(1), (2), (11)(E), and (16), meet Federal requirements.

Response: We are disapproving these definitions because they are not severable from the Qualified Facilities Program, and the State failed to submit information sufficient to demonstrate how these definitions meet Federal requirements. The definitions of “actual emissions” and “allowable emissions” include a statement that limits these definitions only when determining whether there has been a net increase in allowable emissions under 30 TAC 116.116(e), which implements the Qualified Facilities Program, and thus makes these definitions not severable from the Program. Subsection (E) of the definition of “modification of existing facility” *only* applies to changes that do not result in a net increase in allowable

emissions, which implements the Qualified Facilities Program, and thus makes this subsection not severable from the Program. The definition of “qualified facility” defines a term that is used in the Qualified Facilities Program, which makes it not severable from the Qualified Facilities Program.

Furthermore, the State did not provide sufficient information to demonstrate how these definitions meet Federal requirements. Additionally, State legislative actions in 1999 made the statutory definition of “modification of existing facility” ambiguous as to whether the definition is still limited to minor modifications. The State did not submit any legal support for TCEQ’s assertion that the use of “modification” in the Texas Clean Air Act is for Minor NSR only; and therefore separate and severable from the definition of “modification” in the Texas Major NSR SIP. See 74 FR 48450, at 48456–48457 and Section V.E.2 above for further information.

J. Comments on the Definition of “Best Available Control Technology” (“BACT”)

Comment: The UT Environmental Clinic, TCC, TIP, BCCA, TxOGA, GCLC, and TCEQ provided comments on EPA’s proposed disapproval of TCEQ’s definition of BACT.

Response: We are not taking final action on the definition of BACT in today’s rulemaking; therefore, these comments are outside the scope of our rulemaking. They will be considered, however, in our final action on this definition.

K. Comments on Severable Portions of the Definition of “Modification of Existing Facility” at 30 TAC 116.10(11)(A) & (B)

Comment: The UT Environmental Clinic, TxOGA, TIP, BCCA, and TCEQ provided comments on EPA’s proposed disapproval of TCEQ’s changes to the definition of “modification of existing facility” at 30 TAC 116.10(11)(A) and (B) regarding insignificant increases.

Response: We are not taking final action on 30 TAC 116.10(11)(A) and (B) of the definition of “modification of existing facility” in today’s rulemaking; therefore, these comments are outside the scope of our rulemaking. They, however, will be considered in our final agency action on these two definitions.

L. Comments on the Definition of Severable Subsection of “Modification of Existing Facility” at 30 TAC 116.10(11)(G)

Comment: The UT Environmental Clinic and TCEQ provided comments on the proposed disapproval of 30 TAC

116.10(11)(G) of the definition of “modification of existing facility.”

Response: We are not taking final action on 30 TAC 116.10(11)(G) of the definition of “modification of existing facility” in today’s rulemaking; therefore, these comments are outside the scope of our rulemaking. They will be considered, however, in our final agency action on this definition.

M. Comments on the Reinstatement of the Previously Approved Definition of “Facility”

Comment: The TCEQ acknowledges that EPA proposes to correct a typographical error in 72 FR 49198 to clarify that the definition of “facility,” as codified at 30 TAC 116.10(6), was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP. 74 FR 48450, at 48455 at n.6.

Response: EPA thanks TCEQ for its acknowledgement that the definition of “facility” at 30 TAC 116.10(6) was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP. We are making the administrative change to correct the typographical error in the Code of Federal Regulations.

In our proposed rule notice, we requested comments on the State’s legal meaning of the term “facility.” See 30 TAC 116.10(6). We stated that the interpretation of this term is critical to our understanding of the Texas Permitting Program. We received the following comments on this issue:

1. Comments Generally Supporting Proposal

Comment: The UT Environmental Clinic understands that EPA’s proposal is only to correct a typographical error that inadvertently removed the definition of “facility” from the SIP. The commenter notes, however, that Texas’s use of this term is problematic because of its dual definitions and broad meanings. The commenter compares Texas’s definition of “facility” in 30 TAC 116.10 with the definition of “stationary source” in 30 TAC 116.12 and the definition of “building, structure, facility, or installation” in 30 TAC 116.12 and conclude that these definitions are quite similar. The commenters acknowledge that this argument assumes that one can rely on the Nonattainment NSR rules to interpret the general definitions. If one cannot use the Nonattainment NSR definitions to interpret the general definition of “facility,” then one must resort to the definition of “source” in 30 TAC 116.10(17), which is defined as “a point of origin of air contaminants, whether privately or publicly owned or operated.” Pursuant to this reading, a

facility is more like a Federal “emissions unit.” 40 CFR 51.165(a)(1)(vii).

“Emissions unit” means any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant ...” At least in the Qualified Facility rules, it appears that TCEQ use of the definition of “facility” is more like a Federal “emissions unit.” The circular nature of these definitions, and the existence of two different definitions of “facility” without clear description of their applicability, makes Texas’s rules, including the Qualified Facility rules, vague. Commenters urge EPA to require Texas to clarify its definition of “facility” and to ensure that its use of the term throughout the rules is consistent with that definition.

2. Comments Generally Opposing Proposal

Comment: TCEQ responded to EPA’s request concerning its interpretation of Texas law and the Texas SIP with respect to the term “facility.” The definition of “facility” is the cornerstone of the Texas Permitting Program under the Texas Clean Air Act. In addition, to provide clarity and consistency, TCEQ also provides similar comments in regard to Docket ID No. EPA–R06–OAR–2005–TX–0032 and EPA–R06–OAR–2006–0133. EPA believes that the State uses a “dual definition” for the term facility. Under the TCAA and TCEQ rule, “facility” is defined as “a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. Tex. Health & Safety Code 382.003(6); 30 TAC 116.10(6). A mine, quarry, well test, or road is not considered to be a facility.” A facility may contain a stationary source—point of origin of a contaminant. Tex. Health & Safety Code 382.003(12). As a discrete point, a facility can constitute but cannot contain a major stationary source as defined by Federal law. A facility is subject to Major and Minor NSR requirements, depending on the facts of the specific application. Under Major NSR, EPA uses the term “emissions unit” (generally) when referring to a part of a “stationary source,” TCEQ translates “emissions unit” to mean “facility,”¹⁴ which is at least as stringent as Federal rule. TCEQ and its predecessor agencies have consistently interpreted facility to preclude inclusion of more than one stationary source, in contrast to EPA’s stated understanding. Likewise, TCEQ

¹⁴ The term “facility” shall replace the words “emissions unit” in the referenced sections of the CFR. 30 TAC 116.160(c)(3).

does not interpret facility to include “every emissions point on a company site, even if limiting these emission points to only those belonging to the same industrial grouping (SIC Code).” The Federal definition of “major stationary source” is not equivalent to the state definition of “source.” 40 CFR 51.166(b)(1)(a). A “major stationary source”¹⁵ can include more than one “facility” as defined under Texas law—which is consistent with EPA’s interpretation of a “major stationary source” including more than one emissions unit. The above interpretation of “facility” has been consistently applied by TCEQ and its predecessor agencies for more than 30 years. The TCEQ’s interpretation of Texas statutes enacted by the Texas Legislature is addressed by the Texas Code Construction Act. More specifically, words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. Tex. Gov’t Code 311.011(b). While Texas law does not directly refer to the two steps allowing deference enunciated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, Texas law and judicial interpretation recognize *Chevron*¹⁶ and follow similar analysis as discussed below. The Texas Legislature intends an agency created to centralize expertise in a certain regulatory area “be given a large degree of latitude in the methods it uses to accomplish its regulatory function.” *Phillips Petroleum Co. v. Comm’n on Env’tl. Quality*, 121 S.W.3d 502, 508 (Tex.App.—Austin 2003, no pet.), which cites *Chevron* to support the following: “Our task is to determine whether an agency’s decision is based upon a permissible interpretation of its statutory scheme.” Further, Texas courts construe the test of an administrative rule under the same principles as if it were a statute. *Texas Gen. Indem. Co. v. Finance Comm’n*, 36 S.W.3d 635, 641

(Tex.App.—Austin 2000, no pet.). Texas Administrative agencies have the power to interpret their own rules, and their interpretation is entitled to great weight and deference. *Id.* The agency’s construction of its rule is controlling unless it is plainly erroneous or inconsistent. *Id.* “When the construction of an administrative regulation rather than a statute is at issue, deference is even more clearly in order.” *Udall v. Tallman*, 380 U.S. 1, 17 (1965). This is particularly true when the rule involves complex subject matter. See *Equitable Trust Co. v. Finance Comm’n*, 99 S.W.3d 384, 387 (Tex.App.—Austin 2003, no pet.). Texas courts recognize that the legislature intends an agency created to centralize expertise in a certain regulatory area “be given a large degree of latitude in the methods it uses to accomplish its regulatory function.” *Reliant Energy, Inc. v. Public Util. Comm’n*, 62 S.W.3d 833, 838 (Tex.App.—Austin 2001, no pet.) (citing *State v. Public Util. Comm’n*, 883 S.W.2d 190, 197 (Tex. 1994)). In summary, TCEQ translates “emissions unit” to mean “facility.” Just as an “emissions unit” under Federal law is construed by EPA as part of a major stationary source, a “facility” under Texas law can be a part of a major stationary source. However, a facility cannot include more than one stationary source as defined under Texas law.

Comment: TCC, BCCA, TIP, and TxOGA commented that Texas rules are clear that “facility,” as defined in 30 TAC 116.10(6) is equivalent to the TCEQ term “emissions unit.”¹⁷ TCC also stated that the definition of “facility” is so broad that it requires every possible source of air contaminants to obtain some type of approval from TCEQ.

Response: We have determined that Texas’s use of this term “facility,” as it applies to the State’s Qualified Facilities Program, is overly vague, and therefore, unenforceable. TCEQ comments that it translates “emissions unit” to mean “facility.” Yet, Texas’s PSD non-PAL rules explicitly limit the definition of “facility” to “emissions unit,” but the Qualified Facilities rules fail to make such a limitation. 74 FR 48450, at 48475; compare 30 TAC 116.10(6) to 30 TAC 116.160(c)(3). The State clearly thought the prudent legal course was to limit “facility” explicitly to “emissions unit” in its PSD SIP non-PALs revision. However, TCEQ did not submit information sufficient to demonstrate that the lack of this explicit limitation in the submitted Qualified Facilities

revisions is at least as stringent as the revised definition in the PSD non-PALs definition.

We recognize that TCEQ should be accorded a level of deference to interpret the State’s statutes and regulations; however, such interpretations must meet applicable requirements of the Act and implementing regulations under 40 CFR part 51 to be approvable into the SIP as Federally enforceable requirements. The State has failed to provide any case law or SIP citation that confirms TCEQ’s interpretation for “facility” under the Qualified Facilities Program that would ensure Federal enforceability.

Nevertheless, as stated above, the definition of “facility” at 30 TAC 116.10(6) was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP. Therefore, EPA is obligated to correct the typographical error and reinstate the definition of “facility” into the Code of Federal Regulations.

However, today’s final disapproval of the Qualified Facilities Program is based in part on the lack of clarity of the definition of “facility” as it applies specifically to this Program.

Additionally, EPA has proposed disapproval of the State’s Flexible Permit Program and NSR Reform SIP submittals partially based on the need for clarity of the definition of “facility” as it applies to those programs.

N. Comments on the Definition of the Term “Air Quality Account Number”

Comment: The TCEQ commented that it no longer uses the term “air quality account number” and now uses the term “account,” which is a SIP-approved definition.¹⁸ Administrative changes to the Qualified Facilities Program are planned to reflect the change in terms.

Response: EPA’s evaluation of “account” and “air quality account number” were based upon the SIP-approved definition of “account.” 74 FR 48450, at 48455, n.7. The State’s comment that it no longer uses “air quality account number” but uses “account” does not change EPA’s final decision to disapprove the Qualified Facilities Program SIP revision submittal. In fact, the State’s using a different definition that is not in the Qualified Facilities Program’s rules

¹⁵ Tex. Health & Safety Code § 382.003(12).

¹⁶ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 387, 842–43 (1984). “When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously express intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”

¹⁷ Additionally, the definition of “facility” is similar to the definition of “emission unit” in Texas’s Title V rules. 30 TAC 122.10(8).

¹⁸ 30 TAC 101.1(1) Account—For those sources required to be permitted under Chapter 122 of this title * * *, all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railways, rights-of-way, waterways, or similar divisions. Approved as part of the Texas SIP at 70 FR 16129 (March 30, 2005).

provides additional grounds for disapproval. The Qualified Facilities Program's rules must be clear about which sources on a site can participate in the netting process. This goes to the heart of whether the changes are made outside a major stationary source. If TCEQ makes the planned changes noted in the comment letter, the changes must be adopted and submitted to EPA for approval as a SIP revision. Upon receipt, we would review the regulatory changes and evaluate whether they meet the Act and EPA regulations.

The Texas SIP defines an "account" to include an entire company site, which could include more than one plant and more than one major stationary source. SIP rule 30 TAC 101.1(1), second sentence. It does not limit the combination of sources to a SIC code. As stated above, EPA interprets the Program to allow an emission increase to net out by taking into account emission decreases outside of the major stationary source. Therefore, the Program does not meet the CAA's definition of "modification" and the Major NSR SIP requirements and is inconsistent with *Asarco v. EPA*, 578 F.2d 320 (DC Cir. 1978), 74 FR 48450, at 48458–48459; Section IV.B. above.

O. Comments on Whether the Qualified Facilities Rules Meet New Source Review Public Participation Requirements

1. Comments Generally Supporting Proposal

Comment: HCPHES commented that the State's public participation rules are not user friendly with regards to timeliness of initial notification and the time restrictions for public comment. Specifically, it is not uncommon for a permit modification or amendment notification to be delayed on occasion, which results in a shorter period for citizens as well as HCPHES to respond. These situations have unduly limited the opportunities for the public and affected agencies to be able to provide meaningful reviews and submit appropriate comments. The commenter supports EPA's conclusion to disapprove portions of the SIP as proposed until such time as TCEQ addresses all of the specifics noted in the **Federal Register**. In addition, HCPHES strongly supports strengthening public participation rules such that Texas citizens are able to participate meaningfully in the process.

Comment: Several members of the Texas House commented that while the Qualified Facilities Program was a legislative creation, these members of the Texas House recognize that the

statutory language and associated regulations are inconsistent with current CAA requirements regarding modifications and public participation. A particular concern is inadequate public participation.

Comment: HCPHES strongly supports strengthening public participation rules such that Texas citizens are able to participate meaningfully in the process.

Response: General comments on Texas's public participation requirements are outside the scope of this rulemaking. However, in a separate action, EPA has proposed a limited approval/limited disapproval of Texas's SIP submittal for public participation (73 FR 72001 (Nov. 26, 2008)). In addition, TCEQ has proposed revisions to these rules and EPA is working with TCEQ to strengthen its rules for public participation to ensure the State's rules comply with all Federal requirements.

2. Comments Generally Opposing Proposal

Comment: The UT Environmental Clinic commented that the Qualified Facilities Rules allow industrial plants to make changes that can affect neighboring residents with absolutely no notice or opportunity for participation. These rules allow modifications without meeting the Federal public participation requirements that are applicable to Nonattainment NSR and PSD permits under the Act, 40 CFR 51.161, and 40 CFR 51.166(q). TCEQ's Qualified Facilities guidance specifically states that the qualified facility notification process may be used instead of the alteration process to change permit special conditions. *Qualified Facilities Guidance*, at 14.

Response: EPA agrees with the commenter that the Qualified Facilities rules do not meet the Federal public participation requirements for each individual change, either for a Major or Minor NSR SIP revision. As discussed in more detail in Section V.D.1 above, the Program does not clearly require a permit for each change. Therefore, the Program does not provide an opportunity for public review, which circumvents public participation requirements in 40 CFR 51.161. See 74 FR 48450, at 48459–48460.

Comment: The UT Environmental Clinic comments that the Texas rules also allow sources to amend terms and conditions of a Major NSR or Minor NSR permit without public participation. EPA has already expressed concerns to Texas about using methods other than permit amendment for making changes to individual NSR permits. Letter to Dan Eden, TCEQ,

Deputy Director, from Carl Edlund, EPA, Region 6, Director, Multimedia Planning and Permitting Division (March 12, 2008), p. 8. Letter to Richard Hyde, TCEQ, Director Air Permits Division from Jeff Robinson, EPA, Chief, Air Permits Section (May 21, 2008), p. 6.

Response: The comments that TCEQ's rules allow sources to amend terms and conditions of a Major NSR or Minor NSR permit without public participation and the use of methods other than permit amendments are outside the scope of this rulemaking.

Comment: GCLC provided comments on Texas's public participation program because the public participation issues are implicated throughout the three **Federal Register** notices (Qualified Facilities, Flexible Permits, and NSR Reform). GCLC considers these comments timely and appropriate because EPA's proposal directs the public to read the three pending notices and the November 2008 public participation proposal "in conjunction" with each other.

Response: We recognize the need to read the notices in conjunction with each other because the permits issued under these State programs are the vehicles for regulating a significant universe of the air emissions from sources in Texas and thus directly impact the ability of the State to achieve and maintain attainment of the NAAQS and to protect the health of the communities where these sources are located. 74 FR 48450, at 48453. However, this final rulemaking only addresses the Qualified Facilities Program. Therefore, specific issues related to the public participation submittal package are outside the scope of this rulemaking.

Comment: The ERCC commented that public review requirements have been met because the implementing regulations for Qualified Facilities were subject to notice and comment. Proposed on 20 Tex. Reg. 8308 (October 10, 1995) finalized on 21 Tex. Reg. 1569 (February 27, 1996).

Response: EPA agrees with the commenter that the Qualified Facilities rules met the public participation requirements for SIP revision submittals. EPA, however, disagrees with the commenter that the permit application public participation requirements of this submitted Qualified Facilities program meets the NSR public participation requirements for individual permit applications. Where the adopted State rules fail to provide for the minimum public participation required under Federal law for individual permit applications,

Federal public participation requirements cannot be considered met just because the deficient State rules were adopted after public notice and comment. Please see our comments above.

VI. Final Action

EPA is disapproving revisions to the SIP submitted by the State of Texas that relate to the Modification of Qualified Facilities, identified in the Table in section III.B of this action. These affected provisions include the following regulations under Chapter 116: 30 TAC 116.116(e), 30 TAC 116.117, 30 TAC 116.118, and the following definitions under 30 TAC 116.10—General Definitions: 30 TAC 116.10(1)—definition of “actual emissions,” 30 TAC 116.10(2)—definition of “allowable emissions,” 30 TAC 116.10(11)(E) under the definition of “modification of existing facility,” and 30 TAC 116.10(16)—definition of “qualified facility.” EPA finds that these submitted provisions and definitions in the submitted Texas Qualified Facilities Program are not severable from each other.

EPA is disapproving the submitted Texas Qualified Facilities Program as a substitute Major NSR SIP revision because it does not meet the Act and EPA’s regulations. We are also disapproving the submitted Qualified Facilities Program as a Minor NSR SIP revision because it does not meet the Act and EPA’s regulations.

The Qualified Facilities Program submittals do not meet the requirements for a substitute Major NSR SIP revisions because (1) the Program does not prevent circumvention of Major NSR; (2) the State failed to submit information sufficient to demonstrate that the Program’s regulatory text requires an evaluation of Major NSR applicability before a change is exempted from permitting; (3) the Program is deficient for Major NSR netting because (a) it authorizes the use of allowable, rather than actual emissions, to be used as a baseline to determine applicability. This use of allowables violates the Act and Major NSR SIP requirements and is contrary to *New York v. EPA*, 413 F.3d 3, 38–40 (DC Cir. 2005) (“New York I”) and (b) it could allow an emission increase to net out by taking into account emission decreases outside of the major stationary source and, in other circumstances, allow an evaluation of emissions of a subset of units at a major stationary source; and (4) there is not sufficient available information to enable EPA to make a determination that the requested SIP revision relaxation would not

interfere with any applicable requirements concerning attainment, RFP, or any other applicable CAA requirement, as required by section 110(l).

The Qualified Facilities Program submittals do not meet the requirements for a Minor NSR SIP revision. The submitted Program (1) fails to ensure that the Major NSR SIP requirements continue to be met; (2) is not limited only to Minor NSR; (3) fails to include sufficient legally enforceable safeguards to ensure that the NAAQS and control strategies are protected; (4) the State failed to demonstrate that the Program’s exemption from the Texas Minor NSR SIP includes legally enforceable procedures to ensure that the State will not permit a source that will violate the NAAQS or the State’s control strategies; (5) the submitted Program does not provide clear and enforceable requirements for a basic Minor NSR netting program; and (6) EPA lacks sufficient information to make a determination that the requested SIP revision relaxation does not interfere with any applicable requirements concerning attainment and RFP, or any other applicable requirement of the Act, as required by section 110(l). Therefore, we are disapproving the submitted Qualified Facilities Program as a Minor NSR SIP revision because it does not meet sections 110(a)(2)(C) and 110(l) of the Act and 40 CFR 51.160.

EPA is approving the submitted definitions for “grandfathered facility,” “maximum allowable emissions rate table (MAERT),” and “new facility.” Finally, EPA is finalizing an administrative correction in today’s action by specifically correcting a typographical error at 72 FR 49198 to clarify that the definition of “facility” as codified at 30 TAC 116.10(6) was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

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

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, because this SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act

will not in-and-of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b). Because this final action does not impose an information collection burden, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

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

Furthermore, as explained in this action, the submissions do not meet the requirements of the Act and EPA cannot approve the submissions. The final disapproval will not affect any existing State requirements applicable to small entities in the State of Texas. Federal disapproval of a State submittal does not affect its State enforceability. After considering the economic impacts of today’s rulemaking on small entities, and because the Federal SIP disapproval does not create any new requirements or impact a substantial number of small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such

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

D. Unfunded Mandates Reform Act

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

E. Executive Order 13132, Federalism

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

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

F. Executive Order 13175, Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (59 FR 22951, November 9, 2000), because the SIP EPA is disapproving would not apply in Indian country located in the State, and EPA

notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. This action does not involve or impose any requirements that affect Indian Tribes. Thus, Executive Order 13175 does not apply to this action.

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

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

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

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

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides

not to use available and applicable voluntary consensus standards.

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

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

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

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

K. Congressional Review Act

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

This action is not a “major rule” as defined by 5 U.S.C. 804(2).

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by *June 14, 2010*. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not

be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: March 31, 2010.

Al Armendariz,

Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart SS—Texas

■ 2. The table in § 52.2270(c) entitled “EPA-Approved Regulations in the Texas SIP” is amended by revising the entry for section 116.10 to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
*	*	*	*	*
Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification				
Subchapter A—Definitions				
Section 116.10	General Definitions	8/21/2002	4/14/2010 [Insert FR page number where document begins].	The SIP does not include paragraphs (1), (2), (3), (7)(F), (11), and (16).
*	*	*	*	*

■ 3. Section 52.2273 is amended by designating the existing text as paragraph (a) and by adding a new paragraph (b) to read as follows:

§ 52.2273 Approval status.

* * * * *

(b) EPA is disapproving the Texas SIP revision submittals as follows:

(1) The following definitions in 30 TAC 116.10—General Definitions:

(i) Definition of “actual emissions” in 30 TAC 116.10(1), submitted March 13, 1996 and repealed and re-adopted June 17, 1998 and submitted July 22, 1998;

(ii) Definition of “allowable emissions” in 30 TAC 116.10(2),

submitted March 13, 1996; repealed and re-adopted June 17, 1998 and submitted July 22, 1998; and submitted September 11, 2000;

(iii) Portion of the definition of “modification of existing facility” in 30 TAC 116.10(11)(E), submitted March 13, 1996; repealed and re-adopted June 17, 1998 and submitted July 22, 1998; and submitted September 4, 2002; and

(iv) Definition of “qualified facility” in 30 TAC 116.10(16), submitted March 13, 1996; repealed and re-adopted June 17, 1998 and submitted July 22, 1998; and submitted September 4, 2002;

(2) 30 TAC 116.116(e)—Changes at Qualified Facilities—submitted March

13, 1996 and repealed and re-adopted June 17, 1998 and submitted July 22, 1998;

(3) 30 TAC 116.117—Documentation and Notification of Changes to Qualified Facilities—submitted March 13, 1996 and repealed and re-adopted June 17, 1998 and submitted July 22, 1998;

(4) 30 TAC 116.118—Pre-Change Qualification—submitted March 13, 1996 and repealed and re-adopted June 17, 1998 and submitted July 22, 1998.

[FR Doc. 2010–8019 Filed 4–13–10; 8:45 am]

BILLING CODE 6560–50–P

HEALTH AND SAFETY CODE
TITLE 5. SANITATION AND ENVIRONMENTAL QUALITY
SUBTITLE C. AIR QUALITY
CHAPTER 382. CLEAN AIR ACT

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 382.003.

DEFINITIONS. In this chapter:

(1) "Administrator" means the Administrator of the United States Environmental Protection Agency.

(1-a) "Advanced clean energy project" means a project for which an application for a permit or for an authorization to use a standard permit under this chapter is received by the commission on or after January 1, 2008, and before January 1, 2020, and that:

(A) involves the use of coal, biomass, petroleum coke, solid waste, or fuel cells using hydrogen derived from such fuels, in the generation of electricity, or the creation of liquid fuels outside of the existing fuel production infrastructure while co-generating electricity, whether the project is implemented in connection with the construction of a new facility or in connection with the modification of an existing facility and whether the project involves the entire emissions stream from the facility or only a portion of the emissions stream from the facility;

(B) with regard to the portion of the emissions stream from the facility that is associated with the project, is capable of achieving:

(i) on an annual basis a 99 percent or greater reduction of sulfur dioxide emissions or, if the project is designed for the use of feedstock substantially all of which is subbituminous coal, an emission rate of 0.04 pounds or less of sulfur dioxide per million British thermal units as determined by a 30-day average;

(ii) on an annual basis a 95 percent or greater reduction of mercury emissions;

(iii) an annual average emission rate for nitrogen oxides of:

(a) 0.05 pounds or less per million British thermal units; or

(b) if the project uses gasification technology, 0.034 pounds or less per million British thermal units; and

(iv) an annual average emission rate for filterable particulate matter of 0.015 pounds or less per million British thermal units; and

(C) captures not less than 50 percent of the carbon dioxide in the portion of the emissions stream from the facility that is associated with the project and sequesters that captured carbon dioxide by geologic storage or other means.

(2) "Air contaminant" means particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural.

(3) "Air pollution" means the presence in the atmosphere of one or more air contaminants or combination of air contaminants in such concentration and of such duration that:

(A) are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property; or

(B) interfere with the normal use or enjoyment of animal life, vegetation, or property.

(3-a) "Coal" has the meaning assigned by Section 134.004, Natural Resources Code.

(4) "Commission" means the Texas Natural Resource Conservation Commission.

(5) "Executive director" means the executive director of the commission.

(6) "Facility" means a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility.

(7) "Federal source" means a facility, group of facilities, or other source that is subject to the permitting requirements of Title IV or V of the federal Clean Air Act Amendments of 1990 (Pub.L. No. 101-549) and includes:

(A) an affected source as defined by Section 402 of the federal Clean Air Act (42 U.S.C. Section 7651a) as added by Section 401 of the federal Clean Air Act Amendments of 1990 (Pub.L. No. 101-549);

(B) a major source as defined by Title III of the federal Clean Air Act Amendments of 1990 (Pub.L. No. 101-549);

(C) a major source as defined by Title V of the federal Clean Air Act Amendments of 1990 (Pub.L. No. 101-549);

(D) a source subject to the standards or regulations under Section 111 or 112 of the federal Clean Air Act (42 U.S.C. Sections 7411 and 7412);

(E) a source required to have a permit under Part C or D of Title I of the federal Clean Air Act (42 U.S.C. Sections 7470 et seq. and 7501 et seq.);

(F) a major stationary source or major emitting facility under Section 302 of the federal Clean Air Act (42 U.S.C. Section 7602); and

(G) any other stationary source in a category designated by the United States Environmental Protection Agency as subject to the permitting requirements of Title V of the federal Clean Air Act Amendments of 1990 (Pub.L. No. 101-549).

(7-a) "Federally qualified clean coal technology" means a technology or process, including a technology or process applied at the precombustion, combustion, or postcombustion stage, for use at a new or existing facility that will achieve on an annual basis a 97 percent or greater reduction of sulfur dioxide emissions, an emission rate for nitrogen oxides of 0.08 pounds or less per million British thermal units, and significant reductions in mercury emissions associated with the use of coal in the generation of electricity, process steam, or industrial products, including the creation of liquid fuels, hydrogen for fuel cells, and other coproducts. The technology used must comply with applicable federal law regarding mercury emissions and must render carbon dioxide capable of capture, sequestration, or abatement. Federally qualified clean coal technology includes atmospheric or pressurized fluidized bed combustion technology, integrated gasification combined cycle technology, methanation technology, magnetohydrodynamic technology, direct and indirect coal-fired turbines, undiluted high-flame temperature oxygen combustion technology that excludes air, and integrated gasification fuel cells.

(7-b) "Hybrid motor vehicle" means a motor vehicle that draws propulsion energy from both gasoline or conventional diesel fuel and a rechargeable energy storage system.

(8) "Local government" means a health district established under Chapter 121, a county, or a municipality.

(9) "Modification of existing facility" means any physical change in, or change in the method of operation of, a facility in a manner that increases the amount of any air contaminant emitted by the facility into the atmosphere or that results in the emission of any air contaminant not previously emitted. The term does not include:

(A) insignificant increases in the amount of any air contaminant emitted that is authorized by one or more commission exemptions;

(B) insignificant increases at a permitted facility;

(C) maintenance or replacement of equipment components that do not increase or tend to increase the amount or change the characteristics of the air contaminants emitted into the atmosphere;

(D) an increase in the annual hours of operation unless the existing facility has received a preconstruction permit or has been exempted, pursuant to Section 382.057, from preconstruction permit requirements;

(E) a physical change in, or change in the method of operation of, a facility that does not result in a net increase in allowable emissions of any air contaminant and that does not result in the emission of any air contaminant not previously emitted, provided that the facility:

(i) has received a preconstruction permit or permit amendment or has been exempted pursuant to Section 382.057 from preconstruction permit requirements no earlier than 120 months before the change will occur; or

(ii) uses, regardless of whether the facility has received a permit, an air pollution control method that is at least as effective as the best available control technology, considering technical practicability and economic reasonableness, that the commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur;

(F) a physical change in, or change in the method of operation of, a facility where the change is within the scope of a flexible permit or a multiple plant permit; or

(G) a change in the method of operation of a natural gas processing, treating, or compression facility connected to or part of a natural gas gathering or transmission pipeline which does not result in an annual emission rate of a pollutant in excess of the volume emitted at the maximum designed capacity, provided that the facility is one for which:

(i) construction or operation started on or before September 1, 1971, and at which either no modification has occurred after September 1, 1971, or at which modifications have occurred only pursuant to standard exemptions; or

(ii) construction started after September 1, 1971, and before March 1, 1972, and which registered in accordance with Section 382.060 as that section existed prior to September 1, 1991.

(9-a) "Motor vehicle" means a fully self-propelled vehicle having four wheels that has as its primary purpose the transport of a person or persons, or property, on a public highway.

(10) "Person" means an individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity.

(10-a) "Qualifying motor vehicle" means a motor vehicle that meets the requirements of Section 382.210(b).

(11) "Select-use technology" means a technology that involves simultaneous combustion of natural gas with other fuels in fossil fuel-fired boilers. The term includes cofiring, gas reburn, and enhanced gas reburn/sorbent injection.

(11-a) "Solid waste" has the meaning assigned by Section 361.003.

(12) "Source" means a point of origin of air contaminants, whether privately or publicly owned or operated.

(13) "Well test" means the testing of an oil or gas well for a period of time less than 72 hours that does not constitute a major source or major modification under any provision of the federal Clean Air Act (42 U.S.C. Section 7401 et seq.).

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989. Amended by Acts 1991, 72nd Leg., ch. 14, Sec. 135, eff. Sept. 1, 1991; Acts 1991, 72nd Leg., 1st C.S., ch. 3, Sec. 2.01, eff. Sept. 1, 1991; Acts 1993, 73rd Leg., ch. 485, Sec. 4, eff. June 9, 1993; Acts 1995, 74th Leg., ch. 76, Sec. 11.140, eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 150, Sec. 1, eff. May 19, 1995; Acts 1999, 76th Leg., ch. 62, Sec. 11.04(a), eff. Sept. 1, 1999; Acts 1999, 76th Leg., ch. 406, Sec. 1, eff. Aug. 30, 1999.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. [262](#), Sec. 1.01, eff. June 8, 2007.

Acts 2007, 80th Leg., R.S., Ch. [1277](#), Sec. 2, eff. September 1, 2007.

Acts 2009, 81st Leg., R.S., Ch. [87](#), Sec. 27.001(55), eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. [1109](#), Sec. 2, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. [1125](#), Sec. 3, eff. September 1, 2009.

HEALTH AND SAFETY CODE
TITLE 5. SANITATION AND ENVIRONMENTAL QUALITY
SUBTITLE C. AIR QUALITY
CHAPTER 382. CLEAN AIR ACT

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 382.05196.

PERMITS BY RULE. (a) Consistent with Section 382.051, the commission may adopt permits by rule for certain types of facilities if it is found on investigation that the types of facilities will not make a significant contribution of air contaminants to the atmosphere. The commission may not adopt a permit by rule authorizing any facility defined as "major" under any applicable preconstruction permitting requirements of the federal Clean Air Act (42 U.S.C. Section 7401 et seq.) or regulations adopted under that Act. Nothing in this subsection shall be construed to limit the commission's general power to control the state's air quality under Section 382.011(a).

(b) The commission by rule shall specifically define the terms and conditions for a permit by rule under this section.

Added by Acts 1999, 76th Leg., ch. 406, Sec. 5, eff. Aug. 30, 1999.

30 TAC § 101.1

Tex. Admin. Code tit. 30, § 101. 1

Effective:

TAX

TEXAS ADMINISTRATIVE CODE
TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 101. GENERAL AIR QUALITY RULES
SUBCHAPTER A. GENERAL RULES

§ 101. 1. Definitions

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following terms, when used in the air quality rules in this title, have the following meanings, unless the context clearly indicates otherwise.

(1) Account—For those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits Program), all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.

(2) Acid gas flare—A flare used exclusively for the incineration of hydrogen sulfide and other acidic gases derived from natural gas sweetening processes.

(3) Agency established facility identification number—For the purposes of Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), a unique alphanumeric code required to be assigned by the owner or operator of a regulated entity that the emission inventory reporting requirements of § 101.10 of this title (relating to Emissions Inventory Requirements) are applicable to each facility at that regulated entity.

(4) Ambient air—That portion of the atmosphere, external to buildings, to which the general public has access.

(5) Background—Background concentration, the level of air contaminants that cannot be reduced by controlling emissions from man-made sources. It is determined by measuring levels in non-urban areas.

(6) Boiler—Any combustion equipment fired with solid, liquid, and/or gaseous fuel used to produce steam or to heat water.

(7) Capture system—All equipment (including, but not limited to, hoods, ducts, fans, booths, ovens, dryers, etc.) that contains, collects, and transports an air pollutant to a control device.

(8) Captured facility—A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(9) Carbon adsorber—An add-on control device that uses activated carbon to adsorb volatile organic compounds from a gas stream.

(10) Carbon adsorption system—A carbon adsorber with an inlet and outlet for exhaust gases and a system to regenerate the saturated adsorbent.

(11) Coating—A material applied onto or impregnated into a substrate for protective, decorative, or functional purposes. Such materials include, but are not limited to, paints, varnishes, sealants, adhesives, thinners, diluents, inks, maskants, and temporary protective coatings.

(12) Cold solvent cleaning—A batch process that uses liquid solvent to remove soils from the surfaces of parts or to dry the parts by spraying, brushing, flushing, and/or immersion while maintaining the solvent below its boiling point. Wipe cleaning (hand cleaning) is not included in this definition.

(13) Combustion unit—Any boiler plant, furnace, incinerator, flare, engine, or other device or system used to oxidize solid, liquid, or gaseous fuels, but excluding motors and engines used in propelling land, water, and air vehicles.

(14) Combustion turbine—Any gas turbine system that is gas and/or liquid fuel fired with or without power augmentation. This unit is either attached to a foundation or is portable equipment operated at a specific minor or major source for more than 90 days in any 12-month period. Two or more gas turbines powering one shaft will be treated as one unit.

(15) Commercial hazardous waste management facility—Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility that disposes only waste generated on-site or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(16) Commercial incinerator—An incinerator used to dispose of waste material from retail and wholesale trade establishments.

(17) Commercial medical waste incinerator—A facility that accepts for incineration medical waste generated outside the property boundaries of the facility.

(18) Component—A piece of equipment, including, but not limited to, pumps, valves, compressors, and pressure relief valves that has the potential to leak volatile organic compounds.

(19) Condensate—Liquids that result from the cooling and/or pressure changes of produced natural gas. Once these liquids are processed at gas plants or refineries or in any other manner, they are no longer considered condensates.

(20) Construction-demolition waste—Waste resulting from construction or demolition projects.

(21) Control system or control device—Any part, chemical, machine, equipment, contrivance, or combination of

same, used to destroy, eliminate, reduce, or control the emission of air contaminants to the atmosphere.

(22) Conveyorized degreasing—A solvent cleaning process that uses an automated parts handling system, typically a conveyor, to automatically provide a continuous supply of parts to be cleaned or dried using either cold solvent or vaporized solvent. A conveyorized degreasing process is fully enclosed except for the conveyor inlet and exit portals.

(23) Criteria pollutant or standard—Any pollutant for which there is a national ambient air quality standard established under 40 Code of Federal Regulations Part 50.

(24) Custody transfer—The transfer of produced crude oil and/or condensate, after processing and/or treating in the producing operations, from storage tanks or automatic transfer facilities to pipelines or any other forms of transportation.

(25) De minimis impact—A change in ground level concentration of an air contaminant as a result of the operation of any new major stationary source or of the operation of any existing source that has undergone a major modification that does not exceed the following specified amounts.

Figure: 30 TAC §101.1(25)

AIR CONTAMINANT	ANNUAL	24-HOUR	8-HOUR	3-HOUR	1-HOUR
Inhalable Particulate Matter (PM ₁₀)	1.0 µg/m ³	5 µg/m ³			
Sulfur Dioxide	1.0 µg/m ³	5 µg/m ³		25 µg/m ³	
Nitrogen Dioxide	1.0 µg/m ³				
Carbon Monoxide			0.5 mg/m ³		2 mg/m ³

(26) Domestic wastes—The garbage and rubbish normally resulting from the functions of life within a residence.

(27) Emissions banking—A system for recording emissions reduction credits so they may be used or transferred for future use.

(28) Emissions event—Any upset event or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in unauthorized emissions of air contaminants from one or more emissions points at a regulated entity.

(29) Emissions reduction credit—Any stationary source emissions reduction that has been banked in accordance with Chapter 101, Subchapter H, Division 1 of this title (relating to Emission Credit Banking and Trading).

(30) Emissions reduction credit certificate—The certificate issued by the executive director that indicates the amount of qualified reduction available for use as offsets and the length of time the reduction is eligible for use.

(31) Emissions unit—Any part of a stationary source that emits, or would have the potential to emit, any pollut-

ant subject to regulation under the Federal Clean Air Act.

(32) Excess opacity event—When an opacity reading is equal to or exceeds 15 additional percentage points above an applicable opacity limit, averaged over a six-minute period.

(33) Exempt solvent—Those carbon compounds or mixtures of carbon compounds used as solvents that have been excluded from the definition of volatile organic compound.

(34) External floating roof—A cover or roof in an open top tank that rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete and separate closure seals, one above the other, containing an enclosed space between them.

(35) Federal motor vehicle regulation—Control of Air Pollution from Motor Vehicles and Motor Vehicle Engines, 40 Code of Federal Regulations Part 85.

(36) Federally enforceable—All limitations and conditions that are enforceable by the United States Environmental Protection Agency administrator, including those requirements developed under 40 Code of Federal Regulations (CFR) Parts 60 and 61; requirements within any applicable state implementation plan (SIP); and any permit requirements established under [40 CFR § 52.21](#) or under regulations approved under 40 CFR Part 51, Subpart 1, including operating permits issued under the approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program.

(37) Flare—An open combustion unit (i.e., lacking an enclosed combustion chamber) whose combustion air is provided by uncontrolled ambient air around the flame, and that is used as a control device. A flare may be equipped with a radiant heat shield (with or without a refractory lining), but is not equipped with a flame air control damping system to control the air/fuel mixture. In addition, a flare may also use auxiliary fuel. The combustion flame may be elevated or at ground level. A vapor combustor, as defined in this section, is not considered a flare.

(38) Fuel oil—Any oil meeting the American Society for Testing and Materials (ASTM) specifications for fuel oil in ASTM D396-01, Standard Specifications for Fuel Oils, revised 2001. This includes fuel oil grades 1, 1 (Low Sulfur), 2, 2 (Low Sulfur), 4 (Light), 4, 5 (Light), 5 (Heavy), and 6.

(39) Fugitive emission—Any gaseous or particulate contaminant entering the atmosphere that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(40) Garbage—Solid waste consisting of putrescible animal and vegetable waste materials resulting from the handling, preparation, cooking, and consumption of food, including waste materials from markets, storage facilities, and handling and sale of produce and other food products.

(41) Gasoline—Any petroleum distillate having a Reid vapor pressure of four pounds per square inch (27.6 kilopascals) or greater that is produced for use as a motor fuel, and is commonly called gasoline.

(42) Hazardous wastes—Any solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, [42 United States Code, §§ 6901 et seq.](#), as amended.

(43) Heatset (used in offset lithographic printing)—Any operation where heat is required to evaporate ink oil from the printing ink. Hot air dryers are used to deliver the heat.

(44) High-bake coatings—Coatings designed to cure at temperatures above 194 degrees Fahrenheit.

(45) High-volume low-pressure spray guns—Equipment used to apply coatings by means of a spray gun that operates between 0.1 and 10.0 pounds per square inch gauge air pressure measured at the air cap.

(46) Incinerator—An enclosed combustion apparatus and attachments that is used in the process of burning wastes for the primary purpose of reducing its volume and weight by removing the combustibles of the waste and is equipped with a flue for conducting products of combustion to the atmosphere. Any combustion device that burns 10% or more of solid waste on a total British thermal unit (Btu) heat input basis averaged over any one-hour period is considered to be an incinerator. A combustion device without instrumentation or methodology to determine hourly flow rates of solid waste and burning 1.0% or more of solid waste on a total Btu heat input basis averaged annually is also considered to be an incinerator. An open-trench type (with closed ends) combustion unit may be considered an incinerator when approved by the executive director. Devices burning untreated wood scraps, waste wood, or sludge from the treatment of wastewater from the process mills as a primary fuel for heat recovery are not included under this definition. Combustion devices permitted under this title as combustion devices other than incinerators will not be considered incinerators for application of any rule within this title provided they are installed and operated in compliance with the condition of all applicable permits.

(47) Industrial boiler—A boiler located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes.

(48) Industrial furnace—Cement kilns; lime kilns; aggregate kilns; phosphate kilns; coke ovens; blast furnaces; smelting, melting, or refining furnaces, including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, or foundry furnaces; titanium dioxide chloride process oxidation reactors; methane reforming furnaces; pulping recovery furnaces; combustion devices used in the recovery of sulfur values from spent sulfuric acid; and other devices the commission may list.

(49) Industrial solid waste—Solid waste resulting from, or incidental to, any process of industry or manufacturing, or mining or agricultural operations, classified as follows.

(A) Class 1 industrial solid waste or Class 1 waste is any industrial solid waste designated as Class 1 by the executive director as any industrial solid waste or mixture of industrial solid wastes that because of its concentration or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, and may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or otherwise managed, including hazardous industrial waste, as defined in § 335.1 and § 335.505 of this title (relating to Definitions and Class 1 Waste Determination).

(B) Class 2 industrial solid waste is any individual solid waste or combination of industrial solid wastes that cannot be described as Class 1 or Class 3, as defined in § 335.506 of this title (relating to Class 2 Waste Determination).

(C) Class 3 industrial solid waste is any inert and essentially insoluble industrial solid waste, including materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable as defined in § 335.507 of this title (relating to Class 3 Waste Determination).

(50) Internal floating cover—A cover or floating roof in a fixed roof tank that rests upon or is floated upon the liquid being contained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell.

(51) Leak—A volatile organic compound concentration greater than 10,000 parts per million by volume or the amount specified by applicable rule, whichever is lower; or the dripping or exuding of process fluid based on sight, smell, or sound.

(52) Liquid fuel—A liquid combustible mixture, not derived from hazardous waste, with a heating value of at least 5,000 British thermal units per pound.

(53) Liquid-mounted seal—A primary seal mounted in continuous contact with the liquid between the tank wall and the floating roof around the circumference of the tank.

(54) Maintenance area—A geographic region of the state previously designated nonattainment under the Federal Clean Air Act Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under [42 United States Code, § 7505a](#). The following are the maintenance areas within the state:

(A) Victoria Ozone Maintenance Area 60 (Federal Register (FR) 12453)—Victoria County; and

(B) Collin County Lead Maintenance Area (64 FR 55421)—Portion of Collin County. Eastside: Starting at the intersection of South Fifth Street and the fence line approximately 1,000 feet south of the Exide property line going north to the intersection of South Fifth Street and Eubanks Street; Northside: Proceeding west on Eubanks to the Burlington Railroad tracks; Westside: Along the Burlington Railroad tracks to the fence line approximately 1,000 feet south of the Exide property line; Southside: Fence line approximately 1,000 feet south of the Exide property line.

(55) Maintenance plan—A revision to the applicable state implementation plan, meeting the requirements of [42 United States Code, § 7505a](#).

(56) Marine vessel—Any watercraft used, or capable of being used, as a means of transportation on water, and that is constructed or adapted to carry, or that carries, oil, gasoline, or other volatile organic liquid in bulk as a cargo or cargo residue.

(57) Mechanical shoe seal—A metal sheet that is held vertically against the storage tank wall by springs or weighted levers and is connected by braces to the floating roof. A flexible coated fabric (envelope) spans the annular space between the metal sheet and the floating roof.

(58) Medical waste—Waste materials identified by the Department of State Health Services as “special waste from health care-related facilities” and those waste materials commingled and discarded with special waste from health care-related facilities.

(59) Metropolitan Planning Organization—That organization designated as being responsible, together with the

state, for conducting the continuing, cooperative, and comprehensive planning process under [23 United States Code \(USC\), § 134](#) and 49 USC, § 1607.

(60) Mobile emissions reduction credit—The credit obtained from an enforceable, permanent, quantifiable, and surplus (to other federal and state rules) emissions reduction generated by a mobile source as set forth in Chapter 114, Subchapter F of this title (relating to Vehicle Retirement and Mobile Emission Reduction Credits), and that has been banked in accordance with Subchapter H, Division 1 of this chapter.

(61) Motor vehicle—A self-propelled vehicle designed for transporting persons or property on a street or highway.

(62) Motor vehicle fuel dispensing facility—Any site where gasoline is dispensed to motor vehicle fuel tanks from stationary storage tanks.

(63) Municipal solid waste—Solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste except industrial solid waste.

(64) Municipal solid waste facility—All contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste. A facility may be publicly or privately owned and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations of them.

(65) Municipal solid waste landfill—A discrete area of land or an excavation that receives household waste and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under [40 Code of Federal Regulations § 257.2](#). A municipal solid waste landfill (MSWLF) unit also may receive other types of Resource Conservation and Recovery Act Subtitle D wastes, such as commercial solid waste, non-hazardous sludge, conditionally exempt small-quantity generator waste, and industrial solid waste. Such a landfill may be publicly or privately owned. An MSWLF unit may be a new MSWLF unit, an existing MSWLF unit, or a lateral expansion.

(66) National ambient air quality standard—Those standards established under [42 United States Code, § 7409](#), including standards for carbon monoxide, lead, nitrogen dioxide, ozone, inhalable particulate matter, and sulfur dioxide.

(67) Net ground-level concentration—The concentration of an air contaminant as measured at or beyond the property boundary minus the representative concentration flowing onto a property as measured at any point. Where there is no expected influence of the air contaminant flowing onto a property from other sources, the net ground level concentration may be determined by a measurement at or beyond the property boundary.

(68) New source—Any stationary source, the construction or modification of which was commenced after March 5, 1972.

(69) Nitrogen oxides (NO_x)—The sum of the nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(70) Nonattainment area—A defined region within the state that is designated by the United States Environmental Protection Agency (EPA) as failing to meet the national ambient air quality standard for a pollutant for which

a standard exists. The EPA will designate the area as nonattainment under the provisions of [42 United States Code, § 7407\(d\)](#). For the official list and boundaries of nonattainment areas, see 40 Code of Federal Regulations Part 81 and pertinent Federal Register (FR) notices. The following areas comprise the nonattainment areas within the state for all national ambient air quality standards (NAAQS). EPA has indicated that it will revoke the one-hour ozone standard in full, including the associated designations and classifications, on June 15, 2005, which is one year following the effective date of the designations for the eight-hour NAAQS of June 15, 2004.

(A) Carbon monoxide (CO). El Paso CO nonattainment area ([56 FR 56694](#))—Classified as a Moderate CO nonattainment area with a design value less than or equal to 12.7 parts per million. Portion of El Paso County. Portion of the city limits of El Paso: That portion of the City of El Paso bounded on the north by Highway 10 from Porfirio Diaz Street to Raynolds Street, Raynolds Street from Highway 10 to the Southern Pacific Railroad lines, the Southern Pacific Railroad lines from Raynolds Street to Highway 62, Highway 62 from the Southern Pacific Railroad lines to Highway 20, and Highway 20 from Highway 62 to Polo Inn Road. Bounded on the east by Polo Inn Road from Highway 20 to the Texas-Mexico border. Bounded on the south by the Texas-Mexico border from Polo Inn Road to Porfirio Diaz Street. Bounded on the west by Porfirio Diaz Street from the Texas-Mexico border to Highway 10.

(B) Inhalable particulate matter (PM₁₀). El Paso PM₁₀ nonattainment area ([56 FR 56694](#))—Classified as a Moderate PM₁₀ nonattainment area. Portion of El Paso County that comprises the El Paso city limit boundaries as they existed on November 15, 1990.

(C) Lead. No designated nonattainment areas.

(D) Nitrogen dioxide. No designated nonattainment areas.

(E) Ozone (one-hour).

(i) Houston-Galveston-Brazoria (HGB) one-hour ozone nonattainment area ([56 FR 56694](#))—Classified as a Severe-17 ozone nonattainment area. Consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(ii) El Paso one-hour ozone nonattainment area ([56 FR 56694](#))—Classified as a Serious ozone nonattainment area. Consists of El Paso County.

(iii) [Beaumont-Port Arthur \(BPA\) one-hour ozone nonattainment area \(69 FR 16483\)](#)—Classified as a Serious ozone nonattainment area. Consists of Hardin, Jefferson, and Orange Counties.

(iv) [Dallas-Fort Worth one-hour ozone nonattainment area \(63 FR 8128\)](#)—Classified as a Serious ozone nonattainment area. Consists of Collin, Dallas, Denton, and Tarrant Counties.

(F) Ozone (eight-hour).

(i) HGB eight-hour ozone nonattainment area (69 FR 23936)—Classified as a Moderate ozone nonattainment area. Consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(ii) BPA eight-hour ozone nonattainment area (69 FR 23936)—Classified as a Marginal ozone nonattainment area. Consists of Hardin, Jefferson, and Orange Counties.

(iii) Dallas-Fort Worth eight-hour ozone nonattainment area (69 FR 23936)—Classified as a Moderate ozone nonattainment area. Consists of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

(iv) San Antonio eight-hour ozone nonattainment area (69 FR 23936)—Classified under the Federal Clean Air Act, Title I, Part D, Subpart 1 ([42 United States Code, § 7502](#)), nonattainment deferred to September 30, 2005, or as extended by EPA.

(G) Sulfur dioxide. No designated nonattainment areas.

(71) Non-reportable emissions event—Any emissions event that in any 24-hour period does not result in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(72) Opacity—The degree to which an emission of air contaminants obstructs the transmission of light expressed as the percentage of light obstructed as measured by an optical instrument or trained observer.

(73) Open-top vapor degreasing—A batch solvent cleaning process that is open to the air and that uses boiling solvent to create solvent vapor used to clean or dry parts through condensation of the hot solvent vapors on the parts.

(74) Outdoor burning—Any fire or smoke-producing process that is not conducted in a combustion unit.

(75) Particulate matter—Any material, except uncombined water, that exists as a solid or liquid in the atmosphere or in a gas stream at standard conditions.

(76) Particulate matter emissions—All finely-divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by United States Environmental Protection Agency Reference Method 5, as specified at 40 Code of Federal Regulations (CFR) Part 60, Appendix A, modified to include particulate caught by an impinger train; by an equivalent or alternative method, as specified at 40 CFR Part 51; or by a test method specified in an approved state implementation plan.

(77) Petroleum refinery—Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(78) PM₁₀—Particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers as measured by a reference method based on [40 Code of Federal Regulations \(CFR\) Part 50, Appendix J](#), and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.

(79) PM₁₀ emissions—Finely-divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal ten micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method specified in 40 Code of Federal Regulations Part 51, or by a test method specified in an approved state implementation plan.

(80) Polychlorinated biphenyl compound—A compound subject to 40 Code of Federal Regulations Part 761.

(81) Process or processes—Any action, operation, or treatment embracing chemical, commercial, industrial, or

manufacturing factors such as combustion units, kilns, stills, dryers, roasters, and equipment used in connection therewith, and all other methods or forms of manufacturing or processing that may emit smoke, particulate matter, gaseous matter, or visible emissions.

(82) Process weight per hour—"Process weight" is the total weight of all materials introduced or recirculated into any specific process that may cause any discharge of air contaminants into the atmosphere. Solid fuels charged into the process will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not. The "process weight per hour" will be derived by dividing the total process weight by the number of hours in one complete operation from the beginning of any given process to the completion thereof, excluding any time during that the equipment used to conduct the process is idle. For continuous operation, the "process weight per hour" will be derived by dividing the total process weight for a 24-hour period by 24.

(83) Property—All land under common control or ownership coupled with all improvements on such land, and all fixed or movable objects on such land, or any vessel on the waters of this state.

(84) Reasonable further progress—Annual incremental reductions in emissions of the applicable air contaminant that are sufficient to provide for attainment of the applicable national ambient air quality standard in the designated nonattainment areas by the date required in the state implementation plan.

(85) Regulated entity—All regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. The term includes any property under common ownership or control identified in a permit or used in conjunction with the regulated activity at the same street address or location. Owners or operators of pipelines, gathering lines, and flowlines under common ownership or control in a particular county may be treated as a single regulated entity for purposes of assessment and regulation of emissions events.

(86) Remote reservoir cold solvent cleaning—Any cold solvent cleaning operation in which liquid solvent is pumped to a sink-like work area that drains solvent back into an enclosed container while parts are being cleaned, allowing no solvent to pool in the work area.

(87) Reportable emissions event—Any emissions event that in any 24-hour period, results in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(88) Reportable quantity (RQ)—Is as follows:

(A) for individual air contaminant compounds and specifically listed mixtures by name or Chemical Abstracts Service (CAS) number, either:

(i) the lowest of the quantities:

(I) listed in 40 Code of Federal Regulations (CFR) Part 302, Table 302.4, the column "final RQ";

(II) listed in [40 CFR Part 355, Appendix A](#), the column "Reportable Quantity"; or

(III) listed as follows:

(-a-) acetaldehyde—1,000 pounds, except in the Houston-Galveston-Brazoria (HGB) and Beaumont-Port Arthur (BPA) ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where

the RQ must be 100 pounds;

(-b-) butanes (any isomer)—5,000 pounds;

(-c-) butenes (any isomer, except 1,3-butadiene)—5,000 pounds, except in the HGB and BPA ozone non-attainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-d-) carbon monoxide—5,000 pounds;

(-e-) 1-chloro-1,1-difluoroethane (HCFC-142b)—5,000 pounds;

(-f-) chlorodifluoromethane (HCFC-22)—5,000 pounds;

(-g-) 1-chloro-1-fluoroethane (HCFC-151a)—5,000 pounds;

(-h-) chlorofluoromethane (HCFC-31)—5,000 pounds;

(-i-) chloropentafluoroethane (CFC-115)—5,000 pounds;

(-j-) 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124)—5,000 pounds;

(-k-) 1-chloro-1,1,2,2 tetrafluoroethane (HCFC-124a)—5,000 pounds;

(-l-) 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43-10mee)—5,000 pounds;

(-m-) decanes (any isomer)—5,000 pounds;

(-n-) 1,1-dichloro-1-fluoroethane (HCFC-141b)—5,000 pounds;

(-o-) 3,3-dichloro-1,1,2,2-pentafluoropropane (HCFC-225ca)—5,000 pounds;

(-p-) 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC-225cb)—5,000 pounds;

(-q-) 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFR-114)—5,000 pounds;

(-r-) 1,1-dichlorotetrafluoroethane (CFC-114a)—5,000 pounds;

(-s-) 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a)—5,000 pounds;

(-t-) 1,1-difluoroethane (HFC-152a)—5,000 pounds;

(-u-) difluoromethane (HFC-32)—5,000 pounds;

(-v-) ethanol—5,000 pounds;

(-w-) ethylene—5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-x-) ethylfluoride (HFC-161)—5,000 pounds;

- (-y-) 1,1,1,2,3,3,3-heptafluoropropane (HFC-227ea);
- (-z-) 1,1,1,3,3,3-hexafluoropropane (HFC-236fa)—5,000 pounds;
- (-aa-) 1,1,1,2,3,3-hexafluoropropane (HFC-236ea)—5,000 pounds;
- (-bb-) hexanes (any isomer)—5,000 pounds;
- (-cc-) isopropyl alcohol—5,000 pounds;
- (-dd-) mineral spirits—5,000 pounds;
- (-ee-) octanes (any isomer)—5,000 pounds;
- (-ff-) oxides of nitrogen—200 pounds in ozone nonattainment, ozone maintenance, early action compact areas, Nueces County, and San Patricio County, and 5,000 pounds in all other areas of the state, which should be used instead of the RQs for nitrogen oxide and nitrogen dioxide provided in 40 CFR Part 302, Table 302.4, the column “final RQ”;
- (-gg-) pentachlorofluoroethane (CFR-111)—5,000 pounds;
- (-hh-) 1,1,1,3,3-pentafluorobutane (HFC-365mfc)—5,000 pounds;
- (-ii-) pentafluoroethane (HFC-125)—5,000 pounds;
- (-jj-) 1,1,2,2,3-pentafluoropropane (HFC-245ca)—5,000 pounds;
- (-kk-) 1,1,2,3,3-pentafluoropropane (HFC-245ea)—5,000 pounds;
- (-ll-) 1,1,1,2,3-pentafluoropropane (HFC-245eb)—5,000 pounds;
- (-mm-) 1,1,1,3,3-pentafluoropropane (HFC-245fa)—5,000 pounds;
- (-nn-) pentanes (any isomer)—5,000 pounds;
- (-oo-) propane—5,000 pounds;
- (-pp-) propylene—5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;
- (-qq-) 1,1,2,2-tetrachlorodifluoroethane (CFR-112)—5,000 pounds;
- (-rr-) 1,1,1,2-tetrachlorodifluoroethane (CFC-112a)—5,000 pounds;
- (-ss-) 1,1,2,2-tetrafluoroethane (HFC-134)—5,000 pounds;
- (-tt-) 1,1,1,2-tetrafluoroethane (HFC-134a)—5,000 pounds;
- (-uu-) 1,1,2-trichloro-1,2,2-trifluoroethane (CFR-113)—5,000 pounds;
- (-vv-) 1,1,1-trichloro-2,2,2-trifluoroethane (CFC-113a)—5,000 pounds;

(-ww-) 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123)—5,000 pounds;

(-xx-) 1,1,1-trifluoroethane (HFC-143a)—5,000 pounds;

(-yy-) trifluoromethane (HFC-23)—5,000 pounds; or

(-zz-) toluene—1,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(ii) if not listed in clause (i) of this subparagraph, 100 pounds;

(B) for mixtures of air contaminant compounds:

(i) where the relative amount of individual air contaminant compounds is known through common process knowledge or prior engineering analysis or testing, any amount of an individual air contaminant compound that equals or exceeds the amount specified in subparagraph (A) of this paragraph;

(ii) where the relative amount of individual air contaminant compounds in subparagraph (A)(i) of this paragraph is not known, any amount of the mixture that equals or exceeds the amount for any single air contaminant compound that is present in the mixture and listed in subparagraph (A)(i) of this paragraph;

(iii) where each of the individual air contaminant compounds listed in subparagraph (A)(i) of this paragraph are known to be less than 0.02% by weight of the mixture, and each of the other individual air contaminant compounds covered by subparagraph (A)(ii) of this paragraph are known to be less than 2.0% by weight of the mixture, any total amount of the mixture of air contaminant compounds greater than or equal to 5,000 pounds; or

(iv) where natural gas excluding carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen or air emissions from crude oil are known to be in an amount greater than or equal to 5,000 pounds or the associated hydrogen sulfide and mercaptans in a total amount greater than 100 pounds, whichever occurs first;

(C) for opacity from boilers and combustion turbines as defined in this section fueled by natural gas, coal, lignite, wood, fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, opacity that is equal to or exceeds 15 additional percentage points above the applicable limit, averaged over a six-minute period. Opacity is the only RQ applicable to boilers and combustion turbines described in this paragraph; or

(D) for facilities where air contaminant compounds are measured directly by a continuous emission monitoring system providing updated readings at a minimum 15-minute interval an amount, approved by the executive director based on any relevant conditions and a screening model, that would be reported prior to ground level concentrations reaching at any distance beyond the closest regulated entity property line:

(i) less than one-half of any applicable ambient air standards; and

(ii) less than two times the concentration of applicable air emission limitations.

(89) Rubbish—Nonputrescible solid waste, consisting of both combustible and noncombustible waste materials.

Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, and similar materials. Noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, metal furniture, and like materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).

(90) Scheduled maintenance, startup, or shutdown activity—For activities with unauthorized emissions that are expected to exceed a reportable quantity (RQ), a scheduled maintenance, startup, or shutdown activity is an activity that the owner or operator of the regulated entity whether performing or otherwise affected by the activity, provides prior notice and a final report as required by § 101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements); the notice or final report includes the information required in § 101.211 of this title; and the actual unauthorized emissions from the activity do not exceed the emissions estimates submitted in the initial notification by more than an RQ. For activities with unauthorized emissions that are not expected to, and do not, exceed an RQ, a scheduled maintenance, startup, or shutdown activity is one that is recorded as required by § 101.211 of this title. Expected excess opacity events as described in § 101.201(e) of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) resulting from scheduled maintenance, startup, or shutdown activities are those that provide prior notice (if required), and are recorded and reported as required by § 101.211 of this title.

(91) Sludge—Any solid or semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant; water supply treatment plant, exclusive of the treated effluent from a wastewater treatment plant; or air pollution control equipment.

(92) Smoke—Small gas-born particles resulting from incomplete combustion consisting predominately of carbon and other combustible material and present in sufficient quantity to be visible.

(93) Solid waste—Garbage, rubbish, refuse, sludge from a waste water treatment plant, water supply treatment plant, or air pollution control equipment, and other discarded material, including solid, liquid, semisolid, or containerized gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. The term does not include:

(A) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued under the Texas Water Code, Chapter 26;

(B) soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land, if the object of the fill is to make the land suitable for the construction of surface improvements; or

(C) waste materials that result from activities associated with the exploration, development, or production of oil or gas, or geothermal resources, and other substance or material regulated by the Railroad Commission of Texas under [Natural Resources Code, § 91.101](#), unless the waste, substance, or material results from activities associated with gasoline plants, natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, as amended ([42 United States Code, §§ 6901 et seq.](#)).

(94) Sour crude—A crude oil that will emit a sour gas when in equilibrium at atmospheric pressure.

(95) Sour gas—Any natural gas containing more than 1.5 grains of hydrogen sulfide per 100 cubic feet, or more

than 30 grains of total sulfur per 100 cubic feet.

(96) Source—A point of origin of air contaminants, whether privately or publicly owned or operated. Upon request of a source owner, the executive director shall determine whether multiple processes emitting air contaminants from a single point of emission will be treated as a single source or as multiple sources.

(97) Special waste from health care-related facilities—A solid waste that if improperly treated or handled, may serve to transmit infectious disease(s) and that is comprised of the following: animal waste, bulk blood and blood products, microbiological waste, pathological waste, and sharps.

(98) Standard conditions—A condition at a temperature of 68 degrees Fahrenheit (20 degrees Centigrade) and a pressure of 14.7 pounds per square inch absolute (101.3 kiloPascals).

(99) Standard metropolitan statistical area—An area consisting of a county or one or more contiguous counties that is officially so designated by the United States Bureau of the Budget.

(100) Submerged fill pipe—A fill pipe that extends from the top of a tank to have a maximum clearance of six inches (15.2 centimeters) from the bottom or, when applied to a tank that is loaded from the side, that has a discharge opening entirely submerged when the pipe used to withdraw liquid from the tank can no longer withdraw liquid in normal operation.

(101) Sulfur compounds—All inorganic or organic chemicals having an atom or atoms of sulfur in their chemical structure.

(102) Sulfuric acid mist/sulfuric acid—Emissions of sulfuric acid mist and sulfuric acid are considered to be the same air contaminant calculated as H_2SO_4 and must include sulfuric acid liquid mist, sulfur trioxide, and sulfuric acid vapor as measured by Test Method 8 in 40 Code of Federal Regulations Part 60, Appendix A.

(103) Sweet crude oil and gas—Those crude petroleum hydrocarbons that are not “sour” as defined in this section.

(104) Total suspended particulate—Particulate matter as measured by the method described in [40 Code of Federal Regulations Part 50, Appendix B](#).

(105) Transfer efficiency—The amount of coating solids deposited onto the surface or a part of product divided by the total amount of coating solids delivered to the coating application system.

(106) True vapor pressure—The absolute aggregate partial vapor pressure, measured in pounds per square inch absolute, of all volatile organic compounds at the temperature of storage, handling, or processing.

(107) Unauthorized emissions—Emissions of any air contaminant except carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by [Texas Clean Air Act, § 382.0518\(g\)](#).

(108) Unplanned maintenance, startup, or shutdown activity—For activities with unauthorized emissions that are expected to exceed a reportable quantity or with excess opacity, an unplanned maintenance, startup, or shutdown activity is:

(A) a startup or shutdown that was not part of normal or routine facility operations, is unpredictable as to timing, and is not the type of event normally authorized by permit; or

(B) a maintenance activity that arises from sudden and unforeseeable events beyond the control of the operator that requires the immediate corrective action to minimize or avoid an upset or malfunction.

(109) Upset event—An unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions. A maintenance, startup, or shutdown activity that was reported under § 101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), but had emissions that exceeded the reported amount by more than a reportable quantity due to an unplanned and unavoidable breakdown or excursion of a process or operation is an upset event.

(110) Utility boiler—A boiler used to produce electric power, steam, or heated or cooled air, or other gases or fluids for sale.

(111) Vapor combustor—A partially enclosed combustion device used to destroy volatile organic compounds by smokeless combustion without extracting energy in the form of process heat or steam. The combustion flame may be partially visible, but at no time does the device operate with an uncontrolled flame. Auxiliary fuel and/or a flame air control damping system that can operate at all times to control the air/fuel mixture to the combustor's flame zone, may be required to ensure smokeless combustion during operation.

(112) Vapor-mounted seal—A primary seal mounted so there is an annular space underneath the seal. The annular vapor space is bounded by the bottom of the primary seal, the tank wall, the liquid surface, and the floating roof or cover.

(113) Vent—Any duct, stack, chimney, flue, conduit, or other device used to conduct air contaminants into the atmosphere.

(114) Visible emissions—Particulate or gaseous matter that can be detected by the human eye. The radiant energy from an open flame is not considered a visible emission under this definition.

(115) Volatile organic compound—As defined in [40 Code of Federal Regulations § 51.100\(s\)](#), except [§ 51.100\(s\)\(2\)–\(4\)](#), as amended on November 29, 2004 ([69 FR 69290](#)).

(116) Volatile organic compound (VOC) water separator—Any tank, box, sump, or other container in which any VOC, floating on or contained in water entering such tank, box, sump, or other container, is physically separated and removed from such water prior to outfall, drainage, or recovery of such water.

Source: The provisions of this § 101.1 adopted to be effective January 1, 1976; amended to be effective May 7, 1979, 4 TexReg 1358; amended to be effective August 22, 1980, 5 TexReg 3241; amended to be effective April 16, 1981, 6 TexReg 1240; amended to be effective March 17, 1982, 7 TexReg 901; amended to be effective December 30, 1982, 7 TexReg 4388; amended to be effective July 14, 1983, 8 TexReg 2402; amended to be effective October 25, 1985, 10 TexReg 3896; amended to be effective January 27, 1988, 13 TexReg 295; amended to be effective April 14, 1988, 13 TexReg 1539; amended to be effective December 21, 1988, 13 TexReg 6081; amended to be effective July 18, 1989, 14 TexReg 3285; amended to be effective February 7, 1990, 15 TexReg 434; amended to be effective June 8, 1990, 15 TexReg 2913; amended to be effective November 14, 1990, 15 TexReg 6300; amended to be effective October 22, 1991, 16 TexReg 5596; amended to be effective December

26, 1991, 16 TexReg 7205; amended to be effective February 19, 1992, 17 TexReg 1125; amended to be effective July 13, 1992, 17 TexReg 4608; amended to be effective November 15, 1992, 17 TexReg 4777; amended to be effective November 16, 1992, 17 TexReg 7781; amended to be effective March 15, 1993, 18 TexReg 1411; amended to be effective September 13, 1993, 18 TexReg 5746; amended to be effective December 3, 1993, 18 TexReg 8535; amended to be effective May 27, 1994, 19 TexReg 3701; amended to be effective August 16, 1994, 19 TexReg 5953; amended to be effective November 14, 1994, 19 TexReg 8674; amended to be effective March 7, 1996, 21 TexReg 1544; amended to be effective May 22, 1997, 22 TexReg 4211; amended to be effective July 16, 1997, 22 TexReg 6446; amended to be effective August 5, 1997, 22 TexReg 7040; amended to be effective October 22, 1997, 22 TexReg 10319; amended to be effective December 23, 1999, 24 TexReg 11494; amended to be effective July 23, 2000, 25 TexReg 6727; amended to be effective October 18, 2001, 26 TexReg 8073; amended to be effective September 12, 2002, 27 TexReg 8499; amended to be effective June 15, 2005, 30 TexReg 3408; amended to be effective January 5, 2006, 30 TexReg 8884; amended to be effective August 16, 2007, 32 TexReg 4985.

Current through December 31, 2009

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30 TAC § 101.1, 30 TX ADC § 101.1

30 TX ADC § 101.1

END OF DOCUMENT

30 TAC § 106.4

Tex. Admin. Code tit. 30, § **106. 4**

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TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 106. PERMITS BY RULE
SUBCHAPTER A. GENERAL REQUIREMENTS

§ **106. 4.** Requirements for Permitting by Rule

(a) To qualify for a permit by rule, the following general requirements must be met.

(1) Total actual emissions authorized under permit by rule from the facility shall not exceed 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_x); or 25 tpy of volatile organic compounds (VOC) or sulfur dioxide (SO₂) or inhalable particulate matter (PM₁₀); or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

(2) Any facility or group of facilities, which constitutes a new major stationary source, as defined in § 116.12 of this title (relating to Nonattainment Review Definitions), or any modification which constitutes a major modification, as defined in § 116.12 of this title, under the new source review requirements of the Federal Clean Air Act (FCAA), Part D (Nonattainment) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder, must meet the permitting requirements of Chapter 116, Subchapter B of this title (relating to New Source Review Permits) and cannot qualify for a permit by rule under this chapter. Persons claiming a permit by rule under this chapter should see the requirements of § 116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) to ensure that any applicable netting requirements have been satisfied.

(3) Any facility or group of facilities, which constitutes a new major stationary source, as defined in [40 Code of Federal Regulations \(CFR\) § 52.21](#), or any change which constitutes a major modification, as defined in [40 CFR § 52.21](#), under the new source review requirements of the FCAA, Part C (Prevention of Significant Deterioration) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder, must meet the permitting requirements of Chapter 116, Subchapter B of this title and cannot qualify for a permit by rule under this chapter.

(4) Unless at least one facility at an account has been subject to public notification and comment as required in Chapter 116, Subchapter B or Subchapter D of this title (relating to New Source Review Permits or Permit Renewals), total actual emissions from all facilities permitted by rule at an account shall not exceed 250 tpy of CO or NO_x; or 25 tpy of VOC or SO₂ or PM₁₀; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

(5) Construction or modification of a facility commenced on or after the effective date of a revision of this section or the effective date of a revision to a specific permit by rule in this chapter must meet the revised requirements to qualify for a permit by rule.

(6) A facility shall comply with all applicable provisions of the FCAA, § 111 (Federal New Source Performance Standards) and § 112 (Hazardous Air Pollutants), and the new source review requirements of the FCAA, Part C and Part D and regulations promulgated thereunder.

(7) There are no permits under the same commission account number that contain a condition or conditions precluding the use of a permit by rule under this chapter.

(8) The proposed facility or group of facilities shall obtain allowances for NO_x if they are subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(b) No person shall circumvent by artificial limitations the requirements of § 116.110 of this title (relating to Applicability).

(c) The emissions from the facility shall comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of health and property of the public, and all emissions control equipment shall be maintained in good condition and operated properly during operation of the facility.

(d) Facilities permitted by rule under this chapter are not exempted from any permits or registrations required by local air pollution control agencies. Any such requirements must be in accordance with TCAA, § 382.113 and any other applicable law.

Source: The provisions of this § 106. 4 adopted to be effective November 15, 1996, 21 TexReg 10881; amended to be effective April 7, 1998, 23 TexReg 3502; amended to be effective September 4, 2000, 25 TexReg 8653; amended to be effective March 29, 2001, 26 TexReg 2396.

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30 TAC § 106.4, 30 TX ADC § 106.4

30 TX ADC § 106.4

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30 TAC § 116.10

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PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODI-
FICATION
SUBCHAPTER A. DEFINITIONS

§ **116. 10.** General Definitions

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. 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 this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions—The highest rate of emissions of an air contaminant actually achieved from a qualified facility within the 120-month period prior to the change. This rate cannot exceed any applicable federal or state emissions limitation. This definition applies only when determining whether there has been a net increase in allowable emissions under § 116.116(e) of this title (relating to Changes to Facilities).

(2) Allowable emissions—The authorized rate of emissions of an air contaminant from a facility as determined in accordance with this section. This rate cannot exceed any applicable state or federal emissions limitation. This definition applies only when determining whether there has been a net increase in allowable emissions under § 116.116(e) of this title.

(A) Permitted facility—For a facility with a permit under this chapter, the allowable emissions shall be any emission limit established in the permit on a maximum allowable emissions rate table and any emission limit contained in representations in the permit application which was relied upon in issuing the permit, plus any allowable emissions authorized under Chapter 106 of this title (relating to Permits by Rule).

(B) Facility permitted by rule—For a facility operating under Chapter 106 of this title, the allowable emissions shall be the least of the emissions rate allowed in Chapter 106, Subchapter A of this title (relating to General Requirements), the emissions rate specified in the applicable permit by rule, or the federally enforceable emission rate established on a PI-8 form.

(C) Qualified grandfathered facility—For a qualified grandfathered facility, the allowable emissions shall be the maximum annual emissions rate after the implementation of any air pollution control methods to become a

qualified facility, plus 10% of the maximum annual emissions rate prior to the implementation of such control methods, but in no case shall the allowable emissions be greater than the maximum annual emissions rate prior to the implementation of such control methods. The maximum annual emissions rate is the emissions rate at the maximum annual capacity according to the physical or operational design of the facility, data from actual operations over a period of no more than 12 months that demonstrates the maximum annual capacity, or other information that demonstrates the maximum annual capacity. Except where a grandfathered facility has been modified, the allowable emissions for the modification shall be determined as a permitted facility.

(D) Standard permit facility—For a facility authorized by standard permit, other than § 116.617(2) of this title (relating to Standard Permits for Pollution Control Projects), the allowable emissions shall be the maximum emissions rate represented in the registration to use the standard permit.

(E) Special exemption facility—For a facility operating under a special exemption, the allowable emissions shall be the emissions rate represented in the original special exemption request.

(F) The allowable emissions for a qualified facility shall not be adjusted by the voluntary installation of controls.

(3) Best available control technology (BACT)—BACT with consideration given to the technical practicability and the economic reasonableness of reducing or eliminating emissions from the facility.

(4) Dockside vessel—Any water-based transportation, platforms, or similar structures which are connected or moored to the land.

(5) Dockside vessel emissions—Those emissions originating from a dockside vessel that are the result of functions performed by onshore facilities or using onshore equipment. These emissions include, but are not limited to:

- (A) loading and unloading of liquid bulk materials;
- (B) loading and unloading of liquified gaseous materials;
- (C) loading and unloading of solid bulk materials;
- (D) cleaning and degassing of liquid vessel compartments; and
- (E) abrasive blasting and painting.

(6) Facility—A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not a facility.

(7) Federally enforceable—All limitations and conditions which are enforceable by the EPA, including:

- (A) those requirements developed under Title 40 of the Code of Federal Regulations (CFR) Parts 60 and 61 (40 CFR 60 and 61);
- (B) Chapter 113, Subchapter C of this title (relating to National Emission Standards for Hazardous Air Pollutants for Source Categories (FCAA, § 112, 40 CFR 63));

(C) requirements within any applicable state implementation plan (SIP);

(D) any permit requirements established under 40 CFR § 52.21;

(E) any permit requirements established under regulations approved under 40 CFR Part 51, Subpart I, including permits issued under the EPA-approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program; or

(F) any permit requirements established under Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 CFR Part 63)).

(8) Grandfathered facility—Any facility that is not a new facility and has not been modified since August 30, 1971.

(9) Lead smelting plant—Any facility which produces purified lead by melting and separating lead from metal and nonmetallic contaminants and/or by reducing oxides into elemental lead. Raw materials consist of lead concentrates, lead-bearing ores or lead scrap, drosses, or other lead-bearing residues. Additional processing may include refining and alloying. A facility which only remelts lead bars or ingots for casting into lead products is not a lead smelting plant.

(10) Maximum allowable emissions rate table (MAERT)—A table included with a preconstruction permit issued under this chapter that contains the allowable emission rates established by the permit for a facility.

(11) Modification of existing facility—Any physical change in, or change in the method of operation of, a facility in a manner that increases the amount of any air contaminant emitted by the facility into the atmosphere or that results in the emission of any air contaminant not previously emitted. The term does not include:

(A) insignificant increases in the amount of any air contaminant emitted that is authorized by one or more commission exemptions;

(B) insignificant increases at a permitted facility;

(C) maintenance or replacement of equipment components that do not increase or tend to increase the amount or change the characteristics of the air contaminants emitted into the atmosphere;

(D) an increase in the annual hours of operation unless the existing facility has received a preconstruction permit or has been exempted, under the TCAA, § 382.057, from preconstruction permit requirements;

(E) a physical change in, or change in the method of operation of, a facility that does not result in a net increase in allowable emission of any air contaminant and that does not result in the emission of any air contaminant not previously emitted, provided that the facility:

(i) has received a preconstruction permit or permit amendment or has been exempted under the TCAA, § 382.057, from preconstruction permit requirements no earlier than 120 months before the change will occur; or

(ii) uses, regardless of whether the facility has received a preconstruction permit or permit amendment or

has been exempted under the TCAA, § 382.057, an air pollution control method that is at least as effective as the BACT that the commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur;

(F) a physical change in, or change in the method of operation of, a facility where the change is within the scope of a flexible permit or a multiple plant permit; or

(G) a change in the method of operation of a natural gas processing, treating, or compression facility connected to or part of a natural gas gathering or transmission pipeline which does not result in an annual emission rate of any air contaminant in excess of the volume emitted at the maximum designed capacity, provided that the facility is one for which:

(i) construction or operation started on or before September 1, 1971, and at which either no modification has occurred after September 1, 1971, or at which modifications have occurred only under Chapter 106 of this title; or

(ii) construction started after September 1, 1971, and before March 1, 1972, and which registered in accordance with TCAA, § 382.060, as that section existed prior to September 1, 1991.

(12) New facility—A facility for which construction is commenced after August 30, 1971, and no contract for construction was executed on or before August 30, 1971, and that contract specified a beginning construction date on or before February 29, 1972.

(13) New source—Any stationary source, the construction or modification of which is commenced after March 5, 1972.

(14) Nonattainment area—A defined region within the state which is designated by the EPA as failing to meet the national ambient air quality standard for a pollutant for which a standard exists. The EPA will designate the area as nonattainment under the provisions of FCAA, § 107(d).

(15) Public notice—The public notice of application for a permit as required in this chapter.

(16) Qualified facility—An existing facility that satisfies the criteria of either paragraph (9)(E)(i) or (ii) of this section.

(17) Source—A point of origin of air contaminants, whether privately or publicly owned or operated.

Source: The provisions of this § 116. 10 adopted to be effective July 8, 1998, 23 TexReg 6973; amended to be effective September 4, 2000, 25 TexReg 8668; amended to be effective June 12, 2002, 27 TexReg 4954; amended to be effective September 12, 2002, 27 TexReg 8546.

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30 TAC § 116.10, 30 TX ADC § 116.10

30 TX ADC § 116.10

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30 TAC § 116.110

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TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODI-
FICATION
SUBCHAPTER B. NEW SOURCE REVIEW PERMITS
DIVISION 1. PERMIT APPLICATION

§ **116. 110.** Applicability

(a) Permit to construct. Before any actual work is begun on the facility, any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of this state shall either:

(1) obtain a permit under § 116.111 of this title (relating to General Application);

(2) satisfy the conditions for a standard permit under the requirements in:

(A) Subchapter F of this chapter (relating to Standard Permits);

(B) Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding Operations);

(C) Chapter 332 of this title (relating to Composting); or

(D) Chapter 330, Subchapter N of this title (relating to Landfill Mining);

(3) satisfy the conditions for a flexible permit under the requirements in Subchapter G of this chapter (relating to Flexible Permits);

(4) satisfy the conditions for facilities permitted by rule under Chapter 106 of this title (relating to Permits by Rule); or

(5) satisfy the criteria for a de minimis facility or source under § 116.119 of this title (relating to De Minimis Facilities or Sources).

(b) Modifications to existing permitted facilities. Modifications to existing permitted facilities may be handled through the amendment of an existing permit.

(c) Compliance history. For all authorizations listed in subsections (a) and (b) of this section or § 116.116 of this title (relating to Changes to Facilities), compliance history reviews may be required under Chapter 60 of this title (relating to Compliance History).

(d) Exclusion. Owners or operators of affected sources (as defined in § 116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 Code of Federal Regulations Part 63)) are not authorized to use:

(1) a permit by rule under Chapter 106 of this title;

(2) standard permits under Subchapter F of this chapter that do not meet the requirements of Subchapter C of this chapter; or

(3) § 116.116(e) of this title (relating to Changes to Facilities).

(e) Change in ownership.

(1) Within 30 days after the change of ownership of a facility permitted under this chapter, the new owner shall notify the commission and certify the following:

(A) the date of the ownership change;

(B) the name, address, phone number, and contact person for the new owner;

(C) an agreement by the new owner to be bound by all permit conditions and all representations made in the permit application and any amendments and alterations;

(D) there will be no change in the type of pollutants emitted; and

(E) there will be no increase in the quantity of pollutants emitted.

(2) The new owner shall comply with all permit conditions and all representations made in the permit application and any amendments and alterations.

(f) Submittal under seal of Texas licensed professional engineer. Applications for permit or permit amendment with an estimated capital cost of the project above \$2 million, and not subject to any exemption contained in the Texas Engineering Practice Act (TEPA), shall be submitted under seal of a Texas licensed professional engineer. However, nothing in this subsection shall limit or affect any requirement which may apply to the practice of engineering under the TEPA or the actions of the Texas Board of Professional Engineers. The estimated capital cost is defined in § 116.141 of this title (relating to Determination of Fees).

(g) Responsibility for permit application. The owner of the facility or the operator of the facility authorized to act for the owner is responsible for complying with this section.

Source: The provisions of this § 116. 110 adopted to be effective July 8, 1998, 23 TexReg 6973; amended to be effective September 4, 2000, 25 TexReg 8668; amended to be effective August 29, 2002, 27 TexReg 7910.

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30 TAC § 116.110, 30 TX ADC § 116.110

30 TX ADC § 116.110

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30 TAC § 116.111

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION
SUBCHAPTER B. NEW SOURCE REVIEW PERMITS
DIVISION 1. PERMIT APPLICATION

§ **116. 111.** General Application

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

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

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

(A) Protection of public health and welfare.

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

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

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

(C) Best available control technology (BACT). The proposed facility will utilize BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility.

(D) New Source Performance Standards (NSPS). The emissions from the proposed facility will meet the re-

quirements of any applicable NSPS as listed under Title 40 Code of Federal Regulations (CFR) Part 60, promulgated by the EPA under FCAA, § 111, as amended.

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

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

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

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

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

(J) Air dispersion modeling. Computerized air dispersion modeling may be required by the executive director or to determine air quality impacts from a proposed new facility or source modification. In determining whether to issue, or in conducting a review of, a permit application for a shipbuilding or ship repair operation, the commission will not require and may not consider air dispersion modeling results predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission shall determine compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

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

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

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

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

(2) Applications declared administratively complete on or after September 1, 1999, are subject to the require-

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

Source: The provisions of this § 116. 111 adopted to be effective July 8, 1998, 23 TexReg 6973; amended to be effective September 23, 1999, 24 TexReg 8296; amended to be effective March 29, 2001, 26 TexReg 2398; amended to be effective September 12, 2002, 27 TexReg 8546.

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30 TAC § 116.111, 30 TX ADC § 116.111

30 TX ADC § 116.111

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30 TAC § 116.116

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODI-
FICATION
SUBCHAPTER B. NEW SOURCE REVIEW PERMITS
DIVISION 1. PERMIT APPLICATION

§ **116. 116.** Changes to Facilities

(a) Representations and conditions. The following are the conditions upon which a permit, special permit, or special exemption are issued:

- (1) representations with regard to construction plans and operation procedures in an application for a permit, special permit, or special exemption; and
- (2) any general and special conditions attached to the permit, special permit, or special exemption itself.

(b) Permit amendments.

(1) Except as provided in subsection (e) of this section, the permit holder shall not vary from any representation or permit condition without obtaining a permit amendment if the change will cause:

- (A) a change in the method of control of emissions;
- (B) a change in the character of the emissions; or
- (C) an increase in the emission rate of any air contaminant.

(2) Any person who requests permit amendments must receive prior approval by the executive director or the commission. Applications must be submitted with a completed Form PI-1 and are subject to the requirements of § 116.111 of this title (relating to General Application).

(3) Any person who applies for an amendment to a permit to construct or reconstruct an affected source (as defined in § 116.15(1) of this title (relating to Section 112(g) Definitions)) under Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 CFR Part 63)) shall comply with the provisions in Chapter 39 of this title (relating to Public Notice).

(4) Any person who applies for an amendment to a permit to construct a new facility or modify an existing facility shall comply with the provisions in Chapter 39 of this title.

(c) Permit alteration.

(1) A permit alteration is:

(A) a decrease in allowable emissions; or

(B) any change from a representation in an application, general condition, or special condition in a permit that does not cause:

(i) a change in the method of control of emissions;

(ii) a change in the character of emissions; or

(iii) an increase in the emission rate of any air contaminant.

(2) Requests for permit alterations that must receive prior approval by the executive director are those that:

(A) result in an increase in off-property concentrations of air contaminants;

(B) involve a change in permit conditions; or

(C) affect facility or control equipment performance.

(3) The executive director shall be notified in writing of all other permit alterations not specified in paragraph (2) of this subsection.

(4) A request for permit alteration shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of § 116.111(a)(2)(C) of this title.

(5) Permit alterations are not subject to the requirements of § 116.111(a)(2)(C) of this title.

(d) Permits by rule under Chapter 106 of this title (relating to Permits by Rule) in lieu of permit amendment or alteration.

(1) A permit amendment or alteration is not required if the changes to the permitted facility qualify for an exemption from permitting or permit by rule under Chapter 106 of this title unless prohibited by permit condition as provided in § 116.115 of this title (relating to General and Special Conditions).

(2) All changes authorized under Chapter 106 of this title to a permitted facility shall be incorporated into that facility's permit when the permit is amended or renewed.

(e) Changes to qualified facilities.

(1) Notwithstanding any other subsection of this section, a physical or operational change may be made to a qualified facility if it can be determined that the change does not result in:

(A) a net increase in allowable emissions of any air contaminant; and

(B) the emission of any air contaminant not previously emitted.

(2) In making the determination in paragraph (1) of this subsection, the effect on emissions of the following shall be considered:

(A) any air pollution control method applied to the qualified facility;

(B) any decreases in allowable emissions from other qualified facilities at the same commission air quality account number that have received a preconstruction permit or permit amendment no earlier than 120 months before the change will occur; and

(C) any decrease in actual emissions from other qualified facilities at the same commission air quality account number that are not included in subparagraph (B) of this paragraph.

(3) The determination in paragraph (1) of this subsection shall be based on the allowable emissions for air contaminant categories and any allowable emissions for individual compounds. If a physical or operational change would result in emissions of a air contaminant category or compound above the allowable emissions for that air contaminant category or compound, the amount above the allowable emissions must be offset by an equivalent decrease in emissions at the same facility or a different facility. In making this offset, the following applies.

(A) The offset shall be based on the same time periods (e.g., hourly and annual rates) as the allowable emissions for the facility at which the change will occur.

(B) Emissions of different compounds within the same air contaminant category may be interchanged.

(C) For allowable emissions for individual compounds, any interchange shall adjust the emission rates for the different compounds in accordance with the ratio of the effects screening levels of the compounds.

(D) For allowable emissions for air contaminant categories, interchanges shall use the unadjusted emission rates for the different compounds.

(E) The effects screening level shall be determined by the executive director.

(F) An air contaminant category is a group of related compounds, such as volatile organic compounds, particulate matter, nitrogen oxides, and sulfur compounds.

(4) Persons making changes to qualified facilities under this subsection shall comply with the applicable requirements of § 116.117 of this title (relating to Documentation and Notification of Changes to Qualified Facilities) and § 116.118 of this title (relating to Pre-change Qualification).

(5) As used in this subsection, the term “physical and operational change” does not include:

(A) construction of a new facility; or

(B) changes to procedures regarding monitoring, determination of emissions, and recordkeeping that are required by a permit.

(6) Additional air pollution control methods may be implemented for the purpose of making a facility a qualified facility. The implementation of any additional control methods to qualify a facility shall be subject to the requirements of this chapter. The owner or operator shall:

(A) utilize additional control methods that are as effective as best available control technology (BACT) required at the time the additional control methods are implemented; or

(B) demonstrate that the additional control methods, although not as effective as BACT, were implemented to comply with a law, rule, order, permit, or implemented to resolve a documented citizen complaint.

(7) For purposes of this subsection and § 116.117 of this title, the following subparagraphs apply.

(A) Intraplant trading means the consideration of decreases in allowable and actual emissions from other qualified facilities in accordance with paragraph (2) of this subsection.

(B) The allowable emissions from facilities that were never constructed shall not be used in intraplant trading.

(C) The decreases in allowable and actual emissions shall be based on emission rates for the same time periods (e.g., hourly and annual rates) as the allowable emissions for the facility at which the change will occur and for which an intraplant trade is desired.

(D) Actual emissions shall be based on data that is representative of the emissions actually achieved from a facility during the relevant time period (e.g., hourly or annual rate).

(8) The existing level of control may not be lessened for a qualified facility.

(f) Use of credits. Notwithstanding any other subsection of this section, discrete emission reduction credits may be used to exceed permit allowables as described in § 101.29(d)(4)(v) of this title (relating to Emission Credit Banking and Trading) if all applicable conditions of § 101.29 of this title are met. This subsection does not authorize any physical changes to a facility.

Source: The provisions of this § 116. 116 adopted to be effective July 8, 1998, 23 TexReg 6973; amended to be effective September 23, 1999, 24 TexReg 8296; amended to be effective September 4, 2000, 25 TexReg 8668

Current through December 31, 2009

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30 TAC § 116.116, 30 TX ADC § 116.116

30 TX ADC § 116.116

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30 TAC § 116.117

Tex. Admin. Code tit. 30, § **116. 117**

Effective:

TAX

TEXAS ADMINISTRATIVE CODE
TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION
SUBCHAPTER B. NEW SOURCE REVIEW PERMITS
DIVISION 1. PERMIT APPLICATION

§ **116. 117.** Documentation and Notification of Changes to Qualified Facilities

(a) Persons making changes under § 116.116(e) of this title (relating to Changes to Facilities) shall maintain documentation at the plant site demonstrating that the changes satisfy § 116.116(e) of this title. If the plant site is unmanned, the regional manager may authorize an alternative site to maintain the documentation. The documentation shall be made available to representatives of the commission upon request. The documentation shall include:

(1) quantification of all emission increases and decreases associated with the physical or operational change;

(2) a description of the physical or operational change;

(3) a description of any equipment being installed; and

(4) sufficient information as necessary to show that the project will comply with § 116.150 and § 116.151 of this title (relating to Nonattainment Review) and §§ 116.160-116.163 of this title (relating to Prevention of Significant Deterioration Review) and with Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 CFR Part 63)).

(b) Persons making such changes to qualified facilities shall comply with the following notification requirements.

(1) Annual report. For changes to qualified facilities when there is no intraplant trading under § 116.116(e)(2) of this title, an annual report shall be submitted to the appropriate regional office of the commission by August 1 of each year. The report shall include all changes made under § 116.116(e) during the immediately preceding annual period July 1-June 30. This reporting period and the due date may be changed with the agreement of the commission's regional office. The annual report shall contain a PI-E form for each change. The report need not include changes previously submitted by PI-E form to the commission under paragraphs (2) or (3) of this subsection or which have been incorporated into the permit for the facility.

(2) Post-change notification. Post-change notification shall be required for changes to qualified facilities for which there is intraplant trading below the reportable limit. The notification shall be submitted on a PI-E form to the commission's New Source Review Permits Division within 30 days after the change occurs.

(3) Pre-change notification only. Pre-change notification shall be required if a physical or operational change at a qualified facility will affect compliance with a permit special condition. The notice shall be made to the commission prior to the change. It shall identify the affected special condition and indicate the change needed or the desire to remove the special condition from the permit. The permit holder is relieved from complying with the permit special condition upon the filing of the notice, provided the change complies with § 116.116(e) of this title.

(4) Pre-change notification and approval. Pre-change notification shall be required for changes to qualified facilities for which there is intraplant trading above the reportable limit. The notification of the change shall be submitted on a PI-E form to the commission's New Source Review Permits Division before the change may occur. The change may occur after the receipt of written notification from the commission that there are no objections, or 45 days after the PI-E is received by the commission, whichever occurs first.

(5) Reportable limit. The executive director shall establish reportable limits. A reportable limit is either:

(A) an emission rate that is adjusted based on a factor that accounts for a ratio of the effects screening levels of the different compounds and the difference in location of emissions involved in an intraplant trade; or

(B) an emission rate that results in a sum total of modeled ground level concentration for the account that shall not exceed two times the effects screening level at any point off property.

(c) For facilities that have received a preconstruction permit, all changes for which the notification procedure of subsection (b) of this section has been used shall be incorporated into the permit when the permit is amended or renewed.

(d) Nothing in this section shall limit the applicability of any federal requirement.

Source: The provisions of this § 116. 117 adopted to be effective July 8, 1998, 23 TexReg 6973.

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30 TAC § 116.117, 30 TX ADC § 116.117

30 TX ADC § 116.117

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30 TAC § 116.118

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SUBCHAPTER B. NEW SOURCE REVIEW PERMITS
DIVISION 1. PERMIT APPLICATION

§ **116. 118.** Pre-change Qualification

(a) If either of the following conditions exists, it will be necessary to establish that a facility is a qualified facility before a physical or operational change may be made under the notification procedure of § 116.117 of this title (relating to Documentation and Notification of Changes to Qualified Facilities):

- (1) the facility is a qualified facility on the basis of best available control technology and the requirement for the facility type has not been previously established by the executive director; or
- (2) the facility does not have allowable emissions established for an air contaminant relevant to the change in a maximum allowable emissions rate table, PI-8 form, or PI-E form.

(b) The pre-change qualification shall be made by submitting a PI-E form to the commission's New Source Review Permits Division. The facility shall be qualified in accordance with the information contained in the PI-E form after receipt of written notification from the commission that there are no objections, or 45 days after the PI-E form is received by the commission, whichever occurs first. The pre-change qualification may be submitted at the same time as a pre-change notification under § 116.117(b) of this title or at any other time prior to making a change to a qualified facility.

Source: The provisions of this § **116. 118** adopted to be effective July 8, 1998, 23 TexReg 6973.

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30 TAC § 116.118, 30 TX ADC § 116.118

30 TX ADC § 116.118

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30 TAC § 116.610

Tex. Admin. Code tit. 30, § **116. 610**

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TEXAS ADMINISTRATIVE CODE
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PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION
SUBCHAPTER F. STANDARD PERMITS

§ **116. 610.** Applicability

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

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

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

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

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

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

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

(b) Any project that constitutes a new major stationary source or major modification as defined in § 116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) is subject to the requirements of § 116.110 of this title (relating to Applicability) rather than this subchapter.

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

(d) Any project involving a proposed affected source (as defined in § 116.15(1) of this title (relating to Section 112(g) Definitions)) shall comply with all applicable requirements under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 CFR Part 63)). Affected sources subject to Subchapter E of this chapter may use a standard permit under this subchapter only if the terms and conditions of the specific standard permit meet the requirements of Subchapter E of this chapter.

Source: The provisions of this § 116. 610 adopted to be effective May 4, 1994, 19 TexReg 3055; amended to be effective September 1, 1995, 20 TexReg 6324; amended to be effective April 19, 1996, 21 TexReg 3192; amended to be effective May 22, 1997, 22 TexReg 4242; amended to be effective July 8, 1998, 23 TexReg 6973; amended to be effective January 11, 2000, 25 TexReg 150; amended to be effective March 29, 2001, 26 TexReg 2398; amended to be effective February 1, 2006, 31 TexReg 515.

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30 TAC § 116.610, 30 TX ADC § 116.610

30 TX ADC § 116.610

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