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No. 10-60891

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUMINANT GENERATION CO. LLC, et al.,

Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

RESPONDENT EPA'S MERITS BRIEF

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US EPA ARCHIVE DOCUMENT

REQUEST FOR ORAL ARGUMENT

Respondent, United States Environmental Protection Agency ("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.

US EPA ARCHIVE DOCUMENT

TABLE OF CONTENTS

Page

JURISDICTION 1

ISSUES PRESENTED 1

STATEMENT OF THE CASE 1

I. Nature of the Case 1

II. Statutory and Regulatory Background 3

A. Clean Air Act Overview 3

B. New Source Review SIP Requirements 6

1. Major NSR SIP Requirements 6

2. Minor NSR SIP Requirements 8

C. The Texas Standard Permit for Pollution Control Projects 9

1. Background of Minor NSR and Pollution Control Projects . . . 9

2. The Standard Permit for Pollution Control Projects 20

3. EPA's Actions Disapproving the SPPCP 23

STANDARD OF REVIEW 29

SUMMARY OF THE ARGUMENT 31

ARGUMENT 32

US EPA ARCHIVE DOCUMENT

I. The States Do Not Have Unfettered Discretion With Respect to Minor NSR SIPs, ... 32

II. EPA Based Its Disapproval of the Pollution Control Project Standard Permit Based on the Clean Air Act and Associated Regulations Rather than the Terms of the Standard Permit Program 35

III. EPA Appropriately Determined that the SPPCP was not Approvable Under the Clean Air Act 39

A. The SPPCP Is Not Approvable Because It Does Not Relate To A Narrow Category Of Emission Sources 40

B. The SPPCP Is Not Approvable Because It Affords the Executive Director Too Much Discretion And Is Therefore Not Replicable . . 49

IV. EPA Consents to Vacatur and Remand of Its Disapproval of 30 TAC § 116.610(a) and (b) 55

V. If the Court Finds that EPA's Disapproval of the SPPCP was Arbitrary and Capricious, the Proper Remedy is Remand, not Ordering EPA to Approve the SPPCP 55

CONCLUSION 58

CERTIFICATE OF SERVICE 59

CERTIFICATE OF COMPLIANCE 59

US EPA ARCHIVE DOCUMENT

TABLE OF AUTHORITIES

FEDERAL CASES

Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S 461 (2004) 7

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 31

Camp v. Pitts, 411 U.S. 138 (1973) 57

Chemical Mfrs. Ass'n v. NRDC, Inc., 470 U.S. 116 (1985) 30

Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984) 30

CleanCOALition v. TXU Power, 536 F.3d 469 (5th Cir. 2008) 6

Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983) 4

Envtl. Def. v. Duke Energy Corp., 549 U.S. 561 (2007) 6

Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) (en banc) 30

Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17 (1952) 57

Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) 57

General Motors Corp. v. United States, 496 U.S. 530 (1990) 4

Lion Health Services, Inc. v. Sebelius, 635 F.3d 693 (5th Cir. 2011) 57

Louisiana Envtl. Action Network v. EPA, 382 F.3d 575 (5th Cir. 2004) 30

Michigan Dept. of Envtl. Quality v. Browner, 230 F.3d 181 (6th Cir. 2000) . . . 32

Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004) 56-58

Public Citizen, Inc. v. EPA, 343 F.3d 449 (5th Cir. 2003) 31

US EPA ARCHIVE DOCUMENT

Sierra Club v. TVA, 430 F.3d 1337 (11th Cir. 2005) 4

State of New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005) 19

Texas Oil & Gas Ass'n v. EPA, 161 F.3d 923 (5th Cir. 1998) 29-30

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 31

Train v. NRDC, Inc., 421 U.S. 60 (1975) 3, 32

Union Elec. Co. v . EPA, 427 U.S. 246 (1976) 32

Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990) 12

FEDERAL STATUTES

5 U.S.C. § 553 56

5 U.S.C. § 706(1) 56-58

5 U.S.C. § 706(2)(A) 29

42 U.S.C. §§ 7401-7671q 3

42 U.S.C. § 7407(d) 5

42 U.S.C. §§ 7408-09 3

42 U.S.C. § 7410 . . . . . 3, 31, 32

42 U.S.C. § 7410(a) 3

42 U.S.C. § 7410(a)(1) 3

42 U.S.C. § 7410(a)(2) . . . . . passim

US EPA ARCHIVE DOCUMENT

42 U.S.C. § 7410(a)(2)(A) 4

42 U.S.C. § 7410(a)(2)(C) 8, 28

42 U.S.C. § 7410(k) 3

42 U.S.C. § 7410(k)(1) 39

42 U.S.C. § 7410(k)(3) 28

42 U.S.C. § 7410(*l*) 5, 33

42 U.S.C. § 7411 . . . . . 19, 27

42 U.S.C. § 7411(a)(1) 11

42 U.S.C. § 7411(a)(2) 11

42 U.S.C. § 7411(a)(3) 10

42 U.S.C. § 7411(a)(4) 7, 11

42 U.S.C. § 7411(b)(1) 10

42 U.S.C. § 7412 . . . . . 19, 27

42 U.S.C. § 7413 4

42 U.S.C. § 7416 4

42 U.S.C. §§ 7470-7492 . . . . . 6, 11

42 U.S.C. § 7473 7

42 U.S.C. § 7475(a) 12

42 U.S.C. § 7475(a)(3) 7

US EPA ARCHIVE DOCUMENT

42 U.S.C. § 7475(a)(4) 7

42 U.S.C. § 7476 7

42 U.S.C. § 7479(1) 7

42 U.S.C. § 7479(2)(C) 7, 12

42 U.S.C. §§ 7501-7515 . . . . . 8, 11

42 U.S.C. § 7501(4) 12

42 U.S.C. § 7502 7

42 U.S.C. § 7502(b)(5) 12

42 U.S.C. § 7502(2)(5) 8

42 U.S.C. § 7503 . . . . . 7, 8

42 U.S.C. § 7602(j) 8

42 U.S.C. § 7607(b)(1) 1

42 U.S.C. §§ 7651-7651o 13

42 U.S.C. § 7661c(d) 45

FEDERAL REGULATIONS

40 C.F.R. Part 51 . . . . . 9, 29, 31, 37

40 C.F.R. §§ 51.160-51.164 8

40 C.F.R. § 51.160 . . . . . 9, 28, 36, 38

US EPA ARCHIVE DOCUMENT

40 C.F.R. § 51.160(a) 9, 33, 40

40 C.F.R. § 51.160(b) 9, 33, 40

40 C.F.R. § 51.161 36

40 C.F.R. § 51.165(a)(1)(iv) 8

40 C.F.R. § 51.166(b)(49)(iv) 7

40 C.F.R. § 52.21(b)(2)(i) 13

40 C.F.R. § 52.24(f)(5) 13

40 C.F.R. Part 60 . . . . . 11, 49

FEDERAL REGISTER NOTICES

57 Fed. Reg. 13,498 (April 16, 1992) . . . . . passim

57 Fed. Reg. 32,250 (Jul. 21, 1992) 13, 45, 53

57 Fed. Reg. 32,314 (Jul. 21, 1992) 13

61 Fed. Reg. 38,250 (Jul. 23, 1996) 16

67 Fed. Reg. 80,186 (Dec. 31, 2002) 16, 17

68 Fed. Reg. 40,865 (Jul. 9, 2003) 18, 38

68 Fed. Reg. 64,543 (Nov. 14, 2003) 17, 18, 19

74 Fed. Reg. 48,467 (Sep. 23, 2009) . . . . . passim

75 Fed. Reg. 6,309 (Feb. 9, 2010) 55

75 Fed. Reg. 56,424 (Sep. 15, 2010) . . . . . passim

US EPA ARCHIVE DOCUMENT

STATE STATUTES

Tex. Health & Safety Code § 382.051(b)(3) 48

Tex. Health & Safety Code § 382.05195(a) 48

STATE REGULATIONS

30 Tex. Admin. Code § 116.110(a) 20

30 Tex. Admin. Code § 116.601(a)(1) 17

30 Tex. Admin. Code § 116.601(a)(2) 17

30 Tex. Admin. Code § 116.601(b)-(e) 17

30 Tex. Admin. Code § 116.602 17

30 Tex. Admin. Code § 116.603 17

30 Tex. Admin. Code § 116.603(b) 17

30 Tex. Admin. Code § 116.604 17

30 Tex. Admin. Code § 116.605 17

30 Tex. Admin. Code § 116.606 17

30 Tex. Admin. Code § 116.610 17

30 Tex. Admin. Code § 116.610(a) 2, 31, 55, 56

30 Tex. Admin. Code § 116.610(b) 2, 20, 31, 55, 56

US EPA ARCHIVE DOCUMENT

30 Tex. Admin. Code § 116.611 . . . . . 17, 21, 52

30 Tex. Admin. Code § 116.611(a) 50

30 Tex. Admin. Code § 116.611(a)(4) 52

30 Tex. Admin. Code § 116.611(a)(1)-(6) 22

30 Tex. Admin. Code § 116.614 17

30 Tex. Admin. Code § 116.615 . . . . . 17, 22, 52

30 Tex. Admin. Code § 116.615(1)-(11) 22

30 Tex. Admin. Code § 116.617 . . . . . passim

30 Tex. Admin. Code § 116.617(a)(1) 20, 41

30 Tex. Admin. Code § 116.617(a)(2) 20

30 Tex. Admin. Code § 116.617(a)(3)(B) 21, 51, 54, 55

30 Tex. Admin. Code § 116.617(b)(2) 21

30 Tex. Admin. Code § 116.617(b)(1)(D) 21, 52

30 Tex. Admin. Code § 116.617(c) 52

30 Tex. Admin. Code § 116.617(d) 50, 53

30 Tex. Admin. Code § 116.617(d)(1)(A) 21, 50

30 Tex. Admin. Code § 116.617(d)(1)(B) 21, 50

30 Tex. Admin. Code § 116.617(d)(2)(A)-(F) 22

30 Tex. Admin. Code § 116.617(e)(1)-(2) 22

US EPA ARCHIVE DOCUMENT

30 Tex. Admin. Code § 116.617(1)(E) 15

30 Tex. Admin. Code § 116.617(2)(E) 15

30 Tex. Admin. Code § 116.620 . . . . . 17, 19

30 Tex. Admin. Code § 116.621 . . . . . 17, 19

TEXAS REGISTER NOTICES

19 Tex. Reg. 3,055 (Apr. 22, 1994) 15

22 Tex. Reg. 4,242 (May 13, 1997) 16

23 Tex. Reg. 6,973 (Jul. 3, 1998) 16

30 Tex. Reg. 3,040 (May 20, 2005) 16

31 Tex. Reg. 515 (Jan. 27, 2006) 10, 20

31 Tex. Reg. 545 (Jan. 27, 2006) 48

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

JURISDICTION

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

ISSUES PRESENTED

1. Whether Respondent EPA's action in disapproving a revision to Texas's Clean Air Act ("CAA" or the "Act") Minor New Source Review ("NSR") State Implementation Plan ("SIP") to include a Standard Permit for Pollution Control Projects ("SPPCP") was arbitrary and capricious where the SPPCP's applicability was not limited to a narrow set of emission sources and where the Texas Commission on Environmental Quality's Executive Director retained discretion to require changes to the terms applicable to individual projects.

STATEMENT OF THE CASE

I. Nature of the Case

This case combines three separate petitions for review. One petition was filed by Luminant Generation Co. LLC, Oak Grove Management Co. LLC, Big Brown Power Co. LLC, Luminant Mining Co. LLC, and Sandow Power Co. LLC (collectively "Luminant"). A second petition was brought by Texas Oil & Gas Association, Texas Association of Manufacturers, Texas Association of Business, and Chamber of Commerce of the United States of America. A third was filed by the State of Texas ("Texas"). The Texas Oil & Gas Association petitioners have

adopted the merits brief filed by Luminant by reference.

Petitioners challenge Respondent EPA's disapproval of Texas's Standard Permit for Pollution Control Projects ("SPPCP"), 30 TAC § 116.617, into Texas's Minor NSR SIP under the Clean Air Act. EPA had previously approved portions of Texas's general Minor New Source Review Standard Permit Program provisions as part of the Texas Minor NSR SIP, but not the provisions addressing the type of standard permit that includes the SPPCP. After the approval of the Texas Minor NSR Standard Permit Program SIP, EPA later disapproved the SPPCP because it was not applicable to a narrow group of homogenous sources and because the requirements of the SPPCP are not "replicable," that is, the Executive Director of the Texas Commission on Environmental Quality retained very broad discretion under the SPPCP to alter the terms of the standard permit in individual cases.

Petitioners also challenge EPA's disapproval of certain provisions of the Texas Standard Permit Program, specifically 30 TAC § 116.610(a) and (b). EPA concedes those claims and consents to a vacatur of the disapproval and to a remand to reconsider its disapproval of those provisions.

US EPA ARCHIVE DOCUMENT

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. Under Title I of the Clean Air Act, the EPA Administrator is charged with identifying air pollutants that endanger the public health and welfare and with formulating 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). For each pollutant, each State must draft a SIP that specifies emission limitations applicable to sources that pollute in the State and other measures necessary for the attainment, maintenance, and enforcement of the NAAQS. 42 U.S.C. § 7410(a). CAA section 110, 42 U.S.C. § 7410, contemplates that the measures necessary to attain the

US EPA ARCHIVE DOCUMENT

NAAQS will be applied to individual sources through the SIP prepared by each State, subject to EPA review and approval. *Id.*

SIP provisions must be enforceable as a practical matter in order for EPA to approve them. 42 U.S.C. § 7410(a)(2)(A). 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.

EPA has issued guidance relating to the interpretation of CAA section 110(a)(2), 42 U.S.C. § 7410(a)(2), which requires that SIPs include enforceable emissions and other control measures as necessary or appropriate to meet the CAA's requirements. "State Implementation Plans; General Preamble for the

US EPA ARCHIVE DOCUMENT

Implementation of Title I or the Clean Air Act Amendments of 1990," 57 Fed. Reg. 13,498 (April 16, 1992) ("General Preamble"). It lists four fundamental principles applicable to SIPs and the implementing instruments, including permits: the baseline emissions from the source and its control measure must be *quantifiable*; the measures applicable to a source must be *enforceable*; the measures applicable to a source must be *replicable*; and the source-specific limits must provide for *accountability*.

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 of the NAAQS, 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 areas within its boundaries as either meeting or not meeting the NAAQS for each pollutant. An area that meets the NAAQS for a particular pollutant is classified as an "attainment area;" one that does not is classified as a "nonattainment area." If there is insufficient available information to classify an area, EPA designates it as "unclassifiable." 42 U.S.C. § 7407(d). Because the classification is pollutant-specific, an area may be

US EPA ARCHIVE DOCUMENT

designated as "attainment" or "unclassifiable" for one pollutant and "nonattainment" for another.

B. New Source Review SIP Requirements

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 a nonattainment area for the given pollutant.

1. Major NSR SIP Requirements

For major sources in attainment/unclassifiable 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 Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 567-68 (2007) (concerning

US EPA ARCHIVE DOCUMENT

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 "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 Envtl. Conservation v. EPA*, 540 U.S 461, 468 (2004).

For nonattainment areas, major sources are subject to the more stringent nonattainment NSR program ("NNSR"), which applies to major new or modified sources of a pollutant for which the area is designated nonattainment. 42 U.S.C. §§ 7502, 7503. The purpose of the NNSR program is to improve air quality in areas

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[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).

US EPA ARCHIVE DOCUMENT

where it does not meet the applicable NAAQS. *Id*. at §§ 7501-7515. For NNSR, a new or modified 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. Minor NSR SIP Requirements

The CAA also includes requirements for other construction and modification activities that occur at stationary sources generally. EPA calls this program "Minor NSR," and it applies to construction and modification of sources that have the potential to emit an NSR-regulated pollutant below the major source thresholds of the PSD and NNSR programs, and to modifications at major stationary sources that fall below the significance level for each NSR-regulated pollutant. 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.

[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).

US EPA ARCHIVE DOCUMENT

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, or a "minor modification" of an existing major 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 sources subject to Minor NSR 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 of maintenance of a NAAQS. *Id.* at § 51.160(b). Collectively, the requirements of 40 C.F.R. § 51.160, § 51.161 ("Public availability of information"), and the general criteria of 40 C.F.R. Part 51, Appendix V, apply to SIP revisions. Furthermore, any minor NSR SIP revision is evaluated for the four fundamental SIP principles laid out in the General Preamble (quantifiability, enforceability, replicability, and accountability).

C. The Texas Standard Permit for Pollution Control Projects

1. Background of Minor NSR and Pollution Control Projects

These petitions for review challenge EPA's disapproval of Texas's "State Pollution Control Project Standard Permit" ("SPPCP"), 30 TAC § 116.617, into the Texas State Implementation Plan. The SPPCP would be part of the Texas

US EPA ARCHIVE DOCUMENT

Minor NSR SIP provisions if approved by EPA as a SIP revision. The current version of the proposed SPPCP was adopted by the Texas Commission on Environmental Quality ("TCEQ") to be effective February 1, 2006. 31 Tex. Reg. 515 (Jan. 27, 2006). Texas submitted this version of the SPPCP to EPA for approval as a SIP revision on February 1, 2006. EPA proposed to disapprove the SPPCP as part of the Texas Minor NSR SIP on September 23, 2009, 74 Fed. Reg. 48,467, 48,469, and ultimately did so on September 15, 2010. 75 Fed. Reg. 56,424.

The SPPCP was the culmination of a long line of Federal and State statutory and regulatory actions which began with the passage of the Clean Air Act in 1970. When first passed, the Clean Air Act included, among other provisions, a requirement that EPA publish a list of "categories of stationary sources," to be followed by the issuance of regulations "establishing Federal standards of performance for new sources within each category."[4/] 42 U.S.C. § 7411(b)(1). "New sources" were defined as those sources "the construction or modification" of which was begun after the issuance of the standards of performance, also known as

[4/] "Stationary source" is defined as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3).

US EPA ARCHIVE DOCUMENT

"New Source Performance Standards" ("NSPS").[5/] 42 U.S.C. § 7411(a)(2); 40 C.F.R. Part 60. The purpose was to subject new sources to stricter emission limitations than stationary sources existing as of 1970, in order to improve air quality in the future. Relevant to later developments was the definition of "modification" for purposes of NSPS, 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).

Although preconstruction permitting was required previously under the Act, PSD and the Nonattainment NSR provisions were codified in the 1977 Amendments to the Clean Air. As indicated above, Part C of Subchapter I of the Act relates to Prevention of Significant Deterioration of Air Quality (42 U.S.C. §§ 7470 - 7492), applying to attainment/unclassifiable areas, while Part D relates to New Source Review in areas not in attainment of the NAAQS. 42 U.S.C. §§ 7501 - 7515. The PSD provision states that no "major emitting facility" on which "construction is commenced" after August 1977 may be built except in compliance

[5/] These standards of performance were to reflect "the degree of emission limitation achievable through the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

US EPA ARCHIVE DOCUMENT

with PSD requirements. 42 U.S.C. § 7475(a). The definition of "construction" for purposes of the PSD program incorporates the NSPS definition of "modification" quoted above. 42 U.S.C. § 7479(2)(C). Similarly, the Nonattainment NSR provisions required EPA to establish a schedule to require States to submit SIP provisions that "require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area . . . ." 42 U.S.C. § 7502(b)(5). The Nonattainment NSR definition of "modifications" and "modified" also incorporated the NSPS definition of "modification." 42 U.S.C. § 7501(4). This definition of "modification," standing alone, was extremely broad: "Even at first blush, the potential reach of these modification provisions is apparent: the most trivial activities – the replacement of leaky pipes, for example – may trigger the modification provisions if the change results in an increase in the emissions of a facility." *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 905 (7th Cir. 1990) ("*WEPCO*").

In recognition of the breadth of the statutory definition, in the 1970s EPA defined "modification" in the NSPS and NSR regulations to exclude routine maintenance, repair and replacement, increases in the hours of operation or in the production rate (without an accompanying physical change or change in method of operation), and certain types fuel switches. *See* 57 Fed. Reg. 32,314, 32,316 (July

US EPA ARCHIVE DOCUMENT

21, 1992). The NSR regulations also provided that preconstruction review was required for sources undertaking a "major modification," that is, a physical change or change in operations "that would result in a significant net emissions increase of any pollutant subject to regulation under the CAA." *Id*.; 40 C.F.R. §§ 52.21(b)(2)(i), 52.24(f)(5).

In the 1990 Amendments to the CAA, Congress enacted Title IV, relating to acid rain. 42 U.S.C. §§ 7651-7651o. The acid rain program required utilities to comply with certain pollution reduction requirements. However, compliance with emissions control requirements sometimes results in collateral emissions increases of a different pollutant. This emissions increase could cause a source to undergo Major NSR review, which would have delayed timely compliance with the acid rain provisions. To avoid such delays, EPA amended its PSD and NNSR regulations in the "WEPCO" rulemaking in 1992 to add certain "pollution control projects" to the list of activities excluded from the definition of physical or operational changes, but only for electric utilities. EPA stated that it was essentially formalizing an existing policy under which it had been excluding individual PCPs from Major NSR where it found such projects to be "environmentally beneficial, taking into account ambient air quality." 57 Fed. Reg. at 32,320. In guidance issued in 1994, EPA stated that "[f]or several years, EPA has had a policy of excluding

US EPA ARCHIVE DOCUMENT

certain pollution control projects from the [major] NSR requirements . . . on a case-by-case basis." "Pollution Control Projects and New Source Review (NSR) Applicability," John S. Seitz, Director, OAQPS, July 1, 1994, at 1, Respondent's Appendix ("Res. App.") at App. 189. In offering guidance regarding PCP exclusions, EPA stated that (a) such projects must be environmentally beneficial; (b) where a significant collateral increase in emissions would occur as a result of the PCP, the permitting authority must evaluate any adverse effects on NAAQS, PSD increments, or air quality-related values; (c) sources would be required to obtain a determination from the permitting authority that the proposed project qualifies for an exclusion; and (d) the public had to be given an opportunity to review and comment. *Id*. at 3, Res. App. at App. 191. EPA further pointed out that any such PCP excluded from Major NSR must still comply with all otherwise applicable requirements under the CAA and the SIP, including minor source permitting. *Id.* at 4, Res. App. at App. 192. In fact, since EPA had not yet promulgated regulations governing a generally applicable provision excluding PCPs from Major NSR (except for utilities), sources were to receive case-by-case approval by the State/local authorized permitting authority pursuant to its Minor NSR SIP requirements, unless the source's change fell under an exception to the State/local Minor NSR SIP. *Id*. at 16, Res. App. at App. 204.

US EPA ARCHIVE DOCUMENT

In April 1994, the Texas Natural Resource Conservation Commission (now TCEQ) adopted a new Subchapter F to Chapter 116 ("Control of Air Pollution by Permits for New Construction or Modification") of the Texas Administrative Code. 19 Tex. Reg. 3055 (April 22, 1994). The new subchapter added provisions regarding two types of "Standard Permits" (which is the Texas term for "general permit"). Texas stated that "[t]he staff has supported standard permits as a means to reduce the backlog of permit applications that has continued to escalate in recent years. Agency staff resources are limited, and standard permits are designed to provide a streamlined review process for pollution reduction projects and for facility types which have been reviewed and permitted or exempted on a routine basis." *Id*. at 3056. Portions of the new Subchapter F set out applicability requirements and general conditions for standard permits. *Id*. at 3065. That SPPCP included one standard permit for "[i]nstallation of emissions control equipment or implementation of control techniques as required by any state or federal rule, standard, or regulation," and one for voluntary installation of control equipment. If the SPPCP was complied with, "[f]or purposes of compliance with the PSD and nonattainment new source review provisions of [the Clean Air Act] and regulations promulgated thereunder, any increase . . . shall not constitute a physical change or a change in the method of operation." 30 TAC § 116.617(1)(E), (2)(E) (1994

US EPA ARCHIVE DOCUMENT

version), 30 Tex. Reg. at 3064-65. TCEQ submitted this new Standard Permit Program, including the new SPPCP, to EPA for approval in 1994, but EPA did not immediately act on the request.[6/]

Meanwhile, in 1996, EPA proposed to extend the WEPCO PCP exclusion by regulation from utilities only to other sources for Major NSR modifications. 61 Fed. Reg. 38,250 (July 23, 1996). In 2002, EPA issued a final rule "that would exclude from major NSR permitting requirements certain work practices and the installation of qualifying pollution control and pollution prevention projects." 67 Fed. Reg. 80,186, 80,232 (December 31, 2002). EPA noted that its PCP final rule "closely paralleled our existing policy memorandum" (of July 1, 1994, described above) which extended the *WEPCO* PCP exclusion in place for utilities to all types of sources. "Pollution control project" was defined as "an activity, set of work practices, or project at an existing emissions unit that reduces emissions of air pollution from the unit." *Id*. The exclusion would be sought when the PCP reduces one pollutant while causing an increase in emissions of a different, "collateral" pollutant. Whether a PCP would be considered environmentally beneficial would be determined by comparison of the pre- and post-change actual emissions of the

[6/] Texas repealed and adopted a new 30 TAC § 116.617 in 1997 (22 Tex. Reg. 4242 (May 13, 1997)) and amended it in 1998 (23 Tex. Reg. 6972 (July 3, 1998)).

US EPA ARCHIVE DOCUMENT

collateral pollutant with the post-change decrease in the primary pollutant. *Id*. The effect of the rule would be to exclude the installation of qualifying PCPs from the definition of "physical or operational change" within the definition of "major modification" in the NSR regulations. *Id*. The regulation set out a list of PCP projects that would be presumed environmentally beneficial; for those not on the list, the source would be required to receive approval from the permitting authority on a case-by-case basis, with public comment. *Id*. at 80235. EPA cautioned that

> Although we fully support and encourage pollution prevention projects and strategies, special care must be taken in evaluating a pollution prevention project for the PCP exclusion. Pollution prevention projects tend to be dependent on site-specific factors and lack an historical record of performance, which proves problematic in deciding whether they are environmentally beneficial when applied universally.

67 Fed. Reg. at 80,235.

On November 14, 2003, EPA approved portions of Texas's Standard Permit Program as part of the Texas NSR SIP. 68 Fed. Reg. 64,543.[7/] The portion of the

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[7/] The provisions approved were § 116.601(a)(2) and (b) – (e), Types of Standard Permits; § 116.602, Issuance of Standard Permits; § 116.603, Public Participation in Issuance of Standard Permits; § 116.604, Duration and Renewal of Registrations to Use Standard Permits; § 116.605, Standard Permit Amendment and Revocation; § 116.606, Delegation; § 116.610, Applicability; § 116.611, Registration to Use a Standard Permit; § 116.614, Standard Permit Fees; and § 116.615, General Conditions. 68 Fed. Reg. at 64,546. EPA did not approve 30 TAC § 116.601(a)(1), providing for the adoption of a standard permit by TCEQ under the Texas Government Code, Chapter 2001, Subchapter B, into 30 TAC §§ 116.617, 116.620, and 116.621. These three sections refer respectively to Standard Permits for Pollution Control Projects, Installation and/or

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US EPA ARCHIVE DOCUMENT

Standard Permit Program approved by EPA essentially supplies the general provisions of Texas standard permits, and includes standard permits issued by TCEQ after public participation, while the portion *not* approved by EPA includes the particular type of standard permits that would be adopted by TCEQ under the Texas Government Code (such as the SPPCP, 30 TAC § 116.617), which are found in separate sections of Subchapter F. *See* Footnote 7. EPA noted in the proposed approval and in the final action that the Standard Permit Program's provisions provide for a streamlined mechanism for approving the construction of certain sources within categories that contain numerous similar sources. 68 Fed. Reg. 40,865, 40,869 (July 9, 2003); 68 Fed. Reg. 64,543, 64,546 (November 14, 2003). The Standard Permit Program approved by EPA as part of the Texas Minor NSR SIP is not available to a facility or group of facilities undergoing a change constituting a new major source or major modification under the PSD or nonattainment NSR provisions; such facilities would be required to comply with Texas's NSR SIP permitting rules. *Id.* at 64,546. EPA determined that the provisions of the Standard Permit Program it was approving were appropriate for inclusion into the SIP because, among other things, new major sources or

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[7/](...continued)
Modification of Oil and Gas Facilities; and Municipal Solid Waste Landfills.

US EPA ARCHIVE DOCUMENT

modifications were required to proceed under the Major NSR permitting regime; sources qualifying for a Standard Permit must comply with all provisions of 42 U.S.C. §§ 7411 (NSPS) and 7412 (hazardous air pollutants); it included requirements such as recordkeeping; and provided for public notice and comment. 68 Fed. Reg. at 64,546-47. However, as discussed above, EPA did not approve the type of standard permit that is adopted by TCEQ under the Texas Government Code (as opposed to through public notice and comment), and therefore did not take action on three standard permits proposed by Texas, including § 116.617, the Standard Permit for Pollution Control Projects, § 116.620 (Installation and/or Modification of Oil and Gas Facilities), and § 116.621 (Municipal Solid Waste Landfills). 68 Fed. Reg. at 64,547.

In 2005, the United States Court of Appeals for the District of Columbia Circuit, in *State of New York v. EPA*, 413 F.3d 3, 40-42 (D.C. Cir. 2005), held that EPA did not have authority under the Clean Air Act to exempt PCPs from the definition of "modification" for purposes of Major NSR, and therefore vacated the 1992 *WEPCO* rule and the 2002 rulemaking that extended the pollution control project exemption from NSR to all major sources.

US EPA ARCHIVE DOCUMENT

2. The Standard Permit for Pollution Control Projects

In 2006, Texas amended the SPPCP to limit it to Minor NSR, and submitted it to EPA for approval as a SIP revision. 31 Tex. Reg. 515 (Jan. 27, 2006). 30 TAC § 116.110(a) provides that "before any actual work is begun on the facility, any person who plans to construct any new facility or engage in the modification of any existing facility which may emit air contaminants" must either obtain a permit, or, among other options, satisfy the requirements for a Standard Permit. The minor NSR SPPCP (§116.617) applies to "pollution control projects" undertaken voluntarily or as required by "any governmental standard," that "reduce or maintain currently authorized emission rates for facilities authorized by a permit, standard permit, or permit by rule." § 116.617(a)(1). The SPPCP was no longer available for new major stationary sources or major modifications that would be subject to PSD and Nonattainment requirements. § 116.610(b).

A PCP may include the installation or replacement of emissions control equipment, the implementation of or change to control techniques, or the substitution of compounds used in manufacturing processes. § 116.617(a)(2). The SPPCP will not authorize the use of a control technique for which "the executive director determines there are health effects concerns or the potential to exceed a [NAAQS] criteria pollutant or contaminant that results from an increase in

US EPA ARCHIVE DOCUMENT

emissions of any air contaminant until those concerns are addressed by the registrant to the satisfaction of the executive director . . . .” § 116.617(a)(3)(B).

Many PCP projects would qualify for a “notice and go” procedure. If there are “no increases in authorized emissions of any air contaminant” from a replacement PCP project, the registration may be submitted to TCEQ up to thirty days *after* construction or implementation begins. § 116.617(d)(1)(A). If it is a new control device or technique, or there are increases in authorized emissions resulting from the PCP, the registration must be submitted no less than thirty days *before* the commencement of construction or implementation. § 116.617(d)(1)(B). In the latter case, construction or implementation may begin only after either no response from the executive director has been received within thirty days following submission to TCEQ, or the executive director has issued a written acceptance of the registration. § 116. 617(d)(1)(B)(i), (ii). The construction or implementation must begin within 18 months after receiving written acceptance of the registration from the executive director. § 116.617(b)(2).

Pursuant to § 116.617(b)(1)(D), an SPPCP registration must comply with the requirements of § 116.611, which states that a registration must document the basis of emission estimates; quantify all emission increases and decreases; provide sufficient information to show that the project will not constitute an NSR major

US EPA ARCHIVE DOCUMENT

new source or major modification; describe efforts to minimize collateral emissions; describe the project and related process; and identify any equipment being installed. § 116.611(a)(1) – (6). Section 116.617 itself states that the SPPCP registration must include a description of the process units affected; a description of the project; identification of affected existing permits or registrations; "quantification and basis of increases and/or decreases associated with the project, including identification of affected existing or proposed emission points, all air contaminants, and hourly and annual emission rates"; a description of proposed monitoring and recordkeeping to show that the project decreases or maintains emission rates; and a description of how the standard permit will be incorporated into existing permits. § 116.617(d)(2)(A) – (F). After installation of the PCP, the owner/operator must operate it in a manner consistent with good industry and engineering practices in a way to minimize emissions of collateral pollutants, and maintain records on site to show compliance with the requirements. § 116.617(e)(1) – (2).

The SPPCP is subject to the "general conditions" of § 116.615, which include protection of public health and welfare, a requirement that the PCP be constructed in accordance with the registration, construction progress and notification provisions, recordkeeping, and compliance with all rules. § 116.615(1)

US EPA ARCHIVE DOCUMENT

– (11).

3. EPA's Actions Disapproving the SPPCP

On September 23, 2009, EPA proposed disapproval of the SPPCP submitted by TCEQ on February 1, 2006, "because it does not meet the requirements for a minor NSR SIP revision." 74 Fed. Reg. 48,467.

EPA first noted that "any submitted SIP revision must meet the applicable SIP regulatory requirements and the requirements for SIP elements in section 110 of [CAA], and be consistent with applicable statutory and regulatory requirements." *Id*. at 48,471. Citing EPA's 1992 "General Preamble," EPA identified "four fundamental principles for the relationship between the SIP and any implementing instruments . . .":

> These four principles as applied to the review of a major or minor NSR SIP revision include: (1) The baseline emissions from a permitted source be quantifiable; (2) the NSR program be enforceable by specifying clear, unambiguous, and measurable requirements, including a legal means for ensuring the sources are in compliance with the NSR program, and providing a means to determine compliance; (3) the NSR program's measures be replicable by including sufficient specific and objective provisions so that two independent entities applying the permit program's procedures would obtain the same result; and (4) the major NSR permit program be accountable, including means to track emissions at sources resulting from the issuance of permits and permit amendments.

74 Fed. Reg. at 48,471.

EPA stated that it proposed to disapprove the SPPCP " because it does not

US EPA ARCHIVE DOCUMENT

meet the SIP requirements for Minor NSR . . . ." *Id.* at 48,467. In reaching that proposed conclusion, EPA said that a "Standard Permit" under the Texas Standard Permit Program "provides a streamlined mechanism with all permitting requirements for construction and operation of certain sources in categories that contain numerous similar sources," but is not a "case-by-case minor NSR SIP permit." *Id.* at 48,476. Therefore, "each minor NSR SIP Standard Permit must contain all terms and conditions on the face of it (combined with the SIP general requirements) and it cannot be used to address site-specific determinations." *Id.* EPA went on to state that:

> This particular type of minor NSR permit is required to be applicable to narrowly defined categories of emission sources rather than a category of *emission types*. A Standard Permit is a minor NSR permit limited to a particular narrowly defined source category for which the permit is designed to cover and cannot be used to make site-specific determinations that are outside the scope of this type of permit.

Id.; emphasis in original. EPA cited oil and gas facilities, asphalt concrete plants and concrete batch plants as examples of "narrowly defined categories of emission sources." *Id.* at n. 10. EPA also listed a number of EPA guidance documents and Federal Register notices regarding action on other SIP revisions, indicating that the guidance documents set out specific guidelines, including "(1) General permits apply to a specific and narrow category of sources, (2) For sources electing

US EPA ARCHIVE DOCUMENT

coverage under general permits where coverage is not mandatory, provide notice or reporting to the permitting authority . . ., (3) General permits provide specific and technically accurate (verifiable) limits that restrict potential to emit, [and] (4) General permits contain specific compliance requirements . . . ." *Id*., at n. 11.

EPA expressed concern about the overly broad nature of the definition of "pollution control project," which leads to a lack of clarity in determining what type of project might qualify for the permit. *Id*. at 48,476. EPA further noted that "the new PCP Standard Permit is a generic permit that applies to numerous types of pollution control projects, which can be used at *any* source that wants to use a PCP. The definition in this Standard Permit for what is a PCP is overly broad." *Id*. (emphasis in original).

Another concern raised by EPA was that the SPPCP "is designed for case-by-case additional authorization, source-specific review, and source-specific technical determinations." *Id*. EPA said that "[a]n individual Standard Permit must be limited to a single source category, which consists of numerous similar sources that can meet standardized permit conditions." *Id*.

Finally, EPA observed that "[t]here are no replicable conditions in the PCP Standard Permit that specify how the [TCEQ Executive] Director's discretion is to be implemented for the individual determinations. Of particular concern is the

US EPA ARCHIVE DOCUMENT

provision that allows for the exercise of the Executive Director's discretion in making case-specific determinations in individual cases in lieu of generic enforceable requirements." *Id.* In addition, EPA stated that the SPPCP was not the appropriate vehicle for case-by-case establishment of recordkeeping and monitoring requirements, "because it requires the Executive Director to make case-by-case determinations and to establish case specific terms and conditions for the construction or modification of each individual PCP that are outside the terms and conditions in the PCP Standard Permit." *Id.*

EPA received numerous comments on its proposed disapproval, including from the BCCA Appeal Group (AR 2073-2488), Texas Industrial Project (AR 2489-2904), Association of Electric Companies of Texas, Inc. (AR 2905-12), the Electric Reliability Coordinating Council (AR 2913-29), Texas Chemical Council (AR 2943-70), TCEQ (AR 2971-79), Texas Association of Business (AR 2983-96), and from the Environmental Clinic, University of Texas at Austin School of Law (AR 3001-3289).

On September 15, 2010, EPA issued its final rule. 75 Fed. Reg. 56,424. Among other actions, the Agency stated that it was "disapproving the submitted Standard Permit (SP) for Pollution Control Projects (PCP) because it does not meet the requirements of the CAA for a minor NSR Standard Permit program." *Id.*

US EPA ARCHIVE DOCUMENT

Specifically, EPA noted that "[b]ecause of the lack of replicable standardized permit conditions and the lack of enforceability, the PCP Standard Permit is not the appropriate vehicle for authorizing PCPs." *Id*. at 56,444. EPA explained that it had approved the Texas Standard Permits Program ("SPP") in 2003, finding then that the SPP "was adequate to protect the NAAQS and reasonable further progress (RFP) and was enforceable."[8/] *Id*. at 56,444. EPA said that one of the primary reasons the Standard Permits Program was enforceable was "that these types of Minor NSR permits were to be issued for similar sources." The issuance of a Minor NSR permit for similar sources "eliminates the need for a case-by-case review and evaluation to ensure that the NAAQS and RFP are protected and the permit is enforceable." *Id*.

Another reason EPA found that the Standard Permits Program (as opposed to the SPPCP) was enforceable was that it ensured that the terms and conditions of an individual standard permit would be "replicable." *Id*. "This is a key component

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[8/] EPA stated that it approved the SPP, because, among other things "the submitted rules required the following: (1) No major stationary source or major modification subject to part C or part D of the Act could be issued a standard permit; (2) sources qualifying for a standard permit are required to meet all applicable requirements under section 111 of the Act [42 U.S.C. § 7411] (NSPS), section 112 of the Act [42 U.S.C. § 7412] (NESHAPS and MACT), and the TCEQ rules (this includes the Texas SIP control strategies); (3) sources have to register their emissions with the TCEQ and this registration imposes an enforceable emissions limitation; (4) maintenance of records sufficient to demonstrate compliance with all the permit's conditions; and (5) periodic reporting of the nature and amounts of emissions necessary to determine whether a source is in compliance." 75 Fed. Reg. at 56,444.

US EPA ARCHIVE DOCUMENT

for the EPA authorization of a generic preconstruction permit. Replicable methodologies eliminate any director discretion issues." *Id*.

EPA stated that it had approved the Standard Permit Program in 2003 "based on the statutory and regulatory requirements, including section 110 of the Act [42 U.S.C. § 7410], in particular section 110(a)(2)(C), and 40 CFR 51.160, which require EPA to determine that the State has adequate procedures in place in the submitted Program to ensure that construction or modification of sources will not interfere with attainment of" a NAAQS or Reasonable Further Progress. 75 Fed. Reg. at 56,445. When the TCEQ Executive Director retains the authority to exercise discretion in the evaluation of each SPPCP permit holder's impact on air quality, "this undermines EPA's rationale for approving the Texas Standard Permits Program as part of the Texas Minor NSR SIP." *Id.*

EPA said that it "reviews a SIP revision submission for its compliance with the [Clean Air] Act and EPA regulations," citing 42 U.S.C. § 7410(k)(3). *Id*. at 56,447. In summary, EPA stated that it was disapproving the SPPCP because, "as adopted and submitted by Texas to EPA for approval into the Texas Minor NSR SIP, [it] does not meet the requirements of the Texas Minor NSR Standard Permits Program. It does not apply to similar sources. Because it does not apply to similar sources, it lacks the requisite replicable standardized permit terms specifying how

US EPA ARCHIVE DOCUMENT

the Director's discretion is to be implemented for the case-by-case determinations." *Id*.

As part of the documentation supporting its final rule, EPA prepared a "Technical Support Document ("TSD"), AR 32-13, Res. App. at App. 1-82. In that document, EPA stated that it had proposed to disapprove the SPPCP, along with other submissions, "as not meeting the Minor NSR SIP requirements . . . . We have evaluated the SIP submissions for whether they meet the Act and 40 CFR Part 51 and are consistent with EPA's interpretation of the relevant provisions. Based upon our evaluation, EPA has concluded that each of the six portions of the SIP revision submittals [including the SPPCP] does not meet the requirements of the Act and 40 CFR Part 51." AR 34-35, Res. App. at App. 3-4.

STANDARD OF REVIEW

In order to prevail on the merits, Petitioners must show that EPA's final action on the SPPCP 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

US EPA ARCHIVE DOCUMENT

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

US EPA ARCHIVE DOCUMENT

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).

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*.

SUMMARY OF THE ARGUMENT

Petitioners challenge EPA's disapproval of the State of Texas's Standard Permit for Pollution Control Projects, 30 TAC § 116.617 as a SIP revision. As we demonstrate, EPA's disapproval was based on the inconsistency of the SPPCP with section 110 of the Clean Air Act, 42 U.S.C. § 7410, 40 C.F.R. Part 51 regulations regarding Minor NSR SIPs, and long-standing EPA guidance and interpretation. The SPPCP was not approvable as a general permit because it was not sufficiently enforceable, in that it did not apply to sufficiently similar sources. In addition, it was not replicable, because of the discretion given TCEQ's Executive Director to cause changes in the terms of the SPPCP.

Because the present administrative record does not support EPA's disapproval of 30 TAC § 116.610(a) and (b) into the Texas Minor NSR SIP, EPA

US EPA ARCHIVE DOCUMENT

consents to vacatur and remand of its disapproval of those provisions.

Finally, in the event that the Court reverses EPA's action in disapproving the SPPCP, the appropriate remedy is remand, not an order of the Court requiring WPA to approve the SPPCP into the Texas Minor NSR SIP.

ARGUMENT

I. THE STATES DO NOT HAVE UNFETTERED DISCRETION WITH RESPECT TO MINOR NSR SIPS

Throughout their briefs, Petitioners suggest that States have virtually unlimited discretion in the design and implementation of minor source programs and that EPA's role in its review of SIPs is so minimal as to be virtually meaningless. However, while 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 Envtl. Quality v. Browner*, 230 F.3d 181, 185 (6th Cir. 2000). Accordingly, EPA may not defer to a State's discretion in determining whether to approve a requested SIP revision. Instead, EPA must first assure that it meets the minimum standards for approval.

As the Petitioners acknowledge, section 110 of the Clean Air Act, 42 U.S.C. § 7410, is the criterion upon which a SIP revision must be judged. Luminant Brf.,

US EPA ARCHIVE DOCUMENT

at 24. 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*). In addition, 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). Under EPA's implementing regulations, 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. 40 C.F.R. § 51.160(a), (b).

EPA's interpretation of some of the CAA SIP requirements is relevant here. For example, in 1987, EPA published a memorandum entitled "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency," J. Craig Potter, EPA Assistant Administrator for Air and Radiation, September 23, 1987. AR 1907-17 ("1987 Enforceability Memorandum"), Res. App. at App. 178-88. EPA said that SIP regulations must be clear and enforceable: "SIP revisions should be written clearly, with explicit language to implement their intent." *Id.* at 4, AR 1910, App. 181. The rules must be clear as to whom they apply and include

US EPA ARCHIVE DOCUMENT

a description of the types of affected facilities. *Id.* at 7, AR 1913, App. 184. With respect to recordkeeping, SIPs must identify explicitly those records that sources are required to keep to assess compliance, the records must be commensurate with regulatory requirements, and the SIP should specify the reporting formats. *Id.* at 9, AR 1916, App. 187.

In 1992, EPA published the General Preamble. The primary purpose for the General Preamble was to provide the public with advance notice of how EPA generally intended to interpret various requirements and associated issues that have arisen under Title I of the 1990 CAA Amendments. EPA has continued to rely upon it to guide States and help ensure that the States submit approvable NSR SIP revisions. In the General Preamble, EPA set forth fundamental principles that apply to SIPs and control strategies and which features SIPs and permits must include. 57 Fed. Reg. at 13,567-68. EPA's interpretation of CAA section 110(a)(2), 42 U.S.C. 7410(a)(2), as given expression in the General Preamble, requires that SIPs include enforceable emissions limits and other control measures as necessary or appropriate to meet the CAA's requirements. The four fundamental principles applicable to SIPs and the implementing instruments, including permits, include that the baseline emissions from the source and its control measures must be quantifiable; the measures applicable to a source must be enforceable; the

US EPA ARCHIVE DOCUMENT

measures applicable to a source must be replicable; and the source-specific limits must provide for accountability.

EPA explained that measures are enforceable when they are "duly adopted, and specify clear, unambiguous, and measurable requirements." 57 Fed. Reg. at 13,568. EPA further stated that in order to be enforceable, a SIP must contain "a legal means for ensuring that the sources are in compliance with the control measures[,] . . . [and a] regulatory limit is not enforceable if, for example, it is impractical to determine compliance with the published limit." *Id.* Another fundamental principle key to the development of effective control strategies is that a measure be replicable. "This means that where a rule contains procedures for changing the rule, interpreting the rule, or determining compliance with the rule, the procedures are sufficiently specific and nonsubjective so that two independent entities applying the procedures would obtain the same result." *Id.* The control strategy must also be accountable. Among other things, this means that the SIP must contain means "to track emission changes at sources and provide for corrective action if emissions reductions are not achieved according to the plan." *Id.* These principles apply to all SIPs and control strategies.

US EPA ARCHIVE DOCUMENT

II. EPA BASED ITS DISAPPROVAL OF THE POLLUTION CONTROL PROJECT STANDARD PERMIT ON THE CLEAN AIR ACT AND ASSOCIATED REGULATIONS RATHER THAN ON THE TERMS OF THE STANDARD PERMIT PROGRAM

Both Luminant (Luminant Brf. at 27-31) and Texas (Texas Brf. at 20-23) argue that EPA's final rule must be overturned in part because EPA's analysis was supposedly based upon a finding that the terms of the SPPCP were in conflict with the terms of the SIP-approved Standard Permit Program, as opposed to the requirements of the Clean Air and associated regulations. However, a review of the EPA proposed disapproval, the Technical Support Document, and the final rule all make it evident that EPA's action was based on the requirements of the CAA and regulations, as well as a lengthy and consistent history of EPA's interpretation of CAA requirements. In fact, EPA based its disapproval on the program's failure to comply with section 110(a)(2) of the CAA, 42 U.S.C. § 7410(a)(2), and on EPA's regulatory requirements contained in 40 C.F.R. §§ 51.160 – .161.

Thus, in the proposal, EPA stated that it proposed "to disapprove the [SPPCP] as not meeting the Minor NSR SIP requirements." 74 Fed. Reg. at 48,469. "We have evaluated the SIP submissions for whether they meet the [Clean Air] Act and 40 CFR Part 51, and are consistent with EPA's interpretation of the relevant provisions." *Id*. In addition, "any submitted SIP revision must meet the

US EPA ARCHIVE DOCUMENT

applicable SIP regulatory requirements and the requirements for SIP elements in section 110 of the [Clean Air] Act, and be consistent with applicable statutory and regulatory requirements. *Id*. at 48,471. The relevant principles for SIP approvals (*i.e.*, quantification of baseline emissions, enforceability, replicability, and accountability) were derived from the EPA's General Preamble to the NSR regulations, 57 Fed. Reg. 13,498, cited at 74 Fed. Reg. at 48,471-72, and in various guidance documents such as the 1987 Enforceability Memorandum. The guidance documents and Federal Register notices listed in the proposal all relate to EPA's interpretation of various provisions of the Clean Air Act. *Id*. at 48,476, n. 11.

EPA stated in the Technical Support Document that "[w]e have evaluated the SIP submissions for whether they meet the Act and 40 CFR Part 51, and are consistent with EPA's interpretation of the relevant provisions. Based upon our evaluation, EPA has concluded that each of the six portions of the SIP revision submittals [including the SPPCP] does not meet the requirements of the Act and 40 CFR Part 51. Therefore, each portion of the State submittals is not approvable." AR 34-35.

Similarly, in the final rule disapproving the SPPCP as a SIP revision, EPA stated that it was "disapproving the submitted [SPPCP] because it does not meet the requirements of the CAA for a minor NSR Standard Permit program." 75 Fed. Reg. at 56,424. It reiterated that it had approved the Standard Permit Program in

US EPA ARCHIVE DOCUMENT

2003 based on the consistency of those general permit provisions with the Clean Air Act.[9/] *Id*. at 56,443-44. *See also id.* at 56,445 ("Our approval of the Texas Standard Permit Program as part of the Texas Minor NSR SIP was based on the statutory and regulatory requirements, including Section 110 of the Act, in particular section 110(a)(2)(C) and 40 CFR 51.160 . . . ."). EPA acknowledged that it "reviews a SIP submission for its compliance with the Act and EPA regulations." *Id*. at 56,447.

The final rule does include statements such as "EPA is disapproving the submitted Minor NSR Standard Permit for Pollution Control Project SIP revisions because the PCP Standard Permit, as adopted and submitted by Texas to EPA for approval into the Texas Minor NSR SIP, does not meet the requirements of the Texas Minor NSR Standard Permits Program." *Id*. at 56,447. However, in the context of the entire text of EPA's proposed and final rules, including the plain statements quoted above showing that EPA was acting pursuant to the terms of the Clean Air Act and its regulations, it is evident that the basis for the decision was not inconsistency between the SPP and the SPPCP themselves. Instead, EPA acted pursuant to its authority and obligations under CAA section 110(a) and EPA's implementing regulations.

[9/] *See* 68 Fed. Reg. 40,865, 40,870 (July 9, 2003): "Texas' Standard Permits are approvable as meeting the provisions of 40 CFR Subpart I – Review of New Sources and Modifications . . . ."

US EPA ARCHIVE DOCUMENT

III. EPA APPROPRIATELY DETERMINED THAT THE SPPCP WAS NOT APPROVABLE UNDER THE CLEAN AIR ACT

Petitioners wrongly allege that the requirement that standard permits apply to similar sources has no statutory or regulatory basis, and therefore that EPA acted outside the authority of the Clean Air Act in disapproving the SPPCP. In fact, EPA explained that it disapproved the SPPCP because a general permit as part of a Minor SIP should be limited to a narrow group of emission sources and should be replicable and enforceable. These requirements are rooted in the language of the Clean Air Act, associated regulations, and long-standing EPA interpretation.

Section 110(k)(1) of the Clean Air Act, 42 U.S.C. § 7410(k)(1), required EPA to promulgate provisions that a SIP must include before EPA will approve it as meeting the Clean Air Act. The CAA also requires that the State must assure that the emission control strategies will be implemented and enforced as required by Section 110(a)(2) of the Act, 42 U.S.C. § 7410(a)(2).

EPA's regulations relating to Minor NSR SIPs state that "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 . . . will result in a violation of applicable portions of the control strategy . . . or interfere . . . with attainment or maintenance of a national standard . . . ." 40 C.F.R. § 51.160(a). The SIP must also include "means" by

US EPA ARCHIVE DOCUMENT

which the State or local agency "will prevent such construction or modification." 40 C.F.R. § 51.160(b).

As discussed in the proposed disapproval (74 Fed. Reg. at 48,471), EPA's General Preamble set forth a number of fundamental principles to guide EPA's evaluation of various NSR SIP provisions. One of those principles was that of "enforceability." "Measures are enforceable when they are duly adopted, and specify clear, unambiguous and measurable requirements." 57 Fed. Reg. at 13,567. A second principle is that of "accountability." "This means, for example, that source-specific limits should be permanent and must reflect assumptions used in SIP demonstrations." *Id*. In addition, the program's measures must be "replicable," with sufficiently "specific and nonsubjective" provisions such that two independent entities applying the provisions would come to the same result. *Id*.

A. The SPPCP Is Not Approvable Because It Does Not Relate To A Narrow Category Of Emission Sources.

The SPPCP applies to a wide variety of emission sources that propose to undertake pollution control projects. It applies "to pollution control projects undertaken voluntarily or as required by any government standard, that reduce or maintain currently authorized emission rates for facilities authorized by a permit, standard permit, or permit by rule." 30 TAC § 116.617(a)(1). The SPPCP is a

US EPA ARCHIVE DOCUMENT

"generic permit that applies to numerous types of pollution control projects, which can be used at *any* source that wants to use a PCP." 74 Fed. Reg. at 48,476 (emphasis in original). For example, a permit might apply to a refinery that adds an incinerator to destroy volatile organic compound emissions, or to a manufacturer that adds a binding agent to a coagulation process to speed up polymerization. In finding that the definition of PCP was overly broad, EPA was concerned that it could be used by any source that claimed it was undertaking a PCP, and that such claims, in the absence of a more delineated definition, should be subject to case-by-case review.

In proposing disapproval of the SIP revision, EPA stated that "[t]his particular type of minor NSR permit is required to be applicable to narrowly defined categories of emission standards rather than a category of emission *types*." *Id.* (emphasis in original). In the final rule, EPA stated that "[t]he issuance of a Minor NSR permit for similar sources eliminates the need for case-by-case review and evaluation to ensure that the NAAQS and [reasonable forward progress] are protected and the permit is enforceable." 75 Fed. Reg. at 56,444. The SPPCP as a control strategy applies to a wide variety of emission sources. Therefore, the SPPCP is not accountable because it does not provide specific limits that eliminate the need for individual permit review.

In response, Petitioners state that federal law does not include a requirement

US EPA ARCHIVE DOCUMENT

that general permits be applied to categories of similar sources (Luminant Brf. at 32, 42-43; Texas Brf. at 36-42) and that the SPPCP does apply to "similar sources" in any case (Luminant Brf. at 36-37; Texas Brf. at 25). Neither objection is valid. This is because EPA properly ties the requirement that general permits be limited to similar sources to CAA section 110(a)(2) requirements that control measures be enforceable. Unless the program is enforceable, EPA cannot be assured that the claimed emissions reductions will be achieved in practice.

In the proposed disapproval, EPA again pointed to a number of guidance documents and Federal Register notices that bear on these points. 74 Fed. Reg. at 48,476, n. 11. In the final rulemaking, EPA stated that "[t]he memoranda cited in the proposal were cited for the purpose of providing documentary evidence of how EPA has exercised its discretionary authority when reviewing general permit programs similar to the Texas Standard Permits SIP. They also collectively provide an historical perspective on how EPA has exercised its discretion in reviewing regulatory schemes similar to the submitted PCP Standard Permit." 75 Fed. Reg. at 56,447. EPA acknowledges that the cited guidance documents and Federal Register notices do not specifically concern Minor NSR general permits regarding pollution control projects, but they elucidate principles appropriately considered by EPA in its disapproval.

For example, the importance of the principle of enforceability in the

US EPA ARCHIVE DOCUMENT

development of effective SIP control strategies is shown in the guidance document entitled "Approaches to Creating Federally-Enforceable Emissions Limits," John S. Seitz, November 3, 1993, AR 1886-93, Res. App. at App. 170-77. That guidance concerns methods of establishing enforceable emission limits through standardized protocols, and notes that "such protocols could be relied upon to create federally-enforceable limitations on potential to emit if adopted through rulemaking and approved by EPA. Although such an approach is appropriate for only a limited number of source categories, these categories include large numbers of sources, such as dry cleaners, auto body shops, gas stations, printers, and surface coaters." AR 1890, App. 174. This is an example of the utility of limiting the number of sources which may be subject to emission limitations in a general permit. The SPPCP does not have such a limitation. As noted in EPA's proposed disapproval, "the new PCP Standard Permit is a generic permit that applies to numerous types of pollution control projects, which can be used at *any* source . . . ." 74 Fed. Reg. at 48,476 (emphasis in original). This is also in accord with the principle for the SIP and associated implementing measures, including permits, that rules must be replicable. Unless the rules provide for case-by-case EPA approval as SIP revisions, then the rules must contain standardized protocols, *i.e.*, replicable procedures for establishing emission limits.

In "Guidance on Enforceability Requirements for Limiting Potential to Emit

US EPA ARCHIVE DOCUMENT

Through SIP and § 112 Rules and General Permits," Kathie A. Stein, Director, Air Enforcement Division, EPA Office of Enforcement and Compliance Assurance, January 25, 1995, AR 1873, Res. App. at App. 157, EPA noted that "[a] general permit is a single permit that establishes terms and conditions that must be complied with by all sources subject to that permit. The establishment of a general permit could provide for emission limitations in a one-time permitting process, and thus avoid the need to issue separate permits for each source."[10/] *Id*., at AR 1874, App. 158. This guidance memorandum references general permits "covering numerous similar sources" established pursuant to Title V of the Clean Air Act, which governs operating permits. AR 1876, App. 160.

Title V provides in part that the "permitting authority may, after notice and opportunity for public hearing, issue a general permit covering *numerous similar sources*." 42 U.S.C. § 7661c(d) (emphasis supplied). The Stein memorandum cites EPA's Federal Register notice setting forth the final rules for the Title V operating permit program:

> In setting criteria for sources to be covered by general permits, States should consider all of the following factors . . . First, categories of

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[10/] This guidance memorandum is concerned with limiting "potential to emit" for sources. Potential to emit ("PTE") of a facility is a concept which has application to whether a source is considered "major" or not for NSR purposes. A "synthetic minor source" is one in which the source has a potential to emit more pollutants than the threshold between major and minor status, but chooses to limit its emissions to an amount below that threshold. The guidance states that "there is no reason that a State or local agency could not submit a general permit program as a SIP submittal aimed at creating synthetic minor sources." AR 1874.

US EPA ARCHIVE DOCUMENT

> sources covered by a general permit should be generally homogenous in terms of operations, processes, and emissions. All sources in the category should have essentially similar operations or processes and emit pollutants with similar characteristics. Second, sources should not be subject to case-by-case standards or requirements. For example, it would be inappropriate under a general permit to cover sources requiring case-by-case MACT determinations. Third, sources should be subject to the same or substantially similar requirements governing operation, emissions, monitoring, reporting, or recordkeeping.

57 Fed. Reg. 32,250, 32,278 (July 21, 1992), *cited* by EPA at AR 1876, Res. App. at App. 160. Examples of narrow source categories listed in the Title V notice include degreasers, dry cleaners, small heating systems, sheet fed printers, and volatile organic compound storage tanks. 57 Fed. Reg. at 32,279.

The Stein memorandum stated that "[r]ules and general permits designed to limit potential to emit must be specific as to the emission units or sources covered by the rule or permit. In other words, the rule or permit must clearly identify the category(ies) of sources that qualify for the rule's coverage. The rule must apply to categories of sources that are defined specifically or narrowly enough so that specific limits and compliance monitoring techniques can be identified and achieved by all sources in the categories defined." AR 1879, App. 163. Thus, a rule establishing a general permit "must apply to a specific and narrow category of sources . . . ." AR 1883, App. 167. This is consistent with the 1987 Enforceability Memorandum's concern that SIP rules be clear and enforceable.

These materials demonstrate that EPA has historically found that a general

US EPA ARCHIVE DOCUMENT

permit should be applicable to a narrow category of sources. This interpretation is consistent with the basic premise of general permits: that the category of sources permitted is similar enough that rules of general applicability may be fairly applied to those within that category to produce terms and conditions that can be enforced without further individualized action. To the extent that the sources are dissimilar, a general permit is not appropriate. In addition, while the public is entitled to notice and comment regarding the issuance of the general permit itself, *see* 30 TAC § 116.603(b), it is not granted opportunity to comment on each individual application of the general permit. When a general permit applies to sufficiently similar sources, meaningful public participation can be provided on the issuance of that general permit because the emissions limitations, monitoring methods, and compliance obligations may be stated with specificity. Conversely, the PCP Standard Permit program lacks this level of clarity because the appropriate emissions limitations, monitoring, and compliance obligations will necessarily vary because the program is not limited to similar sources.

While first arguing that there is no "similar source" requirement for minor NSR source general permits, Luminant and Texas both claim that if there was such a requirement, the category of Pollution Control Projects would suffice. Luminant states that SPPCPs are limited to a "reasonable and practical" category, that of pollution control projects. Luminant Brf. at 36. Citing various provisions of the

US EPA ARCHIVE DOCUMENT

Texas Standard Permit Program and 30 TAC § 116.617, Luminant argues that the PCP Standard Permit cannot be used to completely replace an existing production facility or reconstruction of a production facility; the PCPs permitted by the Standard Permit result in emission reductions; involve limited minor collateral increases in other pollutants; have no adverse health effects or potential to exceed NAAQS; and comply with particular standard limitations from the Standard Permit Program. Luminant Brf. at 36-37. Texas makes a like argument. "Pollution control projects certainly share a likeness in that they are all meant to control pollution. They are uniquely environmentally beneficial." Texas Brf. at 25. Texas also claims that the PCPs subject to the SPPCP are "similar" because they are all minor sources; do not include the replacement or modification of production facilities; and do not include projects that return a non-compliant facility to compliance unless specifically authorized. *Id.* at 25-27. Texas also asserts that because TCEQ stated (31 Tex. Reg. at 545) that the SPPCP was adopted pursuant to V.T.C.A. Health and Safety Code §§ 382.051(b)(3) (authorizing TCEQ to issue "a standard permit for similar facilities") and 382.05195(a) (TCEQ "may issue a standard permit for new or existing similar facilities"), it necessarily determined that pollution control projects covered by the SPPCP are "similar facilities." Texas Brf. at 27.

These arguments do not obscure the fact that the SPPCP may be used at any

US EPA ARCHIVE DOCUMENT

source that wants to use a pollution control project. The issue is not whether certain extrinsic limitations may be included within the SPPCP, such as a prohibition on replacing a production facility, or overall limits on the quantity of emissions, but that different types of pollution control projects (which may range from installation of equipment, to production process changes, to changes in materials used) require different types of enforceable controls.[11/] In such a situation, unless limited to similar sources, case-by-case analysis is more appropriate. This is particularly so since the structure of the SPPCP calls essentially for the applicant to determine emission limitations, and, in a major category of activities, allows the project to go forward before submitting a registration.

In summary, EPA has consistently interpreted the Clean Air Act and regulations to require that general permits be limited to "similar sources," because such a limitation is necessary to meet the CAA section 110(a)(2) requirement that control measures be enforceable. The only significant similarity in the sources that

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[11/] For example, individual source categories may include fossil fuel-fired steam electric generation plants, combined cycle gas turbine facilities, refineries, oil and gas production plants, asphalt concrete plants, and batch concrete plants. These types of plants are designed to produce specific products or render specific services, use specific types and amounts of raw materials that must meet industry-defined characteristics necessary to produce a desired product that meets specified industry quality standards, employ specific types or process equipment that is designed to produce a desired product, and that emit different amounts and types of air pollutants requiring different types of emission control techniques to reduce emissions of each pollutant. An example of different types of source categories is found in the NSPS regulations, 40 C.F.R. Part 60, in which EPA has promulgated standards of performance for over 70 different source categories.

US EPA ARCHIVE DOCUMENT

could have applied for a SPPCP is the amount of emissions allowed and that a pollution control project is involved. EPA reasonably determined that the SPPCP was not approvable under CAA section 110(a)(2), 42 U.S.C. § 7410(a)(2) or the minor NSR regulatory requirements as a result.

B. The SPPCP Is Not Approvable Because It Affords the Executive Director Too Much Discretion And Is Therefore Not Replicable.

One of the primary principles for approvable NSR SIPs is that of "replicability." "This means that where a rule contains procedures for changing the rule, interpreting the rule, or determining compliance with the rule, the procedures are sufficiently specific and nonsubjective so that two independent entities applying the procedures would obtain the same result." General Preamble, 57 Fed. Reg. at 13,568; 74 Fed. Reg. at 48,471-2 (SPPCP proposed disapproval).

Application of the SPPCP is initiated by the submission of a "registration." 30 TAC §§ 116.611(a), 116.617(d). If there are no increases in authorized emissions of an air pollutant, the registration may be submitted up to thirty days after commencement of the project; otherwise, it must be submitted at least thirty days before commencement. 30 TAC § 116.617(d)(1)(A), (B). The SPPCP is not available if "the executive director determines there are health effects concerns or the potential to exceed a national ambient air quality standard criteria pollutant or contaminant that results from an increase in emissions of any air contaminant until

US EPA ARCHIVE DOCUMENT

those concerns are addressed by the registrant to the satisfaction of the executive director . . . .” § 116.617(a)(3)(B).

In its proposed disapproval of the SPPCP, EPA noted that there are no replicable conditions in the SPPCP “that specify how the Director’s discretion is to be implemented for the individual determinations. Of particular concern is the provision that allows for the exercise of the Executive Director’s discretion in making case-specific determinations in individual cases in lieu of generic enforceable requirements. Because EPA approval will not be required in each individual case, specific replicable criteria must be set forth in the Standard Permit establishing equivalent emission rates and ambient impact.” 74 Fed. Reg. at 48,476. The Executive Director’s ability to exercise discretion in evaluating each SPPCP holder’s impact on air quality “undermines EPA’s rationale for approving the Texas Standard Permits Program as part of the Texas Minor NSR SIP. Under the SIP, any case-by-case determination must be made through the vehicle of the case-by-case Minor NSR SIP Permit, not using a Minor NSR SIP Standard Permit as the vehicle.” 75 Fed. Reg. at 56,445. In addition, “[b]ecause of the broad type of source categories covered by the PCP Standard Permit, this Standard Permit lacks replicable standardized permit conditions specifying how the Director’s discretion is to be implemented for the individual determinations, *e.g.*, the air quality determination, the controls, and even the monitoring, recordkeeping, and

US EPA ARCHIVE DOCUMENT

reporting." *Id.*, at 56,444. As EPA explained in the General Preamble, replicability is one of the general principles a control measure must observe to assure that planned emissions reductions will actually be achieved. 57 Fed. Reg. at 13,568.

In response, Luminant cites the requirements of the Standard Permit Program and the SPPCP, including registration information requirements set forth in 30 TAC § 116.611 applicable to all Texas Standard Permits, registration requirements specific to PCPs under § 116.617, and general conditions imported into the SPPCP from § 116.615. Luminant Brf. at 37-42. Luminant concludes that the EPA finding that the Executive Director's discretion is too broad, is not accurate, and that without evidence to the contrary, EPA should assume that TCEQ would enforce State regulations. *Id.* at 41-42.

Texas states that even if there is a replicability requirement, the SPPCP satisfies it because it includes many standardized conditions, many incorporated by reference from the SIP-approved Standard Permit Program. Texas Brf. at 30. As examples, Texas cites documentation of actions taken to minimize collateral emissions (30 TAC § 116.617(b)(1)(D), incorporating § 116.611(a)(4)), requirements regarding PCPs that are replacement projects (§ 116.617(c)) and regarding registrations (§ 116.617(d)). In addition, Texas argues that the SPPCP does not allow the Executive Director discretion to make site-specific or case-by-

US EPA ARCHIVE DOCUMENT

case determinations. Texas Brf. at 31. It states that the SPPCP only gives the Executive Director discretion to disallow use of the SPPCP on the determination that there is a potential for adverse health effects or interference with NAAQS. "Far from interfering with the NAAQS, this narrowly drawn discretion safeguards compliance with the NAAQS. Accordingly, the PCP Standard Permit does not give the Executive Director too much discretion." *Id*. at 32.

It should be noted first that EPA did not approve the portion of the general provisions in Texas's Standard Permit Program that provides for standard permits to be adopted by TCEQ pursuant to the Texas Government Code, which includes the SPPCP. These types of standard permits adopted under the State's Code include the SPPCP. While the Standard Permit Program's rules and the SPPCP do list certain information to be contained within the registration for a pollution control project standard permit, and there are other general conditions and requirements imported into the SPPCP through the Standard Permit Program, it remains the case that the Executive Director has authority to ultimately modify the terms of the SPPCP by making determinations of "health effects concerns" or "the potential to exceed a [NAAQS] criteria pollutant or contaminant that results from an increase in emissions of any air contaminant." 30 TAC § 116.617(a)(3)(B). If such a determination is made, the SPPCP is not available "until those concerns are addressed by the registrant to the satisfaction of the executive director." *Id*. This

US EPA ARCHIVE DOCUMENT

provision does not limit the discretion of the Executive Director to ultimately alter the terms of the SPPCP in individual cases to a narrowly defined set of circumstances. Health effects "concerns" or "potential to exceed" provide a subjective standard and potentially unlimited opportunity for the Executive Director's authority to ultimately cause a change in the terms each pollution control project must meet. As stated in the preamble to the Title V operating permit rules with regard to general permits, "sources should not be subject to case-by-case standards or requirements [and] should be subject to the same or substantially similar requirements governing operation, emissions, monitoring, reporting, or recordkeeping." 57 Fed. Reg. at 32,278. This lack of replicability is particularly important because the very rationale for the existence of general permits, to avoid expense and expenditure of time and administrative resources, is undermined when such discretion is retained. It is also critical because the public is not provided a right to notice or to comment on the application of the SPPCP in particular cases.

EPA does not dispute the existence of provisions in the Standard Permit Program and the SPPCP itself that provide some measure of uniformity. However, neither Luminant nor Texas can explain away the discretion granted to the Executive Director through 30 TAC § 116.617(a)(3)(B). Replicability is a material consideration relief upon by EPA in determining whether the SPPCP is approvable

US EPA ARCHIVE DOCUMENT

into the Texas Minor NSR SIP pursuant to the requirements of Section 110 of the Clean Air Act.[12/]

IV. EPA CONSENTS TO VACATUR AND REMAND OF ITS DISAPPROVAL OF 30 TAC § 116.610(a) AND (b)

In its brief, Texas challenges EPA's disapproval of revisions to 30 TAC § 116.610(a) and (b). Texas Brf., at 44-51. That regulation is entitled "Applicability." EPA disapproved the submitted SIP revision in the final rulemaking, 75 Fed. Reg. at 56,427, but concedes that it did not provide a rationale for the disapproval. Because the present administrative record does not provide a basis upon which the Court could uphold EPA's action, EPA, consents to vacatur of its disapproval of 30 TAC § 116.610(a) and (b) and remand to the Agency for reconsideration.

V. IF THE COURT FINDS THAT EPA'S DISAPPROVAL OF THE SPPCP WAS ARBITRARY AND CAPRICIOUS, THE PROPER REMEDY IS REMAND, NOT ORDERING EPA TO APPROVE THE

[12/] In its brief, Luminant notes that EPA recently approved a revision into Georgia's SIP, exempting PCPs from permitting requirements as long as the project is minor. 75 Fed. Reg. 6,309 (February 9, 2010). Luminant Brf., at 34-35. EPA's approval of Georgia's revision is consistent with its disapproval of the Texas SPPCP revision because, unlike the Texas SIP revision, the Georgia revision specifically defined "environmentally beneficial activity" and limited its applicability to "similar" projects that consisted of a selected number of projects specified in the regulation. In addition, the Georgia revision ensures replicability by providing that only in very limited sets of circumstances may enforcement action be taken, specifically only to rebut the presumption that selected projects are environmentally beneficial. Thus, the Georgia SIP revision does not permit the director to make case-specifi determinations regarding emissions limits, but only to determine project eligibility for the PCP exemption. This revision allows only a "gate-keeping" role for the Georgia director, and not customization of emissions limits.

US EPA ARCHIVE DOCUMENT

SPPCP

As a remedy, Luminant argues that, pursuant to § 706(1) of the Administrative Procedure Act, the Court should compel EPA to approve 30 TAC § 116.617 and related provisions into the Texas Minor NSR SIP. It also seeks an order of this Court, pursuant to § 553(d) of the Administrative Procedure Act, to issue the requested rule retroactive to an effective date no later than August 1, 2007 (eighteen months after TCEQ last submitted the SPPCP provisions to EPA for approval). Luminant Brf. at 51-55.

Section 706(1) of the APA states in part that "[t]he reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed . . . ." Luminant states that "[c]ompelling EPA to approve is warranted in this case because . . . when applying the correct statutory criteria, EPA has no basis to disapprove," citing *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

Pursuant to the Administrative Procedure Act, the ordinary remedy in the event the agency's action cannot be sustained is remand back to the Agency. As the Supreme Court stated in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985), "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply

US EPA ARCHIVE DOCUMENT

cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *See also Camp v. Pitts*, 411 U.S. 138, 143 (1973) ("If [the agency's] finding is not sustainable on the administrative record made, then [the agency's] decision must be vacated and the matter remanded to [the agency] for further consideration."); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Lion Health Services, Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011).

Luminant also misinterprets the *Norton v. Southern Utah Wilderness Alliance* case itself. In that case, the Supreme Court stated that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." 542 U.S. at 64 (emphasis in original). However, the Supreme Court went on to state that "The limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law . . . .Thus, when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but it has no power to specify what the action must be." *Id*. at 65. This is a similar case. Luminant claims that the duty is to act on the SIP revision request. It is undisputed that EPA has done

US EPA ARCHIVE DOCUMENT

so; the manner in which it carried out that action is the subject of this petition for review. Section 706(1) of the APA is therefore not a vehicle through which the Court may order EPA to take a particular substantive action.

Since the Court may not order EPA to take any particular action, the Court need not reach Luminant's extraordinary request to make EPA's future action on the SPPCP retroactive.

CONCLUSION

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

Respectfully submitted,

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US EPA ARCHIVE DOCUMENT

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US EPA ARCHIVE DOCUMENT

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 6th day of June, 2011. Any other counsel of record will be served by first class U.S. mail on this same day.

s/ Daniel Pinkston

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 13,269 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Daniel Pinkston

ADDENDUM

Citation

5 U.S.C. § 553

5 U.S.C. § 706

42 U.S.C. § 7410

42 U.S.C. § 7411

42 U.S.C. § 7413

42 U.S.C. § 7416

42 U.S.C. § 7475

42 U.S.C. § 7479

42 U.S.C. § 7501

42 U.S.C. § 7502

42 U.S.C. § 7503

42 U.S.C. § 7607

42 U.S.C. § 7661c

40 C.F.R. § 51.160 - 51.164

40 C.F.R Part 51, Appendix V

57 Fed. Reg. 13,498

57 Fed. Reg. 32,250

US EPA ARCHIVE DOCUMENT

61 Fed. Reg. 53,633

62 Fed. Reg. 2,587

67 Fed. Reg. 80,186

68 Fed. Reg. 40,865

68 Fed. Reg. 64,543

71 Fed. Reg. 5,979

71 Fed. Reg. 14,439

74 Fed. Reg. 48,467

75 Fed. Reg. 6,309

75 Fed. Reg. 56,424

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Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 5. Administrative Procedure (Refs & Annos)
Subchapter II. Administrative Procedure (Refs & Annos)

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

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(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

Current through P.L. 112-13 approved 5-12-11

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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.)

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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

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(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

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(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

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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).

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(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

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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-

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Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)

§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" 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.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means--

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(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 792(a)] or any amendment thereto, or any subsequent enactment which supersedes such Act [15 U.S.C.A. § 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii) of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

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(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

(c) State implementation and enforcement of standards of performance

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority--

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

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In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

(e) Prohibited acts

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(f) New source standards of performance

(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) of this section before November 15, 1990, and for which regulations had not been proposed by the Administrator by November 15, 1990, the Administrator shall--

(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after November 15, 1990;

(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after November 15, 1990; and

(C) propose regulations for the remaining categories of sources within 6 years after November 15, 1990.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider--

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

(g) Revision of regulations

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(1) Upon application by the Governor of a State showing that the Administrator has failed to specify in regulations under subsection (f)(1) of this section any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations to specify any such category.

(2) Upon application of the Governor of a State, showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) of this section contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2) of this section, the Administrator shall revise the list under subsection (b)(1)(A) of this section to apply properly such criteria.

(4) Upon application of the Governor of a State showing that--

(A) a new, innovative, or improved technology or process which achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources, and

(B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated,

the Administrator shall revise such standard of performance for such category accordingly.

(5) Unless later deadlines for action of the Administrator are otherwise prescribed under this section, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either--

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(6) Before taking any action required by subsection (f) of this section or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

(h) Design, equipment, work practice, or operational standard; alternative emission limitation

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(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the provisions of this chapter (other than the provisions of subsection (a) of this section and this subsection).

(i) Country elevators

Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

(j) Innovative technological systems of continuous emission reduction

(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing,

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that--

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial likelihood that such system or systems will achieve greater continuous emission reduction than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure--

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 7413 of this title.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of con-

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tinuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of--

(i) the date determined by the Administrator, after consultation with the owner or operator of the source, taking into consideration the design, installation, and capital cost of the technological system or systems being used, or

(ii) the date on which the Administrator determines that such system has failed to--

(I) achieve at least an equivalent continuous emission reduction to that required to be achieved under the standards of performance which would otherwise apply, or

(II) comply with the condition specified in paragraph (1)(A)(iii),

and that such failure cannot be corrected.

(E) In carrying out subparagraph (D)(i), the Administrator shall not permit any waiver for a source or portion thereof to extend beyond the date--

(i) seven years after the date on which any waiver is granted to such source or portion thereof, or

(ii) four years after the date on which such source or portion thereof commences operation,

whichever is earlier.

(F) No waiver under this subsection shall apply to any portion of a source other than the portion on which the innovative technological system or systems of continuous emission reduction is used.

(2)(A) If a waiver under paragraph (1) is terminated under clause (ii) of paragraph (1)(D), the Administrator shall grant an extension of the requirements of this section for such source for such minimum period as may be necessary to comply with the applicable standard of performance under this section. Such period shall not extend beyond the date three years from the time such waiver is terminated.

(B) An extension granted under this paragraph shall set forth emission limits and a compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize

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emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and section 7413 of this title.

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(July 14, 1955, c. 360, Title I, § 111, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1683, and amended Nov. 18, 1971, Pub.L. 92-157, Title III, § 302(f), 85 Stat. 464; Aug. 7, 1977, Pub.L. 95-95, Title I, § 109(a)-(d)(1), (e), (f), Title IV, § 401(b), 91 Stat. 697 to 703, 791; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(7) to (9), 91 Stat. 1399; Nov. 9, 1978, Pub.L. 95-623, § 13(a), 92 Stat. 3457; Nov. 15, 1990, Pub.L. 101-549, Title I, § 108(e) to (g), Title III, § 302(a), (b), Title IV, § 403(a), 104 Stat. 2467, 2574, 2631.)

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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)

§ 7413. Federal enforcement

(a) In general

(1) Order to comply with SIP

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may, without regard to the period of violation (subject to section 2462 of Title 28)--

(A) issue an order requiring such person to comply with the requirements or prohibitions of such plan or permit,

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action in accordance with subsection (b) of this section.

(2) State failure to enforce SIP or permit program

Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator shall so notify the State. In the case of a permit program, the notice shall be made in accordance with subchapter V of this chapter. If the Administrator finds such failure extends beyond the 30th day after such notice (90 days in the case of such permit program), the Administrator shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan or permit program (hereafter referred to in this section as “period of federally assumed enforcement”), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by--

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(A) issuing an order requiring such person to comply with such requirement or prohibition,

(B) issuing an administrative penalty order in accordance with subsection (d) of this section, or

(C) bringing a civil action in accordance with subsection (b) of this section.

(3) EPA enforcement of other requirements

Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under those provisions or subchapters, or for the payment of any fee owed to the United States under this chapter (other than subchapter II of this chapter), the Administrator may--

(A) issue an administrative penalty order in accordance with subsection (d) of this section,

(B) issue an order requiring such person to comply with such requirement or prohibition,

(C) bring a civil action in accordance with subsection (b) of this section or section 7605 of this title, or

(D) request the Attorney General to commence a criminal action in accordance with subsection (c) of this section.

(4) Requirements for orders

An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation and specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers. An order issued under this subsection shall require the person to whom it was issued to comply with the requirement as expeditiously as practicable, but in no event longer than one year after the date the order was issued, and shall be nonrenewable. No order issued under this subsection shall prevent the State or the Administrator from assessing any penalties nor otherwise affect or limit the State's or the United States authority to enforce under other provisions of this chapter, nor affect any person's obligations to comply with any section of this chapter or with a term or condition of any permit or ap-

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plicable implementation plan promulgated or approved under this chapter.

(5) Failure to comply with new source requirements

Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may--

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies; [FN1]

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action under subsection (b) of this section.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

(b) Civil judicial enforcement

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both, in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. Such an action shall be commenced (A) during any period of federally assumed enforcement, or (B) more than 30 days following the date of the Administrator's notification under subsection (a)(1) of this section that such person has violated, or is in violation of, such requirement or prohibition.

(2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter).

(3) Whenever such person attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

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Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant's principal place of business is located, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States under this chapter (other than subchapter II of this chapter) and any noncompliance assessment and nonpayment penalty owed under section 7420 of this title, and to award any other appropriate relief. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable.

(c) Criminal penalties

(1) Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) of this section by the Administrator that such person is violating such requirement or prohibition), any order under subsection (a) of this section, requirement or prohibition of section 7411(e) of this title (relating to new source performance standards), section 7412 of this title, section 7414 of this title (relating to inspections, etc.), section 7429 of this title (relating to solid waste combustion), section 7475(a) of this title (relating to preconstruction requirements), an order under section 7477 of this title (relating to preconstruction requirements), an order under section 7603 of this title (relating to emergency orders), section 7661a(a) or 7661b(c) of this title (relating to permits), or any requirement or prohibition of subchapter IV-A of this chapter (relating to acid deposition control), or subchapter VI of this chapter (relating to stratospheric ozone control), including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or subchapters, and including any requirement for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter) shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not to exceed 5 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(2) Any person who knowingly--

(A) makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this chapter to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State);

(B) fails to notify or report as required under this chapter; or

(C) falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this chapter [FN2]

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shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more than 2 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(3) Any person who knowingly fails to pay any fee owed the United States under this subchapter, subchapter III, IV-A, V, or VI of this chapter shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(4) Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(5)(A) Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $1,000,000 for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

(B) In determining whether a defendant who is an individual knew that the violation placed another person in imminent danger of death or serious bodily injury--

(i) the defendant is responsible only for actual awareness or actual belief possessed; and

(ii) knowledge possessed by a person other than the defendant, but not by the defendant, may not be attributed to the defendant;

except that in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information.

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(C) It is an affirmative defense to a prosecution that the conduct charged was freely consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of--

(i) an occupation, a business, or a profession; or

(ii) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subparagraph by a preponderance of the evidence.

(D) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subparagraph (A) of this paragraph and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(E) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(F) The term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(6) For the purpose of this subsection, the term "person" includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.

(d) Administrative assessment of civil penalties

(1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person--

(A) has violated or is violating any requirement or prohibition of an applicable implementation plan (such order shall be issued (i) during any period of federally assumed enforcement, or (ii) more than thirty days following the date of the Administrator's notification under subsection (a)(1) of this section of a finding that such person has violated or is violating such requirement or prohibition); or

(B) has violated or is violating any other requirement or prohibition of this subchapter or subchapter III, IV-A, V, or VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver,

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permit, or plan promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter); or

(C) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

(2)(A) An administrative penalty assessed under paragraph (1) shall be assessed by the Administrator by an order made after opportunity for a hearing on the record in accordance with sections 554 and 556 of Title 5. The Administrator shall issue reasonable rules for discovery and other procedures for hearings under this paragraph. Before issuing such an order, the Administrator shall give written notice to the person to be assessed an administrative penalty of the Administrator's proposal to issue such order and provide such person an opportunity to request such a hearing on the order, within 30 days of the date the notice is received by such person.

(B) The Administrator may compromise, modify, or remit, with or without conditions, any administrative penalty which may be imposed under this subsection.

(3) The Administrator may implement, after consultation with the Attorney General and the States, a field citation program through regulations establishing appropriate minor violations for which field citations assessing civil penalties not to exceed $5,000 per day of violation may be issued by officers or employees designated by the Administrator. Any person to whom a field citation is assessed may, within a reasonable time as prescribed by the Administrator through regulation, elect to pay the penalty assessment or to request a hearing on the field citation. If a request for a hearing is not made within the time specified in the regulation, the penalty assessment in the field citation shall be final. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence. Payment of a civil penalty required by a field citation shall not be a defense to further enforcement by the United States or a State to correct a violation, or to assess the statutory maximum penalty pursuant to other authorities in the chapter, if the violation continues.

(4) Any person against whom a civil penalty is assessed under paragraph (3) of this subsection or to whom an administrative penalty order is issued under paragraph (1) of this subsection may seek review of such assessment in the United States District Court for the District of Columbia or for the district in which the violation is alleged to have occurred, in which such person resides, or where such person's principal place of business is located, by filing in such court within 30 days following the date the administrative penalty order becomes final under paragraph (2), the assessment becomes final under paragraph (3), or a final decision following a hearing under paragraph (3) is rendered, and by simultaneously sending a copy of the filing by certified mail to the Administrator

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and the Attorney General. Within 30 days thereafter, the Administrator shall file in such court a certified copy, or certified index, as appropriate, of the record on which the administrative penalty order or assessment was issued. Such court shall not set aside or remand such order or assessment unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. Such order or penalty assessment shall not be subject to review by any court except as provided in this paragraph. In any such proceedings, the United States may seek to recover civil penalties ordered or assessed under this section.

(5) If any person fails to pay an assessment of a civil penalty or fails to comply with an administrative penalty order--

(A) after the order or assessment has become final, or

(B) after a court in an action brought under paragraph (4) has entered a final judgment in favor of the Administrator,

the Administrator shall request the Attorney General to bring a civil action in an appropriate district court to enforce the order or to recover the amount ordered or assessed (plus interest at rates established pursuant to section 6621(a)(2) of Title 26 from the date of the final order or decision or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such order or assessment shall not be subject to review. Any person who fails to pay on a timely basis a civil penalty ordered or assessed under this section shall be required to pay, in addition to such penalty and interest, the United States enforcement expenses, including but not limited to attorneys fees and costs incurred by the United States for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be 10 percent of the aggregate amount of such person's outstanding penalties and nonpayment penalties accrued as of the beginning of such quarter.

(e) Penalty assessment criteria

(1) In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. The court shall not assess penalties for noncompliance with administrative subpoenas under section 7607(a) of this title, or actions under section 7414 of this title, where the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action.

(2) A penalty may be assessed for each day of violation. For purposes of determining the number of days of violation for which a penalty may be assessed under subsection (b) or (d)(1) of this section, or section 7604(a) of this title, or an assessment may be made under section 7420 of this title, where the Administrator or an air pollu-

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tion control agency has notified the source of the violation, and the plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

(f) Awards

The Administrator may pay an award, not to exceed $10,000, to any person who furnishes information or services which lead to a criminal conviction or a judicial or administrative civil penalty for any violation of this subchapter or subchapter III, IV-A, V, or VI of this chapter enforced under this section. Such payment is subject to available appropriations for such purposes as provided in annual appropriation Acts. Any officer, or employee of the United States or any State or local government who furnishes information or renders service in the performance of an official duty is ineligible for payment under this subsection. The Administrator may, by regulation, prescribe additional criteria for eligibility for such an award.

(g) Settlements; public participation

At least 30 days before a consent order or settlement agreement of any kind under this chapter to which the United States is a party (other than enforcement actions under this section, section 7420 of this title, or subchapter II of this chapter, whether or not involving civil or criminal penalties, or judgments subject to Department of Justice policy on public participation) is final or filed with a court, the Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing. The Administrator or the Attorney General, as appropriate, shall promptly consider any such written comments and may withdraw or withhold his consent to the proposed order or agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of this chapter. Nothing in this subsection shall apply to civil or criminal penalties under this chapter.

(h) Operator

For purposes of the provisions of this section and section 7420 of this title, the term “operator”, as used in such provisions, shall include any person who is senior management personnel or a corporate officer. Except in the case of knowing and willful violations, such term shall not include any person who is a stationary engineer or technician responsible for the operation, maintenance, repair, or monitoring of equipment and facilities and who often has supervisory and training duties but who is not senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of subsection (c)(4) of this section, the term “a person” shall not include an employee who is carrying out his normal activities and who is not a part of senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of paragraphs (1), (2), (3), and (5) of subsection (c) of this section the term “a person” shall not include an employee who is carrying out his normal activities and who is acting under orders from the employer.

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(July 14, 1955, c. 360, Title I, § 113, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1686, and amended Nov. 18, 1971, Pub.L. 92-157, Title III, § 302(b), (c), 85 Stat. 464; June 22, 1974, Pub.L. 93-319, § 6(a)(1) to (3), 88 Stat. 259; Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 111, 112(a), 91 Stat. 704, 705; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(10) to (21), (b)(1), 91 Stat. 1400, 1404; July 17, 1981, Pub.L. 97-23, § 2, 95 Stat. 139; Nov. 15, 1990, Pub.L. 101-549, Title VII, § 701, 104 Stat. 2672.)

[FN1] So in original. The semicolon probably should be a comma.

[FN2] So in original. Probably should be followed by a comma.

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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)

§ 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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Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part C. Prevention of Significant Deterioration of Air Quality
Subpart I. Clean Air (Refs & Annos)

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless--

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such

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source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

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(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such facility will not cause or contribute to concentrations of such pollutant which exceed the following maximum allowable increases over the baseline concentration for such pollutants:

	Maximum allowable in crease (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	32

5

(D)(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

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(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the following maximum allowable increases for such areas over the baseline concentration for such pollutant and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period:

MAXIMUM ALLOWABLE INCREASE		
[In micrograms per cubic meter]		
	Low terrain	High terrain
Period of exposure	areas	areas
24-hr maximum	36	62
3-hr maximum	13	221
	0	

(iv) For purposes of clause (iii), the term "high terrain area" means with respect to any facility, any area having an elevation of 900 feet or more above the base of the stack of such facility, and the term "low terrain area" means any area other than a high terrain area.

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

(3) The Administrator shall within six months after August 7, 1977, promulgate regulations respecting the analysis required under this subsection which regulations--

(A) shall not require the use of any automatic or uniform buffer zone or zones,

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and vis-

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ibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

(D) shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 165, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 127(a), 91 Stat. 735, and amended Nov. 16, 1977, Pub.L. 95-190, § 14(a)(44)-(51), 91 Stat. 1402.)

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Subchapter I. Programs and Activities
Part C. Prevention of Significant Deterioration of Air Quality
Subpart I. Clean Air (Refs & Annos)
§ 7479. Definitions

For purposes of this part--

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty 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 facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2)(A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

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(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 169, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 127(a), 91 Stat. 740, and amended Nov. 16, 1977, Pub.L. 95-190, § 14(a)(54), 91 Stat. 1402; Nov. 15, 1990, Pub.L. 101-549, Title III, § 305(b), Title IV, § 403(d), 104 Stat. 2583, 2631.)

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Subchapter I. Programs and Activities
Part D. Plan Requirements for Nonattainment Areas
Subpart 1. Nonattainment Areas in General (Refs & Annos)

§ 7501. Definitions

For the purpose of this part--

(1) Reasonable further progress

The term "reasonable further progress" means such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.

(2) Nonattainment area

The term "nonattainment area" means, for any air pollutant, an area which is designated "nonattainment" with respect to that pollutant within the meaning of section 7407(d) of this title.

(3) Lowest achievable emission rate

The term "lowest achievable emission rate" means for any source, that rate of emissions which reflects--

(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

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(4) Modifications; modified

The terms “modifications” and “modified” mean the same as the term “modification” as used in section 7411(a)(4) of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 171, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 129(b), 91 Stat. 746, and amended Nov. 15, 1990, Pub.L. 101-549, Title I, § 102(a)(2), 104 Stat. 2412.)

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Subchapter I. Programs and Activities
Part D. Plan Requirements for Nonattainment Areas
Subpart 1. Nonattainment Areas in General (Refs & Annos)

§ 7502. Nonattainment plan provisions in general

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of Title 5 (concerning notice and comment) and shall not be subject to judicial review until the Administrator takes final action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appro-

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priate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if--

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this subparagraph for a single nonattainment area.

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part.

(b) Schedule for plan submissions

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as ex-

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peditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.

(2) RFP

Such plan provisions shall require reasonable further progress.

(3) Inventory

Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

(4) Identification and quantification

Such plan provisions shall expressly identify and quantify the emissions, if any, of any such pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) of this title, from the construction and operation of major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date.

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

(6) Other measures

Such plan provisions shall include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part.

(7) Compliance with section 7410(a)(2)

Such plan provisions shall also meet the applicable provisions of section 7410(a)(2) of this title.

(8) Equivalent techniques

Upon application by any State, the Administrator may allow the use of equivalent modeling, emission inventory, and planning procedures, unless the Administrator determines that the proposed techniques are, in the ag-

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gregate, less effective than the methods specified by the Administrator.

(9) Contingency measures

Such plan shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

(d) Plan revisions required in response to finding of plan inadequacy

Any plan revision for a nonattainment area which is required to be submitted in response to a finding by the Administrator pursuant to section 7410(k)(5) of this title (relating to calls for plan revisions) must correct the plan deficiency (or deficiencies) specified by the Administrator and meet all other applicable plan requirements of section 7410 of this title and this part. The Administrator may reasonably adjust the dates otherwise applicable under such requirements to such revision (except for attainment dates that have not yet elapsed), to the extent necessary to achieve a consistent application of such requirements. In order to facilitate submittal by the States of adequate and approvable plans consistent with the applicable requirements of this chapter, the Administrator shall, as appropriate and from time to time, issue written guidelines, interpretations, and information to the States which shall be available to the public, taking into consideration any such guidelines, interpretations, or information provided before November 15, 1990.

(e) Future modification of standard

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 172, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 129(b), 91 Stat. 746, and amended Nov. 16, 1977, Pub.L. 95-190, § 14(a)(55), (56), 91 Stat. 1402; Nov. 15, 1990, Pub.L. 101-549, Title I, § 102(b), 104 Stat. 2412.)

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§ 7503. Permit requirements

(a) In general

The permit program required by section 7502(b)(6) of this title shall provide that permits to construct and operate may be issued if--

(1) in accordance with regulations issued by the Administrator for the determination of baseline emissions in a manner consistent with the assumptions underlying the applicable implementation plan approved under section 7410 of this title and this part, the permitting agency determines that--

(A) by the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources (as determined in accordance with the regulations under this paragraph) prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 7502 of this title) reasonable further progress (as defined in section 7501 of this title); or

(B) in the case of a new or modified major stationary source which is located in a zone (within the nonattainment area) identified by the Administrator, in consultation with the Secretary of Housing and Urban Development, as a zone to which economic development should be targeted, that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area from new or modified major stationary sources under section 7502(c) of this title;

(2) the proposed source is required to comply with the lowest achievable emission rate;

(3) the owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common con-

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trol with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this chapter; and [FN1]

(4) the Administrator has not determined that the applicable implementation plan is not being adequately implemented for the nonattainment area in which the proposed source is to be constructed or modified in accordance with the requirements of this part; and

(5) an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.

Any emission reductions required as a precondition of the issuance of a permit under paragraph (1) shall be federally enforceable before such permit may be issued.

(b) Prohibition on use of old growth allowances

Any growth allowance included in an applicable implementation plan to meet the requirements of section 7502(b)(5) of this title (as in effect immediately before November 15, 1990) shall not be valid for use in any area that received or receives a notice under section 7410(a)(2)(H)(ii) of this title (as in effect immediately before November 15, 1990) or under section 7410(k)(1) of this title that its applicable implementation plan containing such allowance is substantially inadequate.

(c) Offsets

(1) The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the State may allow the owner or operator of a source to obtain such emission reductions in another nonattainment area if (A) the other area has an equal or higher nonattainment classification than the area in which the source is located and (B) emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located. Such emission reductions shall be, by the time a new or modified source commences operation, in effect and enforceable and shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant from the same or other sources in the area.

(2) Emission reductions otherwise required by this chapter shall not be creditable as emissions reductions for purposes of any such offset requirement. Incidental emission reductions which are not otherwise required by this chapter shall be creditable as emission reductions for such purposes if such emission reductions meet the requirements of paragraph (1).

(d) Control technology information

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The State shall provide that control technology information from permits issued under this section will be promptly submitted to the Administrator for purposes of making such information available through the RACT/BACT/LAER clearinghouse to other States and to the general public.

(e) Rocket engines or motors

The permitting authority of a State shall allow a source to offset by alternative or innovative means emission increases from rocket engine and motor firing, and cleaning related to such firing, at an existing or modified major source that tests rocket engines or motors under the following conditions:

(1) Any modification proposed is solely for the purpose of expanding the testing of rocket engines or motors at an existing source that is permitted to test such engines on November 15, 1990.

(2) The source demonstrates to the satisfaction of the permitting authority of the State that it has used all reasonable means to obtain and utilize offsets, as determined on an annual basis, for the emissions increases beyond allowable levels, that all available offsets are being used, and that sufficient offsets are not available to the source.

(3) The source has obtained a written finding from the Department of Defense, Department of Transportation, National Aeronautics and Space Administration or other appropriate Federal agency, that the testing of rocket motors or engines at the facility is required for a program essential to the national security.

(4) The source will comply with an alternative measure, imposed by the permitting authority, designed to offset any emission increases beyond permitted levels not directly offset by the source. In lieu of imposing any alternative offset measures, the permitting authority may impose an emissions fee to be paid to such authority of a State which shall be an amount no greater than 1.5 times the average cost of stationary source control measures adopted in that area during the previous 3 years. The permitting authority shall utilize the fees in a manner that maximizes the emissions reductions in that area.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 173, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 129(b), 91 Stat. 748, and amended Nov. 16, 1977, Pub.L. 95-190, § 14(a)(57), (58), 91 Stat. 1403; Nov. 15, 1990, Pub.L. 101-549, Title I, § 102(c), 104 Stat. 2415.)

[FN1] So in original. The word “and” probably should not appear.

Current through P.L. 111-312 (excluding P.L. 111-259, 111-275, 111-296, and 111-309) approved 12-17-10

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United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions
§ 7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4) or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the [FN1] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),, [FN2] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may

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be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,, [FN2] under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to [FN3] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to--

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

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(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

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(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of--

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(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

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(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action 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; or

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(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of Title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section [FN4] 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title III, § 307, as added Dec. 31, 1970, Pub.L. 91-604, § 12(a), 84 Stat. 1707, and amended Nov. 18, 1971, Pub.L. 92-157, Title III, § 302(a), 85 Stat. 464; June 22, 1974, Pub.L. 93-319, § 6(c), 88 Stat. 259; Aug. 7, 1977, Pub.L. 95-95, Title III, §§ 303(d), 305(a), (c), (f)-(h), 91 Stat. 772, 776, 777; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(79), (80), 91 Stat. 1404; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 108(p), 110(5), Title III, § 302(g), (h), Title VII, §§ 702(c), 703, 706, 707(h), 710(b), 104 Stat. 2469, 2470, 2574,

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2681-2684.)

[FN1] So in original. Probably should be “this”.

[FN2] So in original.

[FN3] So in original. The word “to” probably should not appear.

[FN4] So in original. Probably should be “sections”.

Current through P.L. 111-312 (excluding P.L. 111-259, 111-275, 111-296, and 111-309) approved 12-17-10

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United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter V. Permits (Refs & Annos)
§ 7661c. Permit requirements and conditions

(a) Conditions

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.

(b) Monitoring and analysis

The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this chapter, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance. Nothing in this subsection shall be construed to affect any continuous emissions monitoring requirement of subchapter IV-A of this chapter, or where required elsewhere in this chapter.

(c) Inspection, entry, monitoring, certification, and reporting

Each permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b) of this section. Any report required to be submitted by a permit issued to a corporation under this subchapter shall be signed by a responsible corporate official, who shall certify its accuracy.

(d) General permits

The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under this subchapter. No source covered by a general permit shall thereby be relieved from the obligation to file an application under section 7661b of this title.

(e) Temporary sources

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The permitting authority may issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this chapter at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under part C of subchapter I of this chapter. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location. The permitting authority may require a separate permit fee for operations at each location.

(f) Permit shield

Compliance with a permit issued in accordance with this subchapter shall be deemed compliance with section 7661a of this title. Except as otherwise provided by the Administrator by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this chapter that relate to the permittee if--

(1) the permit includes the applicable requirements of such provisions, or

(2) the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.

Nothing in the preceding sentence shall alter or affect the provisions of section 7603 of this title, including the authority of the Administrator under that section.

CREDIT(S)

(July 14, 1955, c. 360, Title V, § 504, as added Nov. 15, 1990, Pub.L. 101-549, Title V, § 501, 104 Stat. 2642.)

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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)

§ 51.160 Legally enforceable procedures.

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

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

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

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

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

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

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

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

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

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

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

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

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

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(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

Current through December 9, 2010; 75 FR 76892

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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)

§ 51.161 Public availability of information.

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

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

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

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

(3) A notice by prominent advertisement in the area affected of the location of the source information and analysis specified in paragraph (b)(1) of this section.

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

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

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. § 51.161, 40 CFR § 51.161

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Code of Federal Regulations Currentness
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Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart I. Review of New Sources and Modifications (Refs & Annos)

§ 51.162 Identification of responsible agency.

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

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. § 51.162, 40 CFR § 51.162

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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)

§ 51.163 Administrative procedures.

The plan must include the administrative procedures, which will be followed in making the determination specified in paragraph (a) of § 51.160.

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. § 51.163, 40 CFR § 51.163

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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)

§ 51.164 Stack height procedures.

Such procedures must provide that the degree of emission limitation required of any source for control of any air pollutant must not be affected by so much of any source's stack height that exceeds good engineering practice or by any other dispersion technique, except as provided in § 51.118(b). Such procedures must provide that before a State issues a permit to a source based on a good engineering practice stack height that exceeds the height allowed by § 51.100(ii) (1) or (2), the State must notify the public of the availability of the demonstration study and must provide opportunity for public hearing on it. This section does not require such procedures to restrict in any manner the actual stack height of any source.

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. § 51.164, 40 CFR § 51.164

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US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 136 Date Filed: 06/06/2011

APPENDIXES T–U TO PART 51
[RESERVED]

APPENDIX V TO PART 51—CRITERIA FOR DETERMINING THE COMPLETENESS OF PLAN SUBMISSIONS

1.0. PURPOSE

This appendix V sets forth the minimum criteria for determining whether a State implementation plan submitted for consideration by EPA is an official submission for purposes of review under §51.103.

1.1 The EPA shall return to the submitting official any plan or revision thereof which fails to meet the criteria set forth in this appendix V, and request corrective action, identifying the component(s) absent or insufficient to perform a review of the submitted plan.

1.2 The EPA shall inform the submitting official whether or not a plan submission meets the requirements of this appendix V within 60 days of EPA's receipt of the submittal, but no later than 6 months after the date by which the State was required to submit the plan or revision. If a completeness determination is not made by 6 months from receipt of a submittal, the submittal shall be deemed complete by operation of law on the date 6 months from receipt. A determination of completeness under this paragraph means that the submission is an official submission for purposes of §51.103.

2.0. CRITERIA

The following shall be included in plan submissions for review by EPA:

2.1. Administrative Materials

(a) A formal letter of submittal from the Governor or his designee, requesting EPA approval of the plan or revision thereof (hereafter "the plan").

(b) Evidence that the State has adopted the plan in the State code or body of regulations; or issued the permit, order, consent agreement (hereafter "document") in final form. That evidence shall include the date of adoption or final issuance as well as the effective date of the plan, if different from the adoption/issuance date.

(c) Evidence that the State has the necessary legal authority under State law to adopt and implement the plan.

(d) A copy of the actual regulation, or document submitted for approval and incorporation by reference into the plan, including indication of the changes made (*such as, redline/strikethrough*) to the existing approved plan, where applicable. The submittal shall be a copy of the official State regulation/document signed, stamped and dated by the appropriate State official indicating that it is fully enforceable by the State. The effective date of the regulation/document shall, whenever possible, be indicated in the document itself. *If the State submits an electronic copy, it must be an exact duplicate of the hard copy with changes indicated, signed documents need to be in portable document format, rules need to be in text format and files need to be submitted in manageable amounts (e.g., a file for each section or chapter, depending on size, and separate files for each distinct document) unless otherwise agreed to by the State and Regional Office.*

(e) Evidence that the State followed all of the procedural requirements of the State's laws and constitution in conducting and completing the adoption/issuance of the plan.

(f) Evidence that public notice was given of the proposed change consistent with procedures approved by EPA, including the date of publication of such notice.

(g) Certification that public hearing(s) were held in accordance with the information provided in the public notice and the State's laws and constitution, if applicable and consistent with the public hearing requirements in 40 CFR 51.102.

(h) Compilation of public comments and the State's response thereto.

2.2. Technical Support

(a) Identification of all regulated pollutants affected by the plan.

(b) Identification of the locations of affected sources including the EPA attainment/nonattainment designation of the locations and the status of the attainment plan for the affected areas(s).

(c) Quantification of the changes in plan allowable emissions from the affected sources; estimates of changes in current actual emissions from affected sources or, where appropriate, quantification of changes in actual emissions from affected sources through calculations of the differences between certain baseline levels and allowable emissions anticipated as a result of the revision.

(d) The State's demonstration that the national ambient air quality standards, prevention of significant deterioration increments, reasonable further progress demonstration, and visibility, as applicable, are protected if the plan is approved and implemented. For all requests to redesignate an area to attainment for a national primary ambient air quality standard, under section 107 of the Act, a revision must be submitted to provide for the maintenance of the national primary ambient air quality standards for at least 10 years as required by section 175A of the Act.

(e) Modeling information required to support the proposed revision, including input data, output data, models used, justification of model selections, ambient monitoring data used, meteorological data used, justification for use of offsite data (where used), modes of models used, assumptions, and other information relevant to the determination of adequacy of the modeling analysis.

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 137 Date Filed: 06/06/2011

(f) Evidence, where necessary, that emission limitations are based on continuous emission reduction technology.

(g) Evidence that the plan contains emission limitations, work practice standards and recordkeeping/reporting requirements, where necessary, to ensure emission levels.

(h) Compliance/enforcement strategies, including how compliance will be determined in practice.

(i) Special economic and technological justifications required by any applicable EPA policies, or an explanation of why such justifications are not necessary.

2.3. Exceptions

2.3.1. The EPA, for the purposes of expediting the review of the plan, has adopted a procedure referred to as "parallel processing." Parallel processing allows a State to submit the plan prior to actual adoption by the State and provides an opportunity for the State to consider EPA comments prior to submission of a final plan for final review and action. Under these circumstances, the plan submitted will not be able to meet all of the requirements of paragraph 2.1 (all requirements of paragraph 2.2 will apply). As a result, the following exceptions apply to plans submitted explicitly for parallel processing:

(a) The letter required by paragraph 2.1(a) shall request that EPA propose approval of the proposed plan by parallel processing.

(b) In lieu of paragraph 2.1(b) the State shall submit a schedule for final adoption or issuance of the plan.

(c) In lieu of paragraph 2.1(d) the plan shall include a copy of the proposed/draft regulation or document, including indication of the proposed changes to be made to the existing approved plan, where applicable.

(d) The requirements of paragraphs 2.1(e)–2.1(h) shall not apply to plans submitted for parallel processing.

2.3.2. The exceptions granted in paragraph 2.3.1 shall apply only to EPA's determination of proposed action and all requirements of paragraph 2.1 shall be met prior to publication of EPA's final determination of plan approvability.

[55 FR 5830, Feb. 16, 1990, as amended at 56 FR 42219, Aug. 26, 1991; 56 FR 57288, Nov. 8, 1991; 72 FR 38793, July 16, 2007]

APPENDIX W TO PART 51—GUIDELINE ON AIR QUALITY MODELS

PREFACE

a. Industry and control agencies have long expressed a need for consistency in the application of air quality models for regulatory purposes. In the 1977 Clean Air Act, Congress mandated such consistency and encouraged the standardization of model applications. The *Guideline on Air Quality Models* (hereafter, *Guideline*) was first published in April 1978 to satisfy these requirements by specifying models and providing guidance for their use. The *Guideline* provides a common basis for estimating the air quality concentrations of criteria pollutants used in assessing control strategies and developing emission limits.

b. The continuing development of new air quality models in response to regulatory requirements and the expanded requirements for models to cover even more complex problems have emphasized the need for periodic review and update of guidance on these techniques. Historically, three primary activities have provided direct input to revisions of the *Guideline*. The first is a series of annual EPA workshops conducted for the purpose of ensuring consistency and providing clarification in the application of models. The second activity was the solicitation and review of new models from the technical and user community. In the March 27, 1980 FEDERAL REGISTER, a procedure was outlined for the submittal to EPA of privately developed models. After extensive evaluation and scientific review, these models, as well as those made available by EPA, have been considered for recognition in the *Guideline*. The third activity is the extensive on-going research efforts by EPA and others in air quality and meteorological modeling.

c. Based primarily on these three activities, new sections and topics have been included as needed. EPA does not make changes to the guidance on a predetermined schedule, but rather on an as-needed basis. EPA believes that revisions of the *Guideline* should be timely and responsive to user needs and should involve public participation to the greatest possible extent. All future changes to the guidance will be proposed and finalized in the FEDERAL REGISTER. Information on the current status of modeling guidance can always be obtained from EPA's Regional Offices.

TABLE OF CONTENTS

List of Tables

1.0 Introduction
2.0 Overview of Model Use
2.1 Suitability of Models
2.2 Levels of Sophistication of Models
2.3 Availability of Models
3.0 Recommended Air Quality Models
3.1 Preferred Modeling Techniques
3.1.1 Discussion
3.1.2 Recommendations
3.2 Use of Alternative Models
3.2.1 Discussion
3.2.2 Recommendations
3.3 Availability of Supplementary Modeling Guidance
4.0 Stationary-Source Models
4.1 Discussion
4.2 Recommendations
4.2.1 Screening Techniques

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 138 Date Filed: 06/06/2011

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-4120-2]

RIN 2060-AD12

State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990

AGENCY: Environmental Protection Agency (EPA).

ACTION: General preamble for future proposed rulemakings.

SUMMARY: Title I of the Clean Air Act Amendments (CAAA) of 1990 revamped the requirements for areas that have not attained the national ambient air quality standards (NAAQS) for ozone, carbon monoxide (CO), particulate matter (PM-10), sulfur dioxide (SO_2), nitrogen dioxide (NO_2), and lead. In addition, title I made numerous changes in the requirements for State implementation plans (SIP's) in general, including the provisions governing EPA's processsing of SIP revisions, as well as the repercussions of State failures to meet the various SIP requirements. Many of these requirements call for early action by the States. For example, under title I, States with pre-enactment ozone nonattainment areas were to begin submitting SIP revisions 6 months after enactment (May 15, 1991).

This General Preamble principally describes EPA's preliminary views on how EPA should interpret various provisions of title I, primarily those concerning SIP revisions required for nonattainment areas. Although the General Preamble includes various statements that States must take certain actions, these statements are made pursuant to EPA's preliminary interpretations, and thus do not bind the States and the public as a matter of law. In the near future, EPA will begin to take action, pursuant to notice-and-comment rulemaking, on SIP revisions submitted by the States, and issue rules, pursuant to notice-and-comment rulemaking, on various title I provisions. During the comment periods for those subsequent actions, members of the public will have the opportunity to comment on the relevant issues. This General Preamble is an advance notice of how EPA generally intends, in those subsequent rulemakings, to take action on SIP submissions and to interpret various title I provisions.

FOR FURTHER INFORMATION CONTACT: Mr. Brock Nicholson, Chief, Policy Development Section, Ozone/CO Programs Branch (MD-15) at (919) 541-5517, for issues related to ozone or carbon monoxide; Mr. Eric Ginsburg at (919) 541-0877, Sulfur Dioxide/Particulate Matter Programs Branch (MD-15), for issues related to sulfur dioxide, particulate matter, or lead; Mr. Gary McCutchen at (919) 541-5592, Permits Programs Branch (MD-15), for issues related to new source review, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; Ms. Paula Van Lare at (202) 260-3450 for issues related to mobile sources, 401 M Street, SW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

Note: In accordance with 1 CFR 5.9(c), this document is published in the Proposed Rules category.

A list of cited references are contained in the appendices which are available from the public docket, A-91-35 at EPH, 400 M Street, S.W. Washington, D.C. Appendices A through E will be published in a subsequent Federal Register.

OUTLINE

I. Purpose
II. Background
A. History
B. Overview of title I of 1990 CAAA
1. Designations/classifications
2. Pollutant-specific requirements
3. General requirements
4. Part D, subpart 1
5. Miscellaneous
6. Relationship between titles I and II of 1990 CAAA
III. SIP Requirements
A. Ozone
1. General
2. Marginal areas
3. Moderate areas
4. Serious areas
5. Severe areas
6. Extreme areas
7. Nonclassifiable nonattainment areas
8. Transport areas
9. Multi-state ozone nonattainment areas
B. Carbon Monoxide
1. Moderate areas 12.7 ppm and below
2. Moderate areas above 12.7 ppm
3. Serious areas
4. Nonclassifiable areas
5. Multi-state CO attainment areas
6. Areas with significant stationary source emissions
7. Guidance on waivers for mobile source measures
C. Particulate Matter
1. Statutory background
2. Determination of RACM/RACT
3. SIP's that demonstrate attainment
4. SIP's that do not demonstrate attainment
D. Sulfur Dioxide
1. Designations
2. Classifications
3. Plan submission deadlines
4. Attainment dates
5. Nonattainment plan provision
6. Sources of SO_2 policy and guidance
E. Lead
1. Statutory background
2. Pre-SIP submittal activities
3. Transition issues
F. Nitrogen Dioxide
1. Designations
2. Plan deadlines
3. Attainment dates
4. Nonattainment plan provisions
G. New Source Review (NSR) Nonattainment Permit Requirements
1. Contruction bans
2. Emissions offsets
3. Creditable emission reductions for netting
4. Growth allowances
5. Analysis of alternatives
6. Control technology information
7. Innovative controls for rocket engines and motors
8. Exemptions for stripper wells
9. Outer Continental Shelf Source Applicability
10. Tribal lands applicability
11. Stationary source definition
12. Temporary clean coal technology demonstration projects
13. Failure to submit NSR rules by statutory deadlines
H. General
1. Part D, subpart 1/section 110 (to the extent not covered under pollutant-specific)
2. Conformity
3. Planning requirements including section 174
4. Economic incentives
5. Section 172(c)(1) requirement for all Reasonably Available Control Measures (RACM)
6. Redesignations
7. Transition issues
8. General savings clause
IV. EPA Requirements
A. SIP Processing Requirements
1. Completeness
2. Partial approvals
B. Sanctions and Other Safeguards
1. Background under 1977 CAAA
2. Available measures under 1990 CAAA
3. Application and timing of the section 179 Sanctions
C. Federal Implementation Plans (FIP's)
V. Miscellaneous
A. Relationship of Title I to Title V
1. Introduction
2. Purposes of a SIP
3. Fundamental principles for SIP's/control strategy
4. Satisfying SIP principles
5. Approaches to ensure that permits properly support SIP's
B. Tribal Implementation Plans
C. Section 179B Requirements
VI. Other Requirements
A. Executive Order 12291
B. Regulatory Flexibility Act

I. Purpose

The primary purpose of this preamble is to provide the public with advance notice of how EPA generally intends to interpret various requirements and associated issues that have arisen under title I of the CAAA. The information

HeinOnline -- 57 Fed. Reg. 13498 1992

Case: 10-60891 Document: 00511500103 Page: 139 Date Filed: 06/06/2011

any requirement or prohibition relating to NSR, the Administrator may issue an order prohibiting the construction or modification of any major stationary source in any area where such requirements apply. In States that delay in revising their SIP's to include the new preconstruction permitting requirements by the statutory deadline, EPA may exercise this authority by proceeding under section 113(a)(5) whenever a particular new source attempts to construct without meeting the NSR requirements added by the 1990 CAAA, or by issuing a general construction ban. As an alternative, the Administrator could issue a contingent order prohibiting construction of any major new or modified source that failed to obtain a permit that met the amended statutory NSR requirements. The EPA will provide additional information on this issue in its NSR regulatory package.

In addition to imposing statutorily required sanctions, EPA is also required by the statute to promulgate a FIP when it finds that a State has failed to make a required SIP submittal or has made an incomplete submission (see section IV.C). Pursuant to this authority, EPA is developing revised NSR regulations that would include, at 40 CFR part 52, a Federal NSR nonattainment permitting program that EPA (or the State pursuant to a delegation agreement) could implement as a FIP in those States that fail to submit NSR regulations by the statutory deadlines. Because of the importance of the increased offset ratios, reduced source thresholds, and other NSR changes to States' overall attainment effort, EPA presently intends to impose this NSR FIP on any State that fails to adopt its own NSR regulations within the deadlines established by the Act. In addition, or until such time as the FIP is in place, EPA may impose any of the sanctions identified above. Of course, once it receives and approves the State's NSR regulations, EPA would, under ordinary circumstances, withdraw the FIP and any sanctions that may have been imposed.

H. General

1. Part D, Subpart 1/Section 110 (to the Extent Not Covered Under Pollutant-Specific)

Subsections (A) through (M) of section 110(a)(2) set forth the elements that a SIP must contain in order to be fully approved. Although Congress substantially amended section 110(a)(2) upon enactment of the amended Act, many of the basic requirements remain the same.

Amended subsection (A) includes the pre-amended subsection (B) requirement that all measures and other elements in the SIP be enforceable. The amended provision specifically authorizes SIP's to contain certain nontraditional techniques for reducing pollution—economic incentives, marketable permits, and auctions of emissions rights. The EPA reads this language to require even these other means of achieving reductions to be enforceable. Section 172(c)(6), one of the general SIP requirements for nonattainment areas, also includes this requirement in essentially the same language.

Subsection (B) carries forth the pre-amended subsection (C) requirement to monitor and compile data on ambient air quality. The EPA historically has promulgated regulations in part 58 of the CFR, indicating the necessary data States need to collect and submit as part of their SIP. The existing regulations remain in effect, pursuant to section 193, to the extent they are not inconsistent with the new law, until EPA elects to amend them.

The enforcement provisions of pre-amended subsection (D) are now under subsection (C). While this provision retains the preexisting requirement that the SIP include a pre-construction review for all new and modified stationary sources, it deletes the previous provision's specific reference to pre-construction review of sources subject to NSPS.

Amended subsection (D) also contains provisions that essentially remain unchanged. It incorporates language from pre-amended subsection (E) requiring States to include SIP provisions prohibiting sources from emitting pollutants that would contribute significantly to nonattainment, interfere with maintenance of the standard, or interfere with PSD or visibility.[34]

Subsection (E) of the amended Act incorporates one provision from pre-amended subsection (F)—clause (E)(ii) reinforces the section 128 requirement that the SIP contain certain requirements as to State boards. In addition, clause (E)(i) of the amended Act includes the pre-amendment subsection (F) requirement that States ensure that the State and/or local governments have adequate resources to implement the plan. This includes a new requirement that the State ensure that nothing in the SIP is otherwise prohibited by any other State or Federal law. Finally, clause (E)(iii) adds a new requirement—that the State retain responsibility for ensuring adequate implementation in cases in which it relies on local implementation of plan provisions.

Subsection (F) carries forth the requirements of pre-amended subsection (F) that concern emission monitoring. The EPA promulgated monitoring regulations at § 51.210 of the CFR and in appendix P to part 51. Under section 193, the existing regulations remain effective to the extent they are not inconsistent with the new law, until EPA elects to amend them.

Amended subsection (G) also carries forth a provision of pre-amended subsection (F). States must provide authority to bring emergency actions (comparable to that granted to EPA in section 303) in cases where a source or a group of sources present an imminent and substantial endangerment to the public health. The EPA has also adopted regulations regarding such authority in 40 CFR 51.150, and these regulations will remain effective under section 193, to the extent they are not inconsistent with the new law, until EPA amends them.

Subsection (H) was not revised by the amendments. It still requires States to provide for the revision of their SIP's (commonly referred to as "SIP calls") in two circumstances: if the NAAQS were revised, or if EPA made a finding that the plan was substantially inadequate to attain the standard. New section 110(K)(5) gives EPA the authority to issue a SIP call.

Amended subsection (I) adds a new requirement to section 110(a)(2). It now states explicitly that any plan or plan revision must meet the applicable requirements of part D (provisions relating to nonattainment areas). Although this is a new section 110(a)(2) provision, it does not add a new requirement to the Act as a whole. The SIP's for nonattainment areas have always been required to meet the part D requirements.

Subsection (J) has also been retained in its preexisting form. It continues the requirement that SIP's meet the applicable PSD and visibility requirements and the associated consultation and public notification provisions of sections 121 and 137, respectively.

[34] The pre-amended section 110(a)(2)(E) required SIP's to contain a provision prohibiting stationary sources from emitting an air pollutant in amounts which will "prevent attainment" in another State. The amended version of this language requires a SIP provision that prohibits emissions that will "contribute significantly to nonattainment" in another State. However, EPA interpreted the pre-amended language in the manner that Congress expressed in the amended Act. See Air Pollution Control Dist. v. U.S. EPA., 739 F.2d 1071, 1090–93 (6th Cir. 1984). In the Senate Report, Congress noted that the pre-amended language presented an impossible standard and noted that it was adopting "significantly contribute" to clarify when a violation of that requirement would occur. S. Rep. No. 228, 101st Cong., 1st sess. 21 (1989).

HeinOnline -- 57 Fed. Reg. 13556 1992

accordance with the requirements of section 113(d), or bring a civil action under section 113(b). Nothing in section 113(a)(5) shall preclude the United States from commencing, at any time, a criminal action under section 113(c) for any such violation.

(f) *Other sanction provisions.* Section 110(m) includes provisions on sanctions. The EPA will be discussing those provisions in a subsequent Federal Register notice.

3. Application and Timing of the Section 179 Sanctions

Eighteen months after the Administrator makes a finding concerning a State failure (as described below) with respect to a specific plan required by part D or in response to a SIP call, under section 179(a), the Administrator must apply either the highway or offset sanctions of section 179(b) unless the inadequacy has been corrected to EPA's satisfaction. The sanction applied will be chosen on a case-by-case basis depending on the circumstances involved. The EPA must apply both sanctions after 18 months if the Administrator finds a lack of good faith on the part of the State, or after 24 months if the deficiency is not corrected (within 6 months after the first sanction is imposed).

C. Federal Implementation Plans (FIP's)

The Administrator is required to promulgate a FIP within 2 years of finding that a State has failed to make a required submittal or that a received submittal does not satisfy the minimum completeness criteria established under section 110(k)(1)(A) (see 56 FR 42216, August 26, 1991), or disapproving a SIP submittal in whole or in part. Section 110(c)(1) mandates EPA promulgation of a FIP if the Administrator has not yet approved a correction proposed by the State before the time a final FIP is required to be promulgated. Within the Act's general provisions, a FIP is defined explicitly to allow for the inclusion of "economic incentives, such as marketable permits or auctions of emissions allowances" (section 302(y)). The EPA views the use of economic incentives in the context of a FIP as potentially appropriate, especially in cases of failure of ozone nonattainment areas to meet the RFP requirements. Such incentives may focus particularly on permitted sources. In developing FIP strategies that include economic incentives, EPA will look to its economic incentive program rules (section 182(g)(4)) due to be published November 15, 1992, as guidance in developing those elements of the FIP. Economic incentive programs are discussed in more detail in section III.G.3.

There may be areas where EPA has to promulgate Federal NSR regulations. The EPA intends to adopt at 40 CFR 52.10 Federal nonattainment area permitting rules that EPA can impose in States with deficient nonattainment NSR permit programs.

V. Miscellaneous

A. Relationship of Title I to Title V

1. Introduction

The purpose of this section is to discuss the issues originally described in the title V rulemaking preamble (56 FR 21712—May 10, 1991). The three main issues discussed here are how a combination of SIP's and permits can do the job that SIP's now do by themselves, the extent to which EPA will develop RACT protocols or procedures, and how EPA will approach marketable permits and trading of allowances in ozone nonattainment areas.

The approach taken here begins with the purposes of a SIP, which are to make demonstrations (of how attainment, maintenance, and progress will be achieved), and to provide a control strategy that will achieve the necessary reductions and otherwise meet the requirements of the Act.

The key questions are what fundamental principles apply to SIP's, and what features must SIP's and permits have to implement SIP control strategies and to satisfy these principles? The fundamental SIP principles will be used as guiding criteria for judging success in resolving the issues described above.

For a number of reasons explained below, certain elements must be contained in a SIP so that it will satisfy the identified principles and meet the Act's requirements. Other elements could be contained in permits, and still other elements may be shared and/or implemented in part by SIP's and in part by permits.

Following the discussion of fundamental SIP principles and associated SIP and permit features, this section proposes ways to answer the questions raised in the title V proposal.

2. Purposes of a SIP

One purpose of a SIP is to perform demonstrations of how various goals will be achieved. These goals are of three types: Attainment of the NAAQS, maintenance of the NAAQS once attainment occurs, and prescribed rates of progress. To satisfy these purposes, a number of assumptions must be made in the SIP regarding baseline emissions and future growth in various sectors of the economy. For these assumptions, SIP planners often rely on projections of population, motor vehicle travel or economic indicators made by other government agencies, and projections made by the air pollution control agency regarding the future effect of planned pollution control measures.

These assumptions, control strategies, and measures are developed as necessary to meet the attainment objectives for the area and the Act's requirements (e.g., RACT). These assumptions and measures are key components of the SIP. It is important to note that projections of the effect of planned air pollution control measures contained in the SIP's are not merely assumed but are enforced by regulations adopted as part of the SIP. Therefore, if the control measures are not implemented sufficiently to result in required reductions, the State or local agency, or EPA, can take action to enforce implementation of the regulations. This provides a means of achieving, at least in part, the goals of attainment and further progress required in the Act.

For purposes of illustrating the principles and elements of SIP's that apply to sources, the discussion below concentrates more on elements relevant to implementing the control strategies part of a SIP, rather than on those relevant to the demonstration. This simplifies the discussion and reflects the fact that the purpose of the permit is to implement measures, not perform demonstrations, which is unquestionably a purpose of the SIP.

3. Fundamental Principles for SIP's/ Control Strategy

To develop an effective SIP control strategy and to achieve the desired result, the SIP and any implementing instruments, including permits, should adhere to certain principles. These principles help provide assurance that the planned emissions reductions will be achieved. These principles are discussed in EPA's policy on emissions trading contained in 51 FR 43814 (December 4, 1986).

(a) *First principle.* The first principle is that the baseline emissions from the source and the control measures be quantifiable (i.e., a specific amount of emissions reductions can be ascribed to the measures). Baseline emissions must be represented accurately in the SIP in order for the benefits of the measure to be properly quantified. Furthermore, the emissions must be representative of the time period of the inventory. Likewise, the effect of the measure must be identified in order to assess the

Case: 10-60891 Document: 00511500103 Page: 141 Date Filed: 06/06/2011

contribution to the necessary emissions reductions. The value for a measure's effect can be used as a limit in a regulation, or it may be used alone or in combination with assumptions regarding operating hours or production, or as part of the projections in the demonstrations.

(b) *Second principle.* The second principle is that the measures be enforceable. Measures are enforceable when they are duly adopted, and specify clear, unambiguous, and measurable requirements. A legal means for ensuring that sources are in compliance with the control measure must also exist in order for a measure to be enforceable. This principle is well grounded in the Act. New section 110(a)(2) of the Act requires that SIP's include "enforceable emission limitations and other control measures" and "a program to provide for the enforcement of the measures" in the plan. Court decisions made clear that regulations must be enforceable in practice. A regulatory limit is not enforceable if, for example, it is impractical to determine compliance with the published limit.

(c) *Third principle.* The third principle is that the measures be replicable. This means that where a rule contains procedures for changing the rule, interpreting the rule, or determining compliance with the rule, the procedures are sufficiently specific and nonsubjective so that two independent entities applying the procedures would obtain the same result.

(d) *Fourth principle.* The fourth principle is that the control strategy be accountable. This means, for example, that source-specific limits should be permanent and must reflect the assumptions used in the SIP demonstrations. It also means that the SIP must contain means (such as operating permits issued under title V) to track emission changes at sources and provide for corrective action if emissions reductions are not achieved according to the plan. The Act provides for this tracking and remedial action in its requirements for meeting milestones and for contingency measures in SIP's. The EPA will use this principle to explore options for tracking emissions resulting from issuing permits or permit amendments.

The principles of quantification, enforceability, replicability, and accountability apply to all SIP's and control strategies, including those involving emissions trading, marketable permits and allowances. The EPA's emissions trading policy provides that only trades producing reductions that are surplus, enforceable, permanent, and quantifiable can get credit and be banked or used in an emissions trade.

4. Approaches To Ensure That Permits Properly Support SIP's.

The EPA has considered various ways that permits and SIP's can be configured to complement each other and still meet the principles discussed above. The following discussion covers some approaches.

The SIP remains the basis for demonstrating and ensuring attainment and maintenance of the national ambient air quality standards (NAAQS). The permit program collects and implements the requirements contained in the SIP as applicable to the particular permittee. Since permit must incorporate emission limitations and other requirements of the SIP, all SIP provisions applicable to a particular source will be defined and collected into a single document. The applicable requirements in the permit would include any recent SIP changes, whether as a result of a State or local SIP revision or of a FIP action by EPA. The EPA intends to assist in the implementation of the permit program through the use of model permits for numerous source categories.

As previously discussed, title V affords significant operational flexibility. The relationship between title V permits and SIP's is a key factor in determining the extent to which operational flexibility is available to sources, since each permit, in part, must assure compliance with the applicable implementation plan. The EPA recognizes that it will take time to complete the transition from a regulatory system where SIP's are the primary tool for implementing and enforcing the Act, to one where operating permits ultimately assume primary responsibility for implementation and enforcement.

The EPA is considering what means will aid in ensuring a smooth transition to increasingly general, and thus more flexible, SIP's, which may allow permits rather than the SIP's to specify the details of how SIP limits and objectives apply to subject sources. In particular, EPA will be seeking to develop information in the following areas:

(1) The most efficient ways of implementing requirements of SIP's through permits, such as moving detail from SIP's to permits;

(2) Flexible ways for sources to demonstrate compliance with reasonably available control technology (RACT) limits, such as through the use of protocols for defining equivalency or through the development of equivalency determinations in the permitting process (as discussed below); and

(3) Expanded use of emissions trading and marketable permits to achieve SIP objectives as well as providing a stable accountable mechanism for tracking and enforcing emissions reductions at a source.

EPA will be adopting provisions to facilitate the movement toward more flexible SIP's in its final rules to implement title V. EPA plans to include provisions which specify that no permit revision is required for emission trades through economic incentives or marketable permit programs, provided that the permit contains a means or process for implementing the program. Thus, a SIP containing a generic trading rule and a replicable procedure for implementing the rule through a permit may allow trading to occur without a permit revision, provided the permit contains the replicable procedure. This is similar to the way in which permits allow sources to shift among alternate scenarios that were initially provided for in the permit. It States choose to implement trading in this matter, the provisions of the permit allowing the trades must incorporate all of the procedural protections contained in the underlying SIP.

States may also elect to develop SIP's that set forth trading and compliance provisions that sources could use to comply with SIP limits. The SIP would have to include compliance requirements and procedures for the trade which are sufficiently specific to demonstrate compliance. Such provisions can prove useful to sources in cases where permits do not already provide for emission trades.

(a) *Increasing flexibility in SIP's through permits.* In addition, a State may choose to adopt a SIP provision that would authorize sources to meet either the SIP limit or an equivalent limit to be formulated in the permit system. The permit must contain the equivalency determination, as well as provisions that assure that the resulting emission limit is quantifiable, accountable, enforceable, and, based upon replicable procedures, is equivalent to the SIP limit. Consistent with these requirements, States may do so for all appropriate SIP requirements or only for specific requirements for which the State determines equivalency determinations are appropriate. The determination of what constitutes an equivalent limit could take place either during the permit issuance, or renewal process, or as a result of the significant permit modification procedures. The State retains discretion, subject to EPA veto, to decide if an alternative emission limit is justified in any particular case.

US EPA ARCHIVE DOCUMENT

HeinOnline -- 57 Fed. Reg. 13568 1992

Case: 10-60891 Document: 00511500103 Page: 142 Date Filed: 06/06/2011

(b) *Developing more RACT protocols.* In the title V preamble, the EPA said that it would develop more flexible ways for sources to demonstrate compliance with RACT limits. One way is to use protocols defining equivalent means of compliance. For example, in 1980 EPA released the "Can Coating Policy," which allows cross-line averaging for can coating facilities and provides the calculation technique for doing so.

The EPA is undertaking a study to determine the extent to which multi-day and cross-line averaging can be used to provide specific industries more flexibility in meeting their VOC RACT requirements. This project is focusing on the graphic arts and aerospace industries. For this study, EPA is taking the following steps:

(i) Survey the can coating industry to determine how the protocol has been functioning and to collect data on daily and monthly emissions, coating usage and VOC content. These data will be used to determine whether there is a good and stable correlation between daily and monthly emissions rates and between cross-line and line-by-line emissions.

(ii) Survey aerospace and graphic arts sources to collect emissions data, coating usage and VOC content on a daily basis. These data also will be analyzed to determine the variability of emissions from day to day and line to line.

(iii) Based on the above information, EPA will determine the appropriateness of developing procedures for time-averaging and line-by-line compliance for the graphic arts and aerospace industries and issue these procedures as appropriate.

When EPA completes this process, it will then assess whether it is feasible and desirable to develop procedures for other source categories for which such procedures may be appropriate.

(c) *Exploring marketable permits/allowance trading.* The EPA fully expects that the use of emissions trading and economic incentives such as marketable permits or allowance trading will increase as the Act is implemented. In addition, EPA is committed to exploring ways to reduce the cost or burden to industry through the use of innovative measures that use the marketplace to reduce costs. And, as mentioned in its title V preamble, the EPA wants to find ways to achieve the goals of the Act without requiring time-consuming SIP revisions for every change at a source.

One way to minimize SIP revisions is through the use of replicable SIP procedures that are implemented by the permit. As long as the terms of the permit complied with the SIP rule, changes to the permit could be made without a SIP revision. The proposed title V regulation, for example, would not require a permit change for emission trades authorized under the Act if such changes were implemented consistently with the replicable procedure specified in the SIP.

The EPA believes that the same principles discussed previously also should apply to measures such as marketable permits, emission trades and allowances. In addition, the principles of surplus and consistency with the SIP should also apply to any trading program. For example, replicability must always be honored to assure that consistent and predictable benefits are derived from a marketable permits program. Also, the principle that baseline emissions and measures should be quantifiable is particularly important when applied to the level of emission trading that might occur in a large ozone nonattainment area.

The EPA does not believe that it has enough information at this time to fully resolve all of the practical questions mentioned above or in the title V preamble regarding marketable permits, trading, and allowances. The EPA believes that, in resolving such questions, it should apply the same principles mentioned above, namely, that such measures should be quantifiable, accountable, enforceable and implemented according to replicable procedures.

B. Tribal Implementation Plans

Section 107 of the 1990 CAAA adds several provisions to the statute that create the first express authority for EPA to treat Indian tribes as States for certain Act purposes. Section 107 also allows a tribe that qualifies for treatment as a State to develop and submit to EPA a tribal implementation plan (TIP) for implementation of the NAAQS on tribal lands (see Act sections 110(o) and 301(d)). Under section 301(d)(2), EPA is required to promulgate regulations by May 15, 1992 for treating of tribes as States. Section 301(d)(3) states that EPA may promulgate regulations setting forth the elements of TIP's and procedures for EPA action on them. In addition, section 301(d)(4) states that where EPA determines that treatment of Indian tribes as identical to States is not appropriate, the Agency may by regulation provide other means by which EPA will directly administer these provisions. In the preambles to the proposed and final rules, EPA will discuss other issues relating to implementation of the Act on tribal lands.

C. Section 179B Requirements

A new section 179B, International Border Areas, was added to the statute. This section applies to nonattainment areas that are affected by emissions emanating from outside the United States. This section requires EPA to approve a SIP if: The SIP or SIP revision meets all of the requirements applicable to it under the Act, other than a requirement that it demonstrate attainment and maintenance of the relevant NAAQS by the applicable attainment date; and the affected State establishes to EPA's satisfaction, that the SIP or revision would be adequate to attain and maintain the relevant NAAQS by the applicable attainment date but for emissions emanating from outside the United States. Further, any State that establishes to the satisfaction of EPA—with respect to an ozone, CO, or PM–10 nonattainment area in such a State—that the State would have attained the relevant NAAQS but for emissions emanating from outside the United States, shall not be subject to the following provisions: extension of the ozone attainment dates pursuant to section 181(a)(5), the fee provisions of section 185, and the bump-up provisions for failure to attain for ozone (section 181(b)(2),[41] CO (section 186(b)(2), and/or PM–10 (section 188(b)(2) NAAQS.[42]

[41] Note that the statute contained an erroneous reference to section 181(a)(2) instead of 181(b)(2).

[42] As noted, section 179B(d) states that PM–10 areas demonstrating attainment of the standards but for emissions emanating from outside the United States shall not be subject to section 188(b)(2) (reclassification for failure to attain). By analogy to this provision and applying canons of statutory construction, EPA will not reclassify before the applicable attainment date areas which can demonstrate attainment of the PM–10 standards but for emissions emanating from outside the United States. See section 188(b)(1). First, EPA believes section 179(B)(d) evinces a general congressional intent not to penalize areas where emissions emanating from outside the country are the but for cause of the PM–10 attainment problems. Further, if EPA were to reclassify such areas before the applicable attainment date, EPA, in effect, would be reading section 179(B)(d) out of the statute. Specifically, if EPA proceeded to reclassify before the applicable attainment date those areas qualifying for treatment under section 179(B), an area would never be subject to the provision in section 179(B)(d) which prohibits EPA from reclassifying such areas after the applicable attainment date. Canons of statutory construction counsel against interpreting the law such that language is rendered mere surplusage. Finally, note that section 179(B)(d) contains a clearly erroneous reference to carbon monoxide instead of PM–10 and that this section contains other errors. See, e.g., section 179(B)(c) reference to section 186(b)(9), which does not exist.

HeinOnline -- 57 Fed. Reg. 13569 1992

Case: 10-60891 Document: 00511500103 Page: 143 Date Filed: 06/06/2011

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[FRL-4152-9]

RIN 2060-AD16

Operating Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is promulgating a new part 70 of chapter I of title 40 of the Code of Federal Regulations (CFR).

Title V of the Clean Air Act (Act) Amendments of 1990, Public Law 101-549, enacted on November 15, 1990, requires EPA to promulgate regulations within 12 months of enactment that require and specify the minimum elements of State operating permit programs. This new part 70 contains these provisions. It requires States to develop, and to submit to EPA, programs for issuing operating permits to major stationary sources (including major sources of hazardous air pollutants listed in section 112 of the Act), sources covered by New Source Performance Standards (NSPS), sources covered by emissions standards for hazardous air pollutants pursuant to section 112 of the Act, and affected sources under the acid rain program.

Title V establishes timeframes for developing and implementing the State permit programs. Within 3 years of enactment (i.e., no later than November 15, 1993), States must submit proposed permit programs to EPA for approval. The EPA must act to approve or disapprove a State program within 1 year of submittal by the State to EPA. In some cases, EPA can grant programs an interim approval for a period of up to 2 years. If a State fails to submit a fully-approvable program within the 3-year period (or by the end of the interim approval period), EPA will apply specific sanctions pursuant to the provisions of title V and, in any event, must establish a Federal program 2 years after the end of the 3-year program submittal period. Sources subject to the part 70 program must submit complete permit applications within 1 year after a State program is approved by EPA (including an interim approval) or, where the State program is not approved, within 1 year after a program is promulgated by EPA. In the case of new sources, complete permit applications would generally be due 12 months after the source commences operation, unless the permitting authority sets an earlier deadline.

Part 70 sources must obtain an operating permit addressing all applicable pollution control obligations under the State implementation plan (SIP) or Federal implementation plan (FIP), the acid rain program, the air toxics program, or other applicable provisions of the Act (e.g., NSPS). Sources must also submit periodic reports to the State and EPA, as appropriate, concerning the extent of their compliance with permit obligations. The permit, permit application, and compliance reports will be available to the public, subject to any applicable confidentiality protection procedures similar to those contained in section 114(c).

In the proposal, EPA discussed issues connected with the regulations that will govern EPA's issuance of title V permits. The EPA will address these issues further when the Agency proposes Federal regulations.

DATES: The regulatory amendments announced herein take effect on July 21, 1992. This promulgation, however, does not affect the date by which States are to submit full permit programs to EPA for approval. The submittal deadline is set by section 502(d)(1) as 3 years after enactment of the Act Amendments of 1990. The deadline for full program submittal, therefore, is set by the Act as November 15, 1993. A slight variation to this rule can occur if EPA grants a program interim approval. An interim approval will be accompanied by a list of revisions or modifications necessary for the program to be fully approved. The State will then have until 6 months prior to the end of the interim approval to submit the program corrections, even though the November 15, 1993 date may have passed.

ADDRESSES:

Docket

Supporting information used in developing the proposed and final rules is contained in Docket No. A-90-33. This docket is available for public inspection and copying between 8:30 a.m. and 3:30 p.m., Monday through Friday, at the address listed below. A reasonable fee may be charged for copying. The address of the EPA Air Docket is: Room M-1500, Waterside Mall, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Michael Trutna (telephone 919/541-5345) or Kirt Cox (telephone 919/541-5399), Mail Drop 15, United States Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Management Division, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are in the following format:

I. Background and Purpose
II. Implementation Principles
III. Summary of Final Rules
IV. Discussion of Regulatory Changes
  A. Section 70.1—Program Overview
  B. Section 70.2—Definitions
  C. Section 70.3—Applicability
  D. Section 70.4—State Program Submittals and Transition
  E. Section 70.5—Permit Applications
  F. Section 70.6—Permit Content
  G. Section 70.7—Permit Issuance, Renewal, Reopenings, and Revisions
  H. Section 70.8—Permit Review by EPA and Affected States
  I. Section 70.9—Fee Determination and Certification
  J. Section 70.10—Federal Oversight and Sanctions
  K. Section 70.11—Requirements for Enforcement Authority
V. Administrative Requirements
  A. Docket
  B. Office of Management and Budget (OMB) Review
  C. Regulatory Flexibility Act Compliance
  D. Paperwork Reduction Act

This preamble is organized to meet the needs of readers who want just an overview of the operating permit program and for readers who want a detailed discussion of the changes made to the proposed regulations to result in today's final rulemaking.

The first section provides background on the amendments to the Act establishing an operating permit program, the purposes of that action, and the expected benefits. The information is useful to anyone seeking any level of information on the operating permit program.

The second section mentions the principles EPA has followed while developing the regulations. These implementation principles and the positions on associated issues were discussed in detail in the May 10, 1991, preamble.

Section III of the preamble provides a summary of the requirements of the regulations being promulgated today.

A discussion of the regulatory changes from the proposed requirements is in section IV. In the preamble of the May 10, 1991, proposal, EPA explained the basis for its various proposed positions. Where the proposed regulations have not been changed in the final rules, EPA continues for the most part to rely on the rationale provided in the proposal notice. Where the regulations have changed in more than a minor way, this preamble states

HeinOnline -- 57 Fed. Reg. 32250 1992

Case: 10-60891 Document: 00511500103 Page: 144 Date Filed: 06/06/2011

rain provisions. As the proposal noted, EPA believes that section 408 bars the permit shield for acid rain requirements [56 FR 21744] (sections 408(a) and 414). The EPA believes that shielding sources from acid rain requirements would disrupt effective implementation of that important new program.

(b) Terms of the permit shield. Industry suggested that the shield extend during the time a permit expires when action on permit renewal is delayed and that the shield should remain in force while a permit is reopened for cause.

State representatives and environmentalists suggested that the permit should be reopened if the permit is found to be in error as the shield cannot exempt a source from an effective provision of the Act. They also suggested that the permitting authority should be allowed to revoke the permit shield if information submitted is found to be false, incomplete or misleading.

The EPA's position is that the application shield applies if the permit lapses and the source has submitted a timely and complete application and there is a delay in issuing the permit renewal. The EPA's position with respect to the permit shield (as it applies to the terms and conditions of the permit) is that this type of shield continues to apply if the permit lapses. Under EPA's interpretation of the shield to exclude later promulgated requirements, these would of course continue to be applicable to the source.

3. Monitoring

Section 504(c) provides that every permit issued under title V shall contain monitoring requirements "to assure compliance with the permit terms and conditions." This statutory provision is implemented through § 70.6(a)(3)(i) of the regulations. If the underlying applicable requirement imposes a requirement to do periodic monitoring or testing (which may consist of recordkeeping designed to serve as monitoring), the permit must simple incorporate this provision under § 70.6(a)(3)(i)(A). If the underlying applicable requirement imposes no such obligation, under § 70.6(a)(3)(i)(B) the permit must require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring) which yields reliable data from the relevant time period that are taken under conditions representative of the source's operations and, therefore, representative of the source's compliance with its permit. Appropriate monitoring or testing may include noninstrumental monitoring or testing techniques such as opacity readings using an EPA approved method. Any monitoring or testing method or procedure approved by EPA for determining compliance may be used to satisfy the requirement of § 70.6(a)(3)(i)(B).

Examples of situations where § 70.6(a)(3)(i)(B) would apply include a SIP provision which contains a reference test method but no testing obligation, or a NSPS which requires only a one time stack test on startup. Any Federal standards promulgated pursuant to the Act amendments of 1990 are presumed to contain sufficient monitoring and, therefore, only § 70.6(a)(3)(i)(A) applies. EPA will issue guidance for public review within eighteen months addressing which applicable requirements contain insufficient monitoring and the criteria EPA will apply in determining the types of monitoring which would satisfy the requirement of § 70.6(a)(3)(i)(B). To the extent that EPA identifies any federally promulgated requirement with insufficient monitoring, EPA will issue a rulemaking to revise such requirement.

In some instances, a recordkeeping obligation will be sufficient to meet the requirement of § 70.6(a)(3)(i). An example would be a VOC coating source which uses complying coatings and relies on no control equipment to meet the applicable SIP limit. For this type of source, an obligation to keep records of and periodically certify and report the contents of all coatings used would be sufficient.

4. General Permits

The proposal reflected the language of section 504(d) of the Act, which allows States to issue a general permit covering numerous similar sources. Sources covered by general permits must comply with all part 70 requirements, including the requirement for submitting a permit application. General permits, however, do not apply to affected sources (acid rain), unless provided for under title IV regulations. The proposal solicited comment as to how the general permit should be applied to specific sources.

Commenters requested that EPA allow more flexibility for general permits and allow States to formulate their own general permit applications and general permits.

The final rule clarifies that once the general permit has been issued after an opportunity for public participation and EPA and affected State review, the permitting authority may grant or deny a source's request to be covered by a general permit without further public participation or EPA or affected State review. The rule further clarifies that this action of granting or denying the source's request will not be subject to judicial review.

The primary purpose of section 504(d) is to provide an alternative means for permitting sources for which the procedures of the normal permitting process would be overly burdensome, such as area sources under section 112. See H.R. 101–490, 101st Cong., 2nd Sess., 350 (1990). This purpose would be substantially frustrated if sources subject to a general permit were required to repeat public participation procedures at the individual application stage, or if each applicability determination were subject to judicial review.

To ensure that the general permit process is not abused, for example, by a source that misrepresents facts in its request for the general permit, this section provides that a source receiving a general permit shall be subject to an enforcement action for operating without a part 70 permit, notwithstanding the permit shield provisions, if the source is later determined not to qualify for coverage under the general permit. The EPA believes that this approach strikes the appropriate balance between the procedural advantages intended by section 504(d) and the need to protect the integrity of the permitting process.

In setting criteria for sources to be covered by general permits, States should consider all of the following factors. EPA may object to general permits that do not meet these factors. First, categories of sources covered by a general permit should be generally homogenous in terms of operations, processes, and emissions. All sources in the category should have essentially similar operations or processes and emit pollutants with similar characteristics. Second, sources should not be subject to case-by-case standards or requirements. For example, it would be inappropriate under a general permit to cover sources requiring case-by-case MACT determinations. Third, sources should be subject to the same or substantially similar requirements governing operation, emissions, monitoring, reporting, or recordkeeping.

Sources, including those emitting air toxics, may also be issued general permits strictly for the purposes of avoiding classification as a major source. For example, if sources above a certain emissions level are subject to stringent requirements, it may be feasible to cover sources below that level under a general permit that has, as its principal requirement, a condition that the emissions level is not exceeded.

HeinOnline -- 57 Fed. Reg. 32278 1992

Case: 10-60891 Document: 00511500103 Page: 145 Date Filed: 06/06/2011

TABLE 52.1167.—EPA-APPROVED RULES AND REGULATIONS.—Continued

State citation	Title/subject	Date submitted by State	Date approved by EPA	Federal Register citation	52.1120(c)	Comments/unapproved sections
*	*	*	*	*	*	* *
310 CMR 7.33 ...	City of Boston/ South Boston Parking Freeze.	7/30/93	October 15, 1996.	[Insert FR citation from published date].	111	Applies to the parking of motor vehicles within the area of South Boston, including Massport property in South Boston.
*	*	*	*	*	*	* *

[FR Doc. 96–26201 Filed 10–11–96; 8:45 am]
BILLING CODE 6560–50–P

40 CFR Part 52

[TN–158–1–9632a; FRL–5619–6]

Approval and Promulgation of Implementation Plans State: Approval of Revisions to the Knox County Portion of the State of Tennessee's State Implementation Plan (SIP)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving revisions to the Knox County portion of the Tennessee State Implementation Plan (SIP) to allow the Knox County Department of Air Pollution Control (Knox County) to utilize permits-by-rule for the purpose of limiting potential to emit (PTE) criteria pollutants for certain source categories to less than the title V permitting major source thresholds. EPA is also approving under section 112(l) of the Clean Air Act several source categories of the submitted regulations for limiting PTE of hazardous air pollutants (HAP) to less than title V permitting major source thresholds. These permits-by-rule provide a way for sources to accept limitations on their operations without the added burden of obtaining source-specific permits for the following source categories: fuel-burning equipment burning natural gas/ liquified petroleum gas (LPG) and/or distillate oil, fuel burning equipment burning natural gas/LPG and/or residual oil, on-site power generation, concrete mixing plants, coating operations, printing operations, and fiberglass molding and forming operations. On May 23, 1995, Knox County through the Tennessee Department of Environment and Conservation submitted a SIP revision fulfilling the requirements necessary to utilize exclusionary rules to limit PTE of air pollutants in a federally enforceable manner.

DATES: This final rule is effective December 16, 1996 unless adverse or critical comments are received by November 14, 1996. If the effective date is delayed, timely notice will be published in the **Federal Register**.

ADDRESSES: Written comments on this action should be addressed to Scott Miller at the Environmental Protection Agency, Region 4 Air Planning Branch, 100 Alabama Street, SW, Atlanta, Georgia 30303. Copies of documents relative to this action are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day. Reference file TN158–1–9632. The Region 4 office may have additional background documents not available at the other locations.

Air and Radiation Docket and Information Center (Air Docket 6102), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460. Environmental Protection Agency, Region 4 Air Planning Branch, 100 Alabama Street, SW, Atlanta, Georgia 30303. Scott Miller, 404/562–9120.

Tennessee Department of Environment and Conservation, Division of Air Pollution Control, 9th Floor, L & C Annex, 401 Church Street, Nashville, Tennessee 37243–1531.

Knox County Department of Air Pollution Control, Suite 339, City-County Building, 400 West Main Street, Knoxville, Tennessee 37902.

FOR FURTHER INFORMATION CONTACT: Scott Miller at 404/562–9120.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

On May 23, 1995, the Knox County Department of Air Pollution Control through the Tennessee Department of Environment and Conservation submitted SIP revisions designed to allow Knox County to utilize permits-by-rule for the purpose of limiting PTE for fuel-burning equipment burning natural LPG and/or distillate oil, fuel burning equipment burning natural gas/ LPG and/or residual oil, on-site power generation, concrete mixing plants, coating operations, printing operations, and fiberglass molding and forming operations. Permits-by-rule are designed to create federally enforceable limits on a facility's PTE in a manner that does not require a facility-specific evaluation of emissions and limiting conditions. As such, permits-by-rule are appropriate for the purpose of limiting PTE when a facility has one type of emission source. EPA is approving all source category permits-by-rule submitted for purposes of limiting PTE for criteria pollutants. EPA is approving under section 112(l) of the CAA, Knox County Air Pollution Control (KCAPC) regulations Section 25.10.7, Section 25.10.8, and Section 25.10.10 for purposes of limiting PTE of HAP from coating operations, printing operations, and fiberglass molding and forming operations. For a description of this and other ways to limit PTE for a facility see the EPA guidance document entitled "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)" dated January 25, 1995, from John Seitz to the EPA Regional Air Division Directors.

These permits-by-rule were designed to meet criteria listed in the EPA guidance memorandum entitled "Guidance for State Rules for Optional Federally Enforceable Emissions Limits Based on Volatile Organic Compound Use" dated October 15, 1993, from D. Kent Barry to the EPA Regional Air Division Directors, an EPA guidance document entitled "Approaches to Creating federally-Enforceable Emissions Limits" dated November 3, 1993, and the January 25, 1995, guidance memorandum referenced above. These guidance documents set out specific guidelines for permit-by-rule development regarding applicability, compliance determination and certification, monitoring, reporting, record keeping, public involvement, practical enforceability, and the requirement that a facility cannot rely on emission limits or caps contained in

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 146 Date Filed: 06/06/2011

a permit-by-rule to justify violation of any rate-based emission limits or other applicable requirements.

A permit-by-rule applies to facilities which agree to limit their annual emissions to less than major source thresholds for criteria and/or hazardous air pollutant (HAP) emissions. A permit-by-rule must also provide that a facility owner or operator specifically apply for coverage under the permit-by-rule. KCAPC regulation Section 25.10.C.5 requires that a facility operating under a permit-by-rule must submit a written statement verifying this status to the Department. The source categories covered by the permit-by-rule regulations are fuel-burning equipment burning natural LPG and/or distillate oil, fuel burning equipment burning natural gas/LPG and/or residual oil, on-site power generation, concrete mixing plants, coating operations, printing operations, and fiberglass molding and forming operations. As such, these regulations meet the guidelines specified in the October 15, 1993, and the January 25, 1995, guidance documents that require a permit-by-rule to clearly identify the category of sources that qualify for the rule's coverage.

The October 15, 1993, and the January 25, 1995, guidance documents suggest that facilities be required to show compliance with the permit-by-rule on a yearly basis by requiring monthly record keeping of the relevant variable causing emissions and showing compliance using the monthly record of the relevant variable affecting emissions. The January 25, 1995, guidance document stipulates that where monitoring cannot be used to determine emissions directly, limits on appropriate operating parameters must be established for the units or source, and monitoring must verify compliance with those limits. In the case of the Knox County regulations, a facility is required to keep records of the use of or processing of a product or substance that produces the emissions. For instance, KCAPC Regulation Section 25.10.B.8 requires printing operations to keep monthly records of materials including but not limited to inks, thinners, and solvents if they contain any VOC or HAP. The printing facility must then show compliance with the 20,000 pounds per year limitation during any twelve consecutive month period. EPA believes that the permit-by-rule submitted by Knox County meets guidelines outlined in the October 15, 1993, and January 25, 1995, guidance documents for purposes of detailing specific compliance monitoring to show compliance with the relevant limit resulting from a permit-by-rule.

The October 15, 1993, guidance document recommends that all submittals that result from permit-by-rule be certified for truth, accuracy, and completeness. KCAPAC regulation Section 25.10.C.3 requires that each facility which chooses to be covered by a permit-by-rule must submit annual reports and compliance certifications addressing the applicable requirements, and terms and conditions of each standard. Therefore, EPA believes that the permit-by-rule regulations submitted by Knox County meet requirements outlined in the October 15, 1993, guidance document for purposes of certification with respect to truth, completeness, and accuracy.

The October 15, 1993, guidance document recommends that reporting requirements should vary based on how close the facility emissions are to the relevant major source threshold. For facilities that are close to the major source threshold, the guidance recommends that a state or local air pollution control agency require more frequent reporting of the variable affecting emissions (e.g. gasoline throughput). KCAPC Regulation Section 25.10.C.3 requires all facilities to report emissions information or the variable directly affecting emissions on an annual basis. While under ideal circumstances, Knox County would require more frequent reporting as the relevant variable affecting emissions approached major source levels for title V, EPA believes that coupled with the requirement found in KCAPC Regulation Section 25.10.C.4, which requires that any exceedance of any applicable limitation be reported by one week after occurrence, Knox County's permit-by-rule regulations meet requirements outlined in the October 15, 1993, guidance document for purposes of reporting the relevant variable affecting emissions from the process. The October 15, 1993, guidance document also requires that a facility report any exceedance of an exclusionary rule within one week after its occurrence. The Knox County regulations satisfy this requirement by a verbatim incorporation of this requirement in KCAPC Regulation Section 25.10.C.4. Therefore, EPA believes that the Knox County regulations meet the requirements set out in the above-listed guidance documents for reporting.

The October 15, 1993, and the January 25, 1995, guidance documents specify that record keeping is required by a facility to show that the facility is eligible for the permit-by-rule and that the facility is in compliance with the relevant permit-by-rule. The October 15, 1993, guidance document requires that record keeping be maintained on site and available to the permitting authority upon demand. The October 15, 1993, guidance document also requires that a facility be required to retain records for a period sufficient to support enforcement efforts. The Knox County regulations require that copies of all records required to be kept for permit-by-rule purposes be kept on site. The permit-by-rule regulations submitted by Knox County require that records be kept for a period of five years from the date of last entry. EPA believes that a five year time period is an adequate time period for a facility subject to a permit-by-rule to maintain records in order to support enforcement efforts.

The November 3, 1993, and the January 25, 1995, guidance documents set out requirements for public involvement in the development and application of permit-by-rule regulations. The November 3, 1993, guidance document states that if permit-by-rule regulations are sufficiently reliable and replicable, EPA and the public need not be involved with their application to individual sources, as long as the protocols themselves have been subject to notice and opportunity to comment and have been approved by EPA into the SIP. The January 25, 1995, guidance document provides that source category standards approved into the SIP or under section 112(l) of the Clean Air Act, if enforceable as a practical matter, can be used as federally enforceable limits on PTE. Once a specific source qualifies under the applicability requirements of the source-category rule, additional public participation is not required to make the limits federally enforceable as a matter of legal sufficiency since the rule itself underwent public participation and EPA review. The Knox County permit-by-rule underwent public participation at the local level when these rules were made locally-effective. EPA has had an opportunity to review these regulations and is publishing this notice to take comment on these regulations at the national level. Later in this **Federal Register** document, practical enforceability of Knox County's permit-by-rule regulations will be addressed. EPA believes that with this **Federal Register** document and other public process received at the local level that the Knox County permit-by-rule regulations satisfy requirements for public participation outlined in the November 3, 1993, and the January 25, 1995, guidance documents.

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 147 Date Filed: 06/06/2011

The January 25, 1995, guidance document sets out requirements for a permit-by-rule to be practically enforceable. These requirements stem from past precedence in what the EPA has required for a permit to be considered enforceable as a practical matter. See 54 FR 27274 (June 28, 1989) and a June 13, 1989, EPA policy memorandum entitled "Limiting Potential to Emit in New Source Permitting." The criteria include clear statements as to the applicability, specificity as to the standard that must be met, explicit statements of the compliance time frames (e.g. hourly, daily, monthly, or 12-month averages, etc.), that the time frame and method of compliance employed must be sufficient to protect the standard involved, record keeping requirements must be specified, and equivalency provisions must meet specific requirements. In general, practical enforceability means that the provision must specify; (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation; and (3) the method to determine compliance including appropriate monitoring, record keeping, and reporting. All of these elements have been discussed prior to this paragraph in this **Federal Register** with the exception of (2) above. The Knox County regulations require facilities subject to the permit-by-rule to keep records on a monthly basis and to determine compliance with a yearly limit on a calendar monthly rolling average basis. This method for determining compliance with the permit-by-rule was addressed specifically as one practically enforceable way to show compliance with a permit limit in the June 13, 1989, guidance document entitled "Limiting Potential to Emit in New Source Permitting." As such, EPA believes the Knox County permit-by-rule regulations meet the requirements necessary for a permit-by-rule to be enforceable as a practical matter.

Finally, the October 15, 1993, guidance document stipulates that a facility cannot rely on emission limits or caps contained in a permit-by-rule to justify violation of any rate-based emission limits or other applicable requirements. This requirement for title V permitting is fulfilled by inclusion of KCAPC Regulation Section 25.10.C.5 which stipulates that non-compliance with provisions of the permit-by-rule regulations will be subject to an enforcement action unless the facility has first obtained a formal release through a part 70 permit or some other federally enforceable permit from Knox County.

Eligibility for federally enforceable permit-by-rule limitations extends not only to certifications made after the effective date of this rule, but also to certifications issued under the current Knox County rule prior to the effective date of this rulemaking. If Knox County followed its own permit-by-rule regulation, it received certifications that established a limiting condition on a facility's PTE. EPA will consider all such permit-by-rule certifications which were submitted in a manner consistent with the Knox County regulations as federally enforceable upon the effective date of this action.

II. Final Action

In this action, EPA is approving the Knox County permit-by-rule regulations found at KCAPC Regulations: Section 25.10 into the Knox County portion of the Tennessee SIP. EPA is approving KCAPC Regulations Section 25.10.A, 25.10.B.7, 25.10.B.8, 25.10.B.10, 25.10.C for purposes of limiting PTE of HAP under section 112(l) of the CAA. The EPA is publishing this document without prior proposal because the EPA views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this **Federal Register** publication, EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective December 16, 1996 unless, by November 14, 1996, adverse or critical comments are received. If the EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on this action serving as a proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective December 16, 1996.

EPA has reviewed this request for revision of the federally-approved SIP for conformance with the provisions of the 1990 Amendments enacted on November 15, 1990. EPA has determined that this action conforms with those requirements.

Nothing in this action shall be construed as permitting or allowing or establishing a precedent for any future request for a revision to any state implementation plan. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

III. Administrative Requirements

A. Executive Order 12866

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989, (54 FR 2214–2225), as revised by a July 10, 1995, memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget has exempted this action from review under Executive Order 12866.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, Part D of the CAA do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-state relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. E.P.A.*, 427 U.S. 246, 256–66 (S.Ct. 1976); 42 U.S.C. 7410(a)(2).

C. Unfunded Mandates Reform Act of 1995

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more. Under section

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 148 Date Filed: 06/06/2011

205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the final action promulgated today does not include a Federal mandate that may result in estimated costs of $100 million or more to State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

D. Submission to Congress and the General Accounting Office

Under U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted 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 General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

E. 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 December 16, 1996. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen oxides, Ozone, Particulate matter, Sulfur oxides.

Dated: August 29, 1996.

Robert F. McGhee,

Acting Regional Administrator.

Part 52 of chapter I, title 40, *Code of Federal Regulations,* is amended as follows:

PART 52—[AMENDED]

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

Authority: 42.U.S.C. 7401–7671q.

Subpart RR—Tennessee

2. Section 52.2220, (c) is amended by adding paragraph (c)(140) to read as follows:

§ 52.2220 Identification of plan.

* * * * *

(c) * * *

(140) Permit-by-rule regulations for Knox County Department of Air Pollution Control submitted by the Knox County Department of Air Pollution Control through the Tennessee Department of Environment and Conservation on May 23, 1995 as part of Knox County's portion of the Tennessee SIP.

(i) Incorporation by reference.

(A) Regulation Section 25.10 of the Knox County portion of the Tennessee SIP as adopted by the Knox County Air Pollution Control Board on April 12, 1995.

(ii) Other material. None.

[FR Doc. 96–26199 Filed 10–11–96; 8:45 am]

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40 CFR Part 52

[ME–001–3567a; A–1–FRL–5620–1]

Approval and Promulgation of Air Quality Implementation Plans; Maine; Stage II Vapor Recovery

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Maine on July 24, 1995. This revision includes requirements for controlling volatile organic compound (VOC) emissions from bulk gasoline terminals and gasoline dispensing facilities. The intended effect of this action is to approve these regulations into the Maine SIP. This action is being taken in accordance with the Clean Air Act.

DATES: This action is effective December 16, 1996, unless EPA receives adverse or critical comments by November 14, 1996. If the effective date is delayed, timely notice will be published in the **Federal Register**.

ADDRESSES: Comments may be mailed to Susan Studlien, Deputy Director, Office of Ecosystem Protection, U.S. Environmental Protection Agency, Region I, JFK Federal Building, Boston, MA 02203. Copies of the documents relevant to this action are available for public inspection during normal business hours, by appointment at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, Region I, One Congress Street, 11th floor, Boston, MA; Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street, S.W., (LE–131), Washington, D.C. 20460; and the Bureau of Air Quality Control, Department of Environmental Protection, 71 Hospital Street, Augusta, ME 04333.

FOR FURTHER INFORMATION CONTACT: Anne E. Arnold, (617) 565–3166.

SUPPLEMENTARY INFORMATION: On July 26, 1995, EPA received a formal State Implementation Plan submittal from the Maine Department of Environmental Protection (DEP) containing the following VOC regulations:

Chapter 100: Definitions Regulation
Chapter 112: Bulk Terminal Petroleum Liquid Transfer Requirements
Chapter 118: Gasoline Dispensing Facilities Vapor Control

These regulations had been recently revised pursuant to the reasonable further progress (RFP) requirements of the Clean Air Act (CAA) [Section 182(b)(1)].

Background

On November 15, 1990, amendments to the 1977 Clean Air Act were enacted. Public Law 101–549, 104 Stat. 2399, codified at 42 U.S.C. 7401–7671q. Section 182(b)(1) of the amended Act requires that states with ozone nonattainment areas classified as moderate and above develop reasonable further progress (RFP) plans to reduce VOC emissions by 15 percent within these areas by 1996 when compared to 1990 baseline emission levels. The State of Maine contains three moderate ozone nonattainment areas 56 FR 56694 (Nov. 6, 1991). EPA, however, determined that RFP plans were not required in the Lewiston-Auburn moderate ozone nonattainment area and the Knox and Lincoln counties moderate ozone nonattainment area (60 FR 29763, (June 6, 1995)). Therefore, Maine adopted and submitted to EPA an RFP Plan for the Portland moderate ozone nonattainment area only. The revisions to Maine's Chapter 112 and Chapter 118 were adopted in order to generate VOC

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 149 Date Filed: 06/06/2011

205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

D. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted 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 General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

E. 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 March 18, 1997. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: November 20, 1996.

Jack W. McGraw,

Acting Regional Administrator, Region VIII.

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

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows: Authority: 42 U.S.C. 7401–7671q.

2. Section 52.320 is amended by adding paragraph (73) to read as follows:

SUBPART G—COLORADO

§ 52.320 Identification of plan.

* * * * *

(c) * * *

(77) On September 29, 1995, Roy Romer, the Governor of Colorado, submitted a SIP revision to the State Implementation Plan for the Control of Air Pollution. This revision provides a replacement Regulation No. 11, Inspection/Maintenance Program which limits dealer self-testing. This material is being incorporated by reference for the enforcement of Colorado's I/M program.

(i) Incorporation by reference.

(A) Department of Health, Air Quality Control Commission, Regulation No. 11 (Motor Vehicle Emissions Inspection Program) as adopted by the Colorado Air Quality Control Commission (AQCC) on September 22, 1994, effective November 30, 1994.

[FR Doc. 97–1075 Filed 1–16–97; 8:45 am]

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40 CFR Part 52

[FL–68–2–9640a; FRL–5662–1]

Approval and Promulgation of Implementation Plans State: Approval of Revisions to the State of Florida State Implementation Plan (SIP)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving revisions to the Florida State Implementation Plan (SIP) to allow the State air pollution control agency to utilize exclusionary rules via general permits for the purpose of limiting potential to emit (PTE) criteria pollutants for certain source categories to less than the title V permitting major source thresholds. EPA is also approving under section 112(l) of the Clean Air Act (CAA) the same source-categories of the submitted regulations for limiting PTE of hazardous air pollutants (HAP) to less than title V permitting major source thresholds. These exclusionary rules allow facilities to compute potential emissions based on actual emissions or raw material usage for the following source categories: Asphalt concrete plants, bulk gasoline plants, emergency generators, surface coating operations, heating units and general purpose internal combustion engines, polyester resin plastic products, cast polymer operations; and mercury reclamation and recovery operations. On April 15, 1996, the State of Florida through the Department of Environmental Protection (DEP) submitted a SIP revision fulfilling the requirements necessary to utilize exclusionary rules to limit PTE of air pollutants in a federally enforceable manner. On August 6, 1996, the State of Florida submitted updates to the earlier submittal which also fulfill the requirements necessary to utilize exclusionary rules to limit PTE in a federally enforceable manner.

DATES: This final rule is effective March 18, 1997 unless adverse or critical comments are received by February 18, 1997. If the effective date is delayed, timely notice will be published in the **Federal Register**.

ADDRESSES: Written comments on this action should be addressed to Scott Miller at the Environmental Protection Agency, Region 4 Air Planning Branch, 100 Alabama Street, SW, Atlanta, Georgia 30303. Copies of documents relative to this action are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day. Reference file FL–68–2–9640. The Region 4 office may have additional background documents not available at the other locations.

Air and Radiation Docket and Information Center (Air Docket 6102), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460.

Environmental Protection Agency, Region 4 Air Planning Branch, 100 Alabama Street, SW, Atlanta, Georgia 30303. Scott Miller, 404/562–9120.

Florida Department of Environmental Protection, Division of Air Resources Management, 2600 Blair Stone Road, MS 5500, Tallahassee, Florida 32399–2400.

FOR FURTHER INFORMATION CONTACT: Scott Miller at 404/562–9120.

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 150 Date Filed: 06/06/2011

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

On April 15, 1996, the State of Florida through the DEP submitted a SIP revision designed to allow the agency to utilize exclusionary rules for the purpose of limiting PTE for asphalt concrete plants, bulk gasoline plants, emergency generators, surface coating operations, heating units and general purpose internal combustion engines, polyester resin plastic products, cast polymer operations, and mercury reclamation and recovery operations. On August 6, 1996, the State of Florida submitted updates to the earlier submittal which also fulfill the requirements necessary to utilize exclusionary rules to limit PTE in a federally enforceable manner. Exclusionary rules are designed to create federally enforceable limits on a facility's PTE in a manner that does not require a facility-specific evaluation of emissions and limiting conditions. As such, exclusionary rules are appropriate for the purpose of limiting PTE when a facility has one type of emission source. EPA is approving all source-category rules found at Florida Administrative Code (F.A.C.) at 62–210.300(3)(c) and 62–210.300(4), submitted for purposes of limiting PTE for criteria pollutants into the SIP. The DEP is implementing these exclusionary rules found at 62–210.300(3)(c) through general permitting regulations found at 62–210.300(4). EPA is also approving under section 112(l) of the CAA, the regulations found in the F.A.C. 62–210.300(3)(c) and 62–210.300(4) for purposes of limiting PTE of HAP. For a description of this and other ways to limit PTE for a facility see the EPA guidance document entitled "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)" dated January 25, 1995, from John Seitz to the EPA Regional Air Division Directors.

These rules which set out specific conditions for a facility to limit its PTE were designed to meet criteria listed in the EPA guidance memorandum entitled "Guidance for State Rules for Optional Federally Enforceable Emissions Limits Based on Volatile Organic Compound Use" dated October 15, 1993, from D. Kent Barry to the EPA Regional Air Division Directors, an EPA guidance document entitled "Approaches to Creating Federally-Enforceable Emissions Limits" dated November 3, 1993, and the January 25, 1995, guidance memorandum referenced above. These guidance documents set out specific guidelines for exclusionary rule development regarding applicability, compliance determination and certification, monitoring, reporting, record keeping, public involvement, practical enforceability, and the requirement that a facility cannot rely on emission limits or caps contained in a exclusionary rule to justify violation of any rate-based emission limits or other applicable requirements.

These regulations apply to facilities which agree to limit their annual emissions to less than major source thresholds for criteria and/or HAP emissions. A rule which sets out the operating parameters must also provide that a facility owner or operator specifically apply for coverage under the exclusionary rule. F.A.C. Regulations 62–210.300(3)(c) and 62–210.300(4) provide that the exclusionary rules are for certain source categories to define and limit their potential emissions to less than major source levels for title V purposes. The source categories covered by the exclusionary rules are asphalt concrete plants, bulk gasoline plants, emergency generators, surface coating operations, heating units and general purpose internal combustion engines, polyester resin plastic products, cast polymer operations, and mercury reclamation and recovery operations. F.A.C. Regulation 62–210.300(3)(c) provides that even though a facility is exempted from obtaining a title V permit by complying with these exclusionary rules, it is still required to obtain a general permit. As such, these regulations meet the guidelines specified in the October 15, 1993, and the January 25, 1995, guidance documents that require an exclusionary rule to clearly identify the category of sources that qualify for the rule's coverage.

The October 15, 1993, and the January 25, 1995, guidance documents suggest that facilities be required to show compliance with the exclusionary rule on a yearly basis by requiring monthly record keeping of the relevant variable causing emissions and showing compliance using the monthly record of the relevant variable affecting emissions. The January 25, 1995, guidance document stipulates that where monitoring cannot be used to determine emissions directly, limits on appropriate operating parameters must be established for the units or source, and monitoring must verify compliance with those limits. In the case of the Florida exclusionary rule regulations, a facility is required to keep records of the use of or processing of a product or substance that produces the emissions. For instance, F.A.C. Regulation 62–210.300(3)(c)1.g requires concrete asphalt facilities to keep monthly and twelve-month rolling total records of asphaltic concrete produced, gallons of fuel oil consumed and the hours of operation. The asphalt concrete facility must then show compliance with the 500,000 ton per any consecutive twelve-month period, fuel-oil consumption records that show that no more than 1.2 million gallons are combusted in any consecutive twelve-month period, and that fuel-oil sulfur content is less than or equal to 1 percent sulfur as determined by ASTM methods ASTM D4057–88, D129–91, D2622–94, or D4294–90. Finally, a concrete asphalt facility must keep records of its operating hours to show that operating hours do not exceed 4000 hours in any consecutive twelve-month period. EPA believes that the exclusionary rules submitted by the DEP meet the guidelines outlined in the October 15, 1993, and January 25, 1995, guidance documents for purposes of detailing specific compliance monitoring to show compliance with the relevant exclusionary rule limit.

The October 15, 1993, guidance document recommends that all submittals that result from exclusionary rules be certified for truth, accuracy, and completeness. Each facility which chooses to be covered by an exclusionary rule submitted by the DEP must make submissions which are certified by the appropriate official as defined under the Air General Permit Notification Form. For instance, F.A.C. Regulation 62–210.300(3)(c)1.j requires concrete asphalt facilities to submit a notification to DEP that certifies that the facility is operating in compliance with the exclusionary rule to which it is subject. In addition, the facility must also certify that it will continue to operate in compliance with the exclusionary rule to which it is subject. EPA believes that the DEP exclusionary rules meet the requirements of the October 15, 1993, guidance document for purposes of certifying compliance with the exclusionary rule to which a facility is subject.

The October 15, 1993, guidance document recommends that reporting requirements should vary based on how close the facility emissions are to the relevant major source threshold. For facilities with emissions that are close to the major source threshold, the guidance recommends that a state or local air pollution control agency require more frequent reporting of the variable affecting emissions (e.g., gasoline throughput). In lieu of requiring facilities to report emissions to DEP, DEP requires the facility to

US EPA ARCHIVE DOCUMENT

HeinOnline -- 62 Fed. Reg. 2588 1997

Case: 10-60891 Document: 00511500103 Page: 151 Date Filed: 06/06/2011

maintain records for a period of five years from their origination. These records are required to be readily available for submission or inspection on-site. In addition, the DEP has committed to inspect ten percent of facilities subject to an exclusionary rule every year. While the rules submitted by the DEP do not match recommended guidelines found in the October 15, 1993, guidance document for reporting requirements, the EPA believes that the DEP inspections of subject facilities, along with the above mentioned record keeping requirements, are sufficient to ensure compliance by subject facilities.

The October 15, 1993, and the January 25, 1995, guidance documents specify that record keeping is required by a facility to show that the facility is eligible for the exclusionary rule and that the facility is in compliance with the relevant exclusionary rule. The October 15, 1993, guidance document requires that record keeping shall be maintained on site and available to the permitting authority upon demand. The October 15, 1993, guidance document also requires that a facility be required to retain records for a period sufficient to support enforcement efforts. The DEP regulations require that copies of all records required to be kept for exclusionary rule purposes be kept on site and be available to each agency on demand. The exclusionary rules submitted by DEP require that records be kept for a period of five years from the date the records are originated. EPA believes that a five year time period is an adequate time period for a facility subject to an exclusionary rule to maintain records in order to support enforcement efforts.

The November 3, 1993, and the January 25, 1995, guidance documents set out requirements for public involvement in the development and application of exclusionary rules. The November 3, 1993, guidance document states that if exclusionary rules are sufficiently reliable and replicable, EPA and the public need not be involved with their application to individual sources, as long as the protocols themselves have been subject to notice and opportunity to comment and have been approved by EPA into the SIP. The January 25, 1995, guidance document provides that source-category standards approved into the SIP or under section 112(l) of the CAA, if enforceable as a practical matter, can be used as federally enforceable limits on PTE. Once a specific source qualifies under the applicability requirements of the source-category rule, additional public participation is not required to make the limits federally enforceable as a matter of legal sufficiency since the rule itself underwent public participation and EPA review. The DEP general permit exclusionary rules underwent public participation at the State level when these rules were made State-effective by the DEP. EPA has had an opportunity to review these regulations and is publishing this document to take comment on these regulations at the national level. Later in this **Federal Register** document, practical enforceability of DEP's exclusionary rules will be addressed. EPA believes that, with this **Federal Register** document and other public process received at the State and local level, the DEP exclusionary rules satisfy requirements for public participation outlined in the November 3, 1993, and the January 25, 1995, guidance documents.

The January 25, 1995, guidance document sets out requirements for exclusionary rule conditions to be practically enforceable. These requirements stem from past precedence in what the EPA has required for a permit to be considered enforceable as a practical matter. See 54 FR 27274 (June 28, 1989) and a June 13, 1989, EPA policy memorandum entitled "Limiting Potential to Emit in New Source Permitting." The criteria include clear statements as to the applicability, specificity as to the standard that must be met, explicit statements of the compliance time frames (e.g., hourly, daily, monthly, or 12-month averages, etc.), that the time frame and method of compliance employed must be sufficient to protect the standard involved, record keeping requirements must be specified, and equivalency provisions must meet specific requirements. In general, practical enforceability means that the provision must specify; (1) A technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation; and (3) the method to determine compliance including appropriate monitoring, record keeping, and reporting. All of these elements have been discussed prior to this paragraph in this **Federal Register** with the exception of (2) above. The DEP regulations require facilities subject to the exclusionary rule to keep records on a monthly basis and to determine compliance with a yearly limit on a calendar monthly rolling average basis. This method for determining compliance with the exclusionary rule limitation was addressed specifically as one practically enforceable way to show compliance with a permit limit in the June 13, 1989, guidance document entitled "Limiting Potential to Emit in New Source Permitting." As such, EPA believes the DEP general permit exclusionary rule regulations meet the requirements necessary for exclusionary rules to be enforceable as a practical matter.

Finally, the October 15, 1993, guidance document stipulates that a facility cannot rely on emission limits or caps contained in a exclusionary rule to justify violation of any rate-based emission limits or other applicable requirements. This requirement is reflected by the fact that exclusionary rules are carried out through general permits. These general permits contain other requirements to which a facility is subject. Since the general permit will include all requirements to which a facility is subject, it follows that the exclusionary rules contained in the general permit cannot be used to override other requirements found in the permit. Therefore, EPA believes that the DEP exclusionary rules meet the requirements listed in the October 15, 1993, guidance document regarding the use of an exclusionary rule cap to justify violation of any rate-based emission limit or other applicable requirements.

Eligibility for federally enforceable exclusionary rule certifications extends not only to certifications made after the effective date of this rule, but also to certifications issued under the State rule prior to the effective date of this rulemaking. If the State agency followed its own regulation, it received exclusionary rule certifications that established a limiting condition on a facility's PTE. EPA will consider all such exclusionary rule certifications which were submitted in a manner consistent with the State agency regulations as federally enforceable upon the effective date of this action.

II. Final Action

In this action, the EPA is approving the State of Florida exclusionary rules and general permit regulations found at FAC Regulation 62–210.300(3)(c) and 62–210.300(4) into the Florida SIP. The EPA is approving Florida regulations FAC Regulation 62–210.300(3)(c) and 62–210.300(4) for purposes of limiting PTE of HAP under section 112(l) of the CAA. The EPA is publishing this document without prior proposal because the EPA views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this **Federal Register** publication, EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective March 18, 1997 unless, by February 18, 1997,

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 152 Date Filed: 06/06/2011

adverse or critical comments are received. If the EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will be addressed in a subsequent final rule based on this action serving as a proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective March 18, 1997.

EPA has reviewed this request for revision of the federally-approved SIP for conformance with the provisions of the 1990 Amendments enacted on November 15, 1990. EPA has determined that this action conforms with those requirements.

Nothing in this action shall be construed as permitting or allowing or establishing a precedent for any future request for a revision to any state implementation plan. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

III. Administrative Requirements

A. Executive Order 12866

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225), as revised by a July 10, 1995, memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget has exempted this action from review under Executive Order 12866.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, Part D of the CAA do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-state relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. E.P.A.*, 427 U.S. 246, 256–66 (S.Ct. 1976); 42 U.S.C. Section 7410(a)(2).

C. Unfunded Mandates Reform Act of 1995

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

EPA has determined that the final action promulgated today does not include a Federal mandate that may result in estimated costs of $100 million or more to State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

D. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted 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 General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

E. 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 March 18, 1997. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen oxides, Ozone, Particulate matter, Sulfur oxides.

Dated: August 29, 1996.

R. F. McGhee,

Acting, Regional Administrator.

Part 52 of chapter I, title 40, *Code of Federal Regulations,* is amended as follows:

PART 52—[AMENDED]

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

Authority: 42.U.S.C. 7401–7671q.

Subpart K—Florida

2. Section 52.520, paragraph (c) is amended by adding paragraph (97) to read as follows:

§ 52.520 Identification of plan.

* * * * *

(c) * * *

(97) General permit rules and exclusionary rules for the State of Florida Department of Environmental Protection submitted by the Florida Department of Environmental Protection as part of the Florida SIP.

(i) Incorporation by reference.

(A) Florida Administrative Code Regulation 62–210.300(3)(c) and 62–210.300(4) of the Florida SIP as adopted by the Secretary of the Florida Department of Environmental Protection on July 26, 1996 and which became effective on August 15, 1996.

(ii) Other material. None.

[FR Doc. 96–1077 Filed 1–16–97; 8:45 am]

BILLING CODE 6560–50–P

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 153 Date Filed: 06/06/2011

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[AD–FRL–7414–5]

RIN 2060–AE11

Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is revising regulations governing the New Source Review (NSR) programs mandated by parts C and D of title I of the Clean Air Act (CAA or Act). These revisions include changes in NSR applicability requirements for modifications to allow sources more flexibility to respond to rapidly changing markets and to plan for future investments in pollution control and prevention technologies. Today's changes reflect EPA's consideration of discussions and recommendations of the Clean Air Act Advisory Committee's (CAAAC) Subcommittee on NSR, Permits and Toxics, comments filed by the public, and meetings and discussions with interested stakeholders. The changes are intended to provide greater regulatory certainty, administrative flexibility, and permit streamlining, while ensuring the current level of environmental protection and benefit derived from the program and, in certain respects, resulting in greater environmental protection.

EFFECTIVE DATE: This final rule is effective on March 3, 2003.

ADDRESSES: *Docket.* Docket No. A–90–37, containing supporting information used to develop the proposed rule and the final rule, is available for public inspection and copying between 8 a.m. and 4:30 p.m., Monday through Friday (except government holidays) at the Air and Radiation Docket and Information Center (6102T), Room B–108, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20460; telephone (202) 566–1742, fax (202) 566–1741. A reasonable fee may be charged for copying docket materials. *Worldwide Web (WWW).* In addition to being available in the docket, an electronic copy of this final rule will also be available on the WWW through the Technology Transfer Network (TTN). Following signature, a copy of the rule will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules: *http://www.epa.gov/ttn/oarpg.*

FOR FURTHER INFORMATION CONTACT: Ms. Lynn Hutchinson, Information Transfer and Program Integration Division (C339–03), U.S. EPA Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, telephone 919–541–5795, or electronic mail at *hutchinson.lynn@epa.gov,* for general questions on this rule. For questions on baseline emissions determination or the actual-to-projected-actual applicability test, contact Mr. Dan DeRoeck, at the same address, telephone 919–541–5593, or electronic mail at *deroeck.dan@epa.gov.* For questions on Plantwide Applicability Limitations (PALs), contact Mr. Raj Rao, at the same address, telephone 919–541–5344, or electronic mail at rao.raj@epa.gov. For questions on Clean Units, contact Mr. Juan Santiago, at the same address, telephone 919–541–1084, or electronic mail at santiago.juan@epa.gov. For questions on Pollution Control Projects (PCPs), contact Mr. Dave Svendsgaard, at the same address, telephone 919–541–2380, or electronic mail at *svendsgaard.dave@epa.gov.*

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities potentially affected by this final action include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups.

Industry group	SIC [a]	NAICS [b]
Electric Services	491	221111, 221112, 221113, 221119, 221121, 221122
Petroleum Refining	291	32411
Chemical Processes	281	325181, 32512, 325131, 325182, 211112, 325998, 331311, 325188
Natural Gas Transport	492	48621, 22121
Pulp and Paper Mills	261	32211, 322121, 322122, 32213
Paper Mills	262	322121, 322122
Automobile Manufacturing	371	336111, 336112, 336712, 336211, 336992, 336322, 336312, 33633, 33634, 33635, 336399, 336212, 336213
Pharmaceuticals	283	325411, 325412, 325413, 325414

[a] Standard Industrial Classification
[b] North American Industry Classification System.

Entities potentially affected by this final action also include State, local, and tribal governments that are delegated authority to implement these regulations.

Outline. The information presented in this preamble is organized as follows:

I. Overview of Today's Final Action
A. Background
B. Introduction
C. Overview of Final Actions
1. Determining Whether a Proposed Modification Results in a Significant Emissions Increase
2. CMA Exhibit B
3. Plantwide Applicability Limitations (PALs)
4. Clean Units
5. Pollution Control Projects (PCPs)
6. Major NSR Applicability
7. Enforcement
8. Enforceability
II. Revisions to the Method for Determining Whether a Proposed Modification Results in a Significant Emissions Increase
A. Introduction
B. What We Proposed and How Today's Action Compares
C. Baseline Actual Emissions For Existing Emissions Units Other than EUSGUs
D. The Actual-to-projected-actual Applicability Test
E. Clarifying Changes to WEPCO Provisions for EUSGUs
F. The "Hybrid" Applicability Test
G. Legal Basis for Today's Action
H. Response to Comments and Rationale for Today's Actions
III. CMA Exhibit B
IV. Plantwide Applicability Limitations (PALs)
A. Introduction
B. Relevant Background
C. Final Regulations for Actuals PALs
D. Rationale for Today's Final Action on Actuals PALs
V. Clean Units

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 154 Date Filed: 06/06/2011

A. Introduction
B. Summary of 1996 Clean Unit Proposal
C. Final Regulations for Clean Units
D. Legal Basis for the Clean Unit Test
E. Summary of Major Comments and Responses
VI. Pollution Control Projects (PCPs)
A. Description and Purpose of This Action
B. What We Proposed and How Today's Action Compares To It
C. Legal Basis for PCP
D. Implementation
VII. Listed Hazardous Air Pollutants
VIII. Effective Date for Today's Requirements
IX. Administrative Requirements
A. Executive Order 12866—Regulatory Planning and Review
B. Executive Order 13132—Federalism
C. Executive Order 13175—Consultation and Coordination with Indian Tribal Governments
D. Executive Order 13045—Protection of Children from Environmental Health Risks and Safety Risks
E. Unfunded Mandates Reform Act of 1995
F. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*
G. Paperwork Reduction Act
H. National Technology Transfer and Advancement Act of 1995
I. Congressional Review Act
J. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
X. Statutory Authority
XI. Judicial Review

I. Overview of Today's Final Action

A. Background

We [1] proposed revisions to the NSR rules in a notice published in the **Federal Register** on July 23, 1996 (61 FR 38250). On July 24, 1998, we published a notice (63 FR 39857) to solicit further comment on two specific aspects of the proposed revisions. Today's **Federal Register** action announces EPA's final action on the proposed revisions for baseline emissions determinations, the actual-to-future-actual methodology, actuals PALs, Clean Units, and PCPs. We have not made final determinations on any other proposed changes to the regulations.

Today's actions finalize these changes to the regulations for both the approval and promulgation of implementation plans and requirements for preparation, adoption, and submittal of implementation plans governing the NSR programs mandated by parts C and D of title I of the Act. We also proposed conforming changes to 40 CFR (Code of Federal Regulations) part 51, appendix S, and part 52.24. Today we have not included the final regulatory language for these regulations. It is our intention to include regulatory changes that conform appendix S and 40 CFR 52.24 to today's final rules in any final regulations that set forth an interim implementation strategy for the 8-hour ozone standard. We intend to finalize changes to these sections precisely as we have finalized requirements for other parts of the program. Because these are conforming changes and the public has had an opportunity for review and comment, we will not be soliciting additional comments before we finalize them.

The major NSR program contained in parts C and D of title I of the Act is a preconstruction review and permitting program applicable to new or modified major stationary sources of air pollutants regulated under the Act. In areas not meeting health-based National Ambient Air Quality Standards (NAAQS) and in ozone transport regions (OTR), the program is implemented under the requirements of part D of title I of the Act. We call this program the ''nonattainment'' NSR program. In areas meeting NAAQS (''attainment'' areas) or for which there is insufficient information to determine whether they meet the NAAQS (''unclassifiable'' areas), the NSR requirements under part C of title I of the Act apply. We call this program the Prevention of Significant Deterioration (PSD) program. Collectively, we also commonly refer to these programs as the major NSR program. These regulations are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, appendix S.

The NSR provisions of the Act are a combination of air quality planning and air pollution control technology program requirements for new and modified stationary sources of air pollution. In brief, section 109 of the Act requires us to promulgate primary NAAQS to protect public health and secondary NAAQS to protect public welfare. Once we have set these standards, States must develop, adopt, and submit to us for approval a State Implementation Plan (SIP) that contains emission limitations and other control measures to attain and maintain the NAAQS and to meet the other requirements of section 110(a) of the Act.

Each SIP is required to contain a preconstruction review program for the construction and modification of any stationary source of air pollution to assure that the NAAQS are achieved and maintained; to protect areas of clean air; to protect Air Quality Related Values (AQRVs) (including visibility) in national parks and other natural areas of special concern; to assure that appropriate emissions controls are applied; to maximize opportunities for economic development consistent with the preservation of clean air resources; and to ensure that any decision to increase air pollution is made only after full public consideration of all the consequences of such a decision.

For newly constructed, ''greenfield'' sources, the determination of whether an activity is subject to the major NSR program is fairly straightforward. The Act, as implemented by our regulations, sets applicability thresholds for major sources in nonattainment areas [potential to emit (PTE) above 100 tons per year (tpy) of any pollutant subject to regulation under the Act, or smaller amounts, depending on the nonattainment classification] and attainment areas (100 or 250 tpy, depending on the source type). A new source with a PTE at or above the applicable threshold amount ''triggers,'' or is subject to, major NSR.

The determination of what should be classified as a modification subject to major NSR presents more difficult issues. The modification provisions of the NSR program in parts C and D are based on the definition of modification in section 111(a)(4) of the Act: the term ''modification'' 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.'' That definition contemplates that, first, you will determine whether a physical or operational change will occur. If so, then you will proceed to determine whether the physical or operational change will result in an emissions increase over baseline levels.

The expression ''any physical change * * * or change in the method of operation'' in section 111(a)(4) of the Act is not defined. We have recognized that Congress did not intend to make every activity at a source subject to the major NSR program. As a result, we have previously adopted several exclusions from what may constitute a ''physical or operational change.'' For instance, we have specifically recognized that routine maintenance, repair and replacement, and changes in hours of operation or in the production rate are not considered a physical change or change in the method of

[1] In this preamble the term ''we'' refers to EPA and the term ''you'' refers to major stationary sources of air pollution and their owners and operators. All other entities are referred to by their respective names (for example, reviewing authorities.)

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 155 Date Filed: 06/06/2011

operation within the definition of major modification.[2]

We have likewise addressed the scope of the statutory definition of modification by excluding all changes that do not result in a ''significant'' emissions increase from a major source.[3] This regulatory framework applies the major NSR program at existing sources to only ''major modifications'' at major stationary sources.

One key attribute of the major NSR program in general is that you may ''net'' modifications out of review by coupling proposed emissions increases at your source with contemporaneous emissions reductions. Thus, under regulations we promulgated in 1980, you may modify, or even completely replace, or add, emissions units without obtaining a major NSR permit, so long as ''actual emissions'' do not increase by a significant amount over baseline levels at the plant as a whole.

Applicability of the major NSR program must be determined in advance of construction and is pollutant-specific. In cases involving existing sources, this requires a pollutant-by-pollutant determination of the emissions change, if any, that will result from the physical or operational change. Our 1980 regulations implementing the PSD and nonattainment major NSR programs thus inquire whether the proposed change constitutes a ''major modification,'' that is, a physical change or change in the method of operation ''that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.'' A ''net emissions increase'' is defined as the increase in ''actual emissions'' from the particular physical or operational change (taking into account the use of emissions control technology and restrictions on hours of operation or rates of production where such controls and restrictions are enforceable), together with your other contemporaneous increases or decreases in actual emissions.[4] In order to trigger applicability of the major NSR program, the net emissions increase must be ''significant.''[5]

Before today's changes, our regulations generally defined actual emissions as ''the average rate, in tpy, at which the unit actually emitted the pollutant during a 2-year period which precedes the particular date and which is representative of normal source operation.'' The reviewing authorities will allow use of a different time period ''upon a determination that it is more representative of normal source operation.'' We have historically used the 2 years immediately preceding the proposed change to establish a source's actual emissions. However, in some cases we have allowed use of an earlier period.

With respect to changes at existing sources, a prediction of whether the physical or operational change would result in a significant net increase in your actual emissions following the change was thus necessary. In part, this involved a straightforward and readily predictable engineering judgment—how would the change affect the emission factor or emissions rate of the emissions units that are to be changed.

Before today's changes, the regulations provided that when your emissions unit, other than an electric utility steam generating unit (EUSGU), ''has not begun normal operations,'' actual emissions equal the PTE of the unit. When you have not begun normal operations following a change, you must assume that your source will operate at its full capacity year round, that is, at its full emissions potential. This is referred to as the actual-to-potential test. You may avoid the need for an NSR permit by reducing your source's potential emissions through the use of enforceable restrictions to pre-modification actual emissions levels plus an amount that is less than ''significant''.

In 1992, we promulgated revisions to our applicability regulations creating special rules for physical and operational changes at EUSGUs. *See* 57 FR 32314 (July 21, 1992).[6] In this rule, prompted by litigation involving the Wisconsin Electric Power Company (WEPCO) and commonly referred to as the ''WEPCO rule,'' we adopted an actual-to-future-actual methodology for all changes at EUSGUs except the construction of a new electric generating unit or the replacement of an existing emissions unit. Under this methodology, the actual annual emissions before the change are compared with the projected actual emissions after the change to determine if a physical or operational change would result in a significant increase in emissions. To ensure that the projection is valid, the rule requires the utility to track its emissions for the next 5 years and provide to the reviewing authority information demonstrating that the physical or operational change did not result in an emissions increase.

In promulgating the WEPCO rule, we also adopted a presumption that utilities may use as baseline emissions the actual annual emissions from any 2 consecutive years within the 5 years immediately preceding the change.

In attainment areas, once major NSR is triggered, you must, among other things, install best available control technology (BACT) and conduct modeling and monitoring as necessary. If your source is located in a nonattainment area, you must install technology that meets the lowest achievable emissions rate (LAER), secure emissions reductions to offset any increases above baseline emission levels, and perform other analyses.

B. Introduction

Today's final regulations were proposed as part of a larger regulatory package on July 23, 1996 (61 FR 38250). That package proposed a number of changes to our existing major NSR requirements. (Please refer to the outline of that proposed rulemaking for a complete list of changes that were proposed to our existing regulations.) On July 24, 1998, we published a **Federal Register** Notice of Availability (NOA) that requested additional comment on three of the proposed changes: determining baseline emissions, actual-to-future-actual methodology, and PALs. Following the 1996 proposals, we held two public hearings and more than 50 stakeholder meetings. Environmental groups, industry, and State, local, and Federal agency representatives participated in these many discussions.

In May 2001, President Bush's National Energy Policy Development Group issued findings and key recommendations for a National Energy Policy. This document included numerous recommendations for action, including a recommendation that the EPA Administrator, in consultation with the Secretary of Energy and other relevant agencies, review NSR regulations, including administrative interpretation and implementation. The recommendation requested that we issue a report to the President on the impact of the regulations on investment

[2] *See* 40 CFR 52.21(b)(2).

[3] *See* 40 CFR 52.21(b)(23).

[4] In approximate terms, ''contemporaneous'' emissions increases or decreases are those that have occurred between the date 5 years immediately preceding the proposed physical or operational change and the date that the increase from the change occurs. *See,* for example, § 52.21(b)(3)(ii).

[5] Once a modification is determined to be major, the PSD requirements apply only to those specific pollutants for which there would be a significant net emissions increase. See, for example, § 52.21(j)(3) (BACT) and § 52.21(m)(1)(b) (air quality analysis).

[6] The regulations define ''electric utility steam generating units'' as any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts (MW) of electrical output to any utility power distribution system for sale. *See,* for example, § 51.166(b)(30).

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 156 Date Filed: 06/06/2011

in new utility and refinery generation capacity, energy efficiency, and environmental protection.

In response, in June 2001, we issued a background paper giving an overview of the NSR program. This paper is available on the Internet at *http://www.epa.gov/air/nsr-review/background.html.* We solicited public comments on the background paper and other information relevant to the New Source Review 90-day Review and Report to the President. During our review of the NSR program, we met with more than 100 groups, held four public meetings around the country, and received more than 130,000 written comments. Our report to the President and our recommendations in response to the energy policy were issued on June 13, 2002. A copy of this information is available at *http://www.epa.gov/air/nsr-review/.* We expect that our recommendations in response to the energy policy will be reflected in the future in various programs and regulatory actions. Today's actions implement several of those recommendations.

Today, we are finalizing five actions that we previously proposed in 1996 (three of which were re-noticed in the 1998 NOA). We are not taking final action on any of the remaining issues in the 1996 proposal at this time. We have not decided what final action we will take on those issues.

C. Overview of Final Actions

Today we are taking final action on five changes to the NSR program that will reduce burden, maximize operating flexibility, improve environmental quality, provide additional certainty, and promote administrative efficiency. These elements include baseline actual emissions, actual-to-projected-actual emissions methodology, PALs, Clean Units, and PCPs. We are also codifying our longstanding policy regarding the calculation of baseline emissions for EUSGUs. In addition, we are responding to comments we received on a proposal to adopt a methodology, developed by the American Chemistry Council (formerly known as the Chemical Manufacturers Association (CMA)) and other industry petitioners, to determine whether a source has undertaken a modification based on its potential emissions. We are including a new section in today's final rules that outlines how a major modification is determined under the various major NSR applicability options and clarifies where you will find the provisions in our revised rules. Finally, we have codified a new definition of ''regulated NSR pollutant'' that clarifies which pollutants are regulated under the Act for purposes of major NSR.

This section briefly introduces each improvement. Detailed discussions of the improvements are found in sections II through VII of this preamble.

1. Determining Whether a Proposed Modification Results in a Significant Emissions Increase

Today we are finalizing two changes to our existing major NSR regulations that will affect how you calculate emissions increases to determine whether physical changes or changes in the method of operation trigger the major NSR requirements. First, we have a new procedure for determining ''baseline actual emissions.'' That is, the relevant terminology for calculating pre-change emissions for most applications is now ''baseline actual emissions'' rather than ''actual emissions.'' You may use any consecutive 24-month period in the past 10 years to determine your baseline actual emissions. Second, we are supplementing the existing actual-to-potential applicability test with an actual-to-projected-actual applicability test for determining if a physical or operational change at an existing emissions unit will result in an emissions increase. Notwithstanding the new test, you will still have the ability to conduct an actual-to-potential type test within the new actual-to-projected-actual applicability test. In this case, you will not be subject to recordkeeping requirements that are being established and would otherwise apply as part of the new actual-to-projected actual applicability test.

For EUSGUs, we are making several changes to the existing procedures and are codifying our current policy for calculating the baseline actual emissions. That is, the baseline actual emissions for EUSGUs is the average rate, in tpy, at which that unit actually emitted the pollutant during a 2-year (consecutive 24-month) period within the 5-year period immediately preceding when the owner or operator begins actual construction. We are also retaining the option that allows the use of a different time period if the reviewing authority determines it is more representative of normal source operation.

2. CMA Exhibit B

As described in section I.C.1 above, we have decided to adopt an actual-to-projected-actual methodology, combined with a revised process to determine baseline emissions, to use in determining when sources are considered to have made a modification and are thereby subject to NSR. We are not adopting the methodology based on potential emissions as discussed in the CMA Exhibit B proposal. *See* section III of this preamble for a discussion of the comments we received on this proposal and our responses.

3. Plantwide Applicability Limitations

A PAL is a voluntary option that will provide you with the ability to manage facility-wide emissions without triggering major NSR review. We believe that the added flexibility provided under a PAL will facilitate your ability to respond rapidly to changing market conditions while enhancing the environmental protection afforded under the program.

Today we are promulgating a PAL based on plantwide actual emissions. If you keep the emissions from your facility below a plantwide actual emissions cap (that is, an actuals PAL), then these regulations will allow you to avoid the major NSR permitting process when you make alterations to the facility or individual emissions units. In return for this flexibility, you must monitor emissions from all of your emissions units under the PAL. The benefit to you is that you can alter your facility without first obtaining a Federal NSR permit or going through a netting review. A PAL will allow you to make changes quickly at your facility. If you are willing to undertake the necessary recordkeeping, monitoring, and reporting, a PAL offers you flexibility and regulatory certainty.

4. Clean Units

We are promulgating a new type of applicability test for emissions units that are designated as Clean Units. The new applicability test recognizes that when you go through major NSR review and install BACT or LAER, you may make any changes to the Clean Unit without triggering an additional major NSR review, if the project at a Clean Unit does not cause the need for a change in the emission limitations or work practice requirements in the permit for the unit that were adopted in conjunction with BACT or LAER and the project would not alter any physical or operational characteristics that formed the basis for the BACT or LAER determination. If the project causes the need for a change in the emission limitations or work practice requirements in the permit for the unit adopted in conjunction with BACT or LAER or would alter any physical or operational characteristics that formed the basis for the BACT or LAER determination, you lose Clean Unit status. You may still proceed with the project without triggering major NSR

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 157 Date Filed: 06/06/2011

review, if the increase is not a significant net emissions increase. Emissions units that have not been through major NSR may still qualify for Clean Unit status if they demonstrate that the emissions control level is comparable to BACT or LAER. Clean Unit status will be valid for up to a 10-year period. The new applicability test does not exclude consideration of physical changes or changes in the method of operation of Clean Units from major NSR, but rather changes the way emissions increases are calculated for these changes. This new applicability test therefore protects air quality, creates incentives for sources to install state-of-the-art controls, provides flexibility for sources, and promotes administrative efficiency.

5. Pollution Control Projects

Today's rule contains a new list of environmentally beneficial technologies that qualify as PCPs for all types of sources. Installation of a PCP is not subject to the major modification provisions. An owner or operator installing a listed PCP automatically qualifies for the exclusion if there is no adverse air quality impact—that is, if it will not cause or contribute to a violation of NAAQS or PSD increment, or adversely impact an AQRV (such as visibility) that has been identified for a Federal Class I area by a Federal Land Manager (FLM) and for which information is available to the general public. The PCPs that are not listed in today's rules may also qualify for the PCP Exclusion if the reviewing authority determines on a case-specific basis that a non-listed PCP is environmentally beneficial when used for a particular application. Also, in the future, we may add to the listed PCPs through a rulemaking that provides for public notice and opportunity for comment. The PCP Exclusion allows sources to install emissions controls that are known to be environmentally beneficial. These provisions thus offer flexibility while improving air quality.

6. Major NSR Applicability

We have briefly described the new provisions for baseline actual emissions, actual-to-projected-actual methodology, PALs, and Clean Units. Sections II, IV, and V describe the new provisions in detail. These provisions offer major new changes to NSR applicability, especially regarding how a major modification is determined. The major NSR applicability provisions have developed over time and therefore have been added to the NSR rules in a piecemeal fashion. In today's final rules we are including a new section that outlines how a major modification is determined under the various major NSR applicability options and clarifies where you will find the provisions in our revised rules. For each applicability option, we describe how a major modification is determined in detail. You'll find this new applicability "roadmap" in §§ 51.165(a)(2), 51.166(a)(7), and 52.21(a)(2). To summarize, the various provisions for major modifications are now as follows.

- Actual-to-projected-actual applicability test for all existing emissions units. (Including an actual-to-potential option)
- Actual-to-potential test for any new unit, including EUSGUs.
- The Clean Unit Test for existing emissions units with Clean Unit status.
- The hybrid test for modifications with multiple types of emissions units. (Used when a physical or operational change affects a combination of more than one type of unit.)

We describe actuals PALs, which are an alternative way of complying with major NSR, in section IV of this preamble. If you have a PAL, as long as you are complying with the PAL requirements, any physical or operational changes are not major modifications.

We have revised the definition of major modification to clarify what has always been our policy—that determining whether a major modification has occurred is a two-step process. The new definition of major modification is "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; and (2) a significant net emissions increase of that pollutant from the major stationary source." We have also revised the definitions of actual emissions, emissions unit, net emissions increase, and construction. We have deleted the word "actual" as related to emissions from the definition of "construction." This change was necessary because of how the definition of "actual emissions" is used in the final rule, but the deletion is not intended to change any meaning in the term "construction." We have added new definitions for baseline actual emissions, projected actual emissions, project, and significant emissions increase. These revisions and additions implement our new provisions for major modifications under the actual-to-projected-actual applicability test, actual-to-potential test, Clean Unit Test, and hybrid test. You will find a complete discussion of the Clean Unit Test, including how modifications to Clean Units are treated, in section V of this preamble. The other tests are discussed in section II.

"Actual emissions," as the term has been historically applied, will still be used to determine air quality impacts (for example, compliance with NAAQS, PSD increments, and AQRVs) and to compute the required amount of emissions offsets.

To further clarify major NSR applicability in one location, we have moved § 51.166(i)(1) through (3) and § 52.21(i)(1) through (3) into the new applicability sections at § 51.166(a)(7) and § 52.21(a)(2). These provisions clarify that you must obtain a permit before you begin construction (including for major modifications), that the provisions apply for each regulated NSR pollutant that your source emits, and that the provisions apply to any source located in the area designated as attainment or unclassifiable (for §§ 51.166 and 52.21).

We have also added a new definition for reviewing authority that clarifies who has authority to implement major NSR programs. Reviewing authority means the State air pollution control agency, local agency, other State agency, Indian tribe, or other agency authorized by the Administrator to carry out a permit program under §§ 51.165 and 51.166, or the Administrator in the case of EPA-implemented permit programs under § 52.21.

7. Enforcement

As noted above, today we are taking final action on five changes to the NSR program that create alternative means of determining NSR applicability for projects that begin actual construction after these provisions become effective in your jurisdiction. If you are subsequently determined not to have met any of the obligations of these new alternatives (for example, failure to meet emissions or applicability limits, properly project emissions, and/or properly implement the PCP Exclusion or Clean Unit Test), you will be subject to any applicable enforcement provisions (including the possibility of citizens' suits) under the applicable sections of the Act. Sanctions for violations of these provisions may include monetary penalties of up to $27,500 per day of violation, as well as the possibility of injunctive relief, which may include the requirement to install air pollution controls.

8. Enforceability

This rule uses several terms related to enforceability of particular provisions. A requirement is "legally enforceable" if some authority has the right to enforce the restriction. Practical enforceability for a source-specific permit will be

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 158 Date Filed: 06/06/2011

achieved if the permit's provisions specify: (1) A technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, and annual limits such as rolling annual limits); and (3) the method to determine compliance, including appropriate monitoring, recordkeeping, and reporting. For rules and general permits that apply to categories of sources, practicable enforceability additionally requires that the provisions: (1) Identify the types or categories of sources that are covered by the rule; (2) where coverage is optional, provide for notice to the permitting authority of the source's election to be covered by the rule; and (3) specify the enforcement consequences relevant to the rule.[7, 8] "Enforceable as a practical matter" will be achieved if a requirement is both legally and practically enforceable.

Note that we continue to require offsets to be federally enforceable. "Federal enforceability" means that not only is a requirement practically enforceable, as described above, but in addition, "EPA must have a direct right to enforce restrictions and limitations imposed on a source to limit its exposure to Act programs."[9] Also note that, for computing baseline actual emissions for use in determining major NSR applicability or for establishing a PAL, you must consider "legally enforceable" requirements. A requirement will be legally enforceable if the Administrator, State, local or tribal air pollution control agency has the authority to enforce the requirement irrespective of its practical enforceability.

In our existing regulations that are unamended by today's action, the term "federally enforceability" still appears. In 1995, the court in *Chemical Manufacturers Ass'n* v. *EPA* remanded the definition of PTE in the major NSR program to EPA. No. 89–1514 (D.C. Cir. Sept. 150 1995). Because the court vacated the requirements in the nationwide rules, the term federal enforceability as it relates to PTE is not in effect (pending final rule making by the Agency) in the Federal rules. The decision, however, did not address the term "federally enforceable" as used in SIPs, because that issue was not before the court.

II. Revisions to the Method for Determining Whether a Proposed Modification Results in a Significant Emissions Increase

A. Introduction

Today we are finalizing two sets of amendments to our existing major NSR regulations that provide another way in which you may calculate emissions increases to determine whether certain types of physical changes or changes in the method of operation (physical or operational changes) of an existing emissions unit trigger the major NSR requirements.[10] The first set of amendments relates to the way in which you will determine your baseline actual emissions for such emissions units in accordance with a new definition of "baseline actual emissions." *See,* for example, new § 52.21(b)(48). We will be allowing you to use any consecutive 24-month period during the 10-year period prior to the change to determine your baseline actual emissions for existing emissions units (other than EUSGUs). The second set of amendments replaces the existing actual-to-potential and actual-to-representative-actual-annual emissions applicability tests for existing emissions units (including EUSGUs) with an actual-to-projected-actual applicability test for determining if a physical or operational change will result in an emissions increase at such units. (Notwithstanding this new test, the actual-to-potential methodology is still available at your option under the new applicability tests.) The new procedure for determining your pre-change baseline actual emissions will not apply to EUSGUs.[11] Instead, for EUSGUs we are retaining the existing procedures for determining the baseline actual emissions.[12] *See,* for example, existing § 52.21(b)(33). We are also affirming our current method used for calculating the baseline actual emissions for EUSGUs (allowing any consecutive 2 years in the past 5 years, or another more representative period) by codifying it in the NSR regulations. *See,* for example, new § 52.21(b)(48).

For existing emissions units other than EUSGUs, the changes we are making to the method for calculating a unit's baseline actual emissions will apply only for the following three purposes.

- For modifications, to determine a modified unit's pre-change baseline actual emissions as part of the new actual-to-projected-actual applicability test.
- For netting, to determine the pre-change baseline actual emissions of an emissions unit that underwent a physical or operational change within the contemporaneous period.
- For PALs, to establish the PAL emissions cap.

Today's new procedures for calculating baseline actual emissions and for the actual-to-projected-actual applicability test should not be used when determining a source's actual emissions on a particular date as may be used for other NSR-related requirements. Such requirements include, but are not limited to, air quality impacts analyses (for example, compliance with NAAQS, PSD increments, and AQRVs) and computing the required amount of emissions offsets. For each of these requirements, the existing definition of "actual emissions" continues to apply. This is discussed in greater detail in section II.D.9.

We believe that these changes will greatly improve the major NSR program by responding to industry concerns with our existing methodology without compromising air quality. One common complaint about the current emissions baseline process is that you have a limited ability to consider the operational fluctuations associated with normal business cycles when establishing baseline actual emissions unless your reviewing authority agrees that another period is "more representative of normal source

[7] See memorandum, "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit," signed by John Seitz and Robert Van Heuvelen, Jan. 22, 1996 at 5–6 and Attachment 4, available on the Web as *http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/pottoemi.pdf.* More detailed guidance on practical enforceability is contained in the memorandum.

[8] The Agency has frequently used the term "practicably enforceable" and "practical enforceability," interchangeably. There is no difference in the meaning of these terms.

[9] *See* generally memorandum, "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act," signed by John Seitz and Robert Van Heuvelen, Jan. 25, 1995, at 2–3.

[10] By definition, the modification of an existing source is potentially subject to major NSR only if that existing source is "major." In addition, when an existing "minor" source makes a physical or operational change that by itself is major, that change constitutes a major stationary source that is subject to major NSR. *See*, for example, § 52.21(b)(1)(*i*).

[11] For NSR purposes, the definition of "electric utility steam generating unit" means any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam electric generator that would produce electrical energy for sale is also considered in determining the electrical energy output capacity of the affected facility. See, for example, § 52.21(b)(31). Reference in this notice to utility units is meant to include all emissions units covered by this definition.

[12] We promulgated special applicability rules for physical and operational changes at EUSGUs in 1992. *See* 57 FR 32314 (July 21, 1992).

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 159 Date Filed: 06/06/2011

preclude some well-controlled sources from benefitting from the Clean Unit Test simply because there is insufficient information in the RBLC or because they are using an innovative approach to emissions control. This provision will allow you to use alternative controls as long as they achieve comparable control and air quality results. We believe that the reviewing authority is in the best position to judge whether a particular control technology achieves an emissions control level that is comparable to BACT or LAER for a specific application, as well as to assure that air quality impacts have been accounted for. Thus, rather than requiring the reviewing authority to submit its permit decisions to us for approval as a comparable technology, our final rules allow the reviewing authority the ability to make this determination after the public comment process.

7. Can Clean Unit Status Be Made Using the Title V Permitting Process?

We proposed that for sources that had not undergone major NSR, Clean Unit status would occur as part of the title V permitting process. Although a few commenters support this concept, several State and local agency commenters strongly disagree. These commenters believe that title V is an appropriate mechanism for documenting Clean Units, but that the process for certifying sources should be separate from title V to avoid delays in title V permitting.

We agree with these commenters, and today are promulgating provisions that an emissions unit may be designated as a Clean Unit once it has gone through major NSR or another SIP-approved permitting program that provides for public notice and opportunity for comment. This allows the reviewing authority the flexibility to use the permitting process that it believes is most appropriate to make a Clean Unit status determination. However, once Clean Unit status has been established through a SIP-approved permitting program, it must be incorporated into the title V permit. *See* section V.C.7 for a discussion of this process.

VI. Pollution Control Projects

A. Description and Purpose of This Action

Our policy is to promote pollution control and prevention projects whenever possible. Today we are finalizing a rule provision that would exclude from major NSR permitting requirements certain work practices and the installation of qualifying pollution control and pollution prevention projects. With these provisions, we are removing a regulatory disincentive that might otherwise prevent industry from undertaking pollution control and prevention measures that result in a net environmental benefit. The ''Pollution Control Project Exclusion'' (or ''PCP Exclusion'') will allow the installation of certain projects that result in net overall environmental benefits to avoid the permitting requirements of major NSR for their collateral emissions increases that exceed the significant level. This action was proposed on July 23, 1996, and closely paralleled our existing policy memorandum [35] which, in effect, enabled a control project exclusion for EUSGUs which was implemented under the electric utility-specific NSR rule (*see* 57 FR 32314, hereinafter ''WEPCO PCP Exclusion'') to apply to all types of sources, and enabled qualifying pollution prevention projects to apply for an exclusion as well. This action will replace both the WEPCO PCP Exclusion and the July 1, 1994 policy guidance with a single, comprehensive NSR exclusion for all types of qualifying PCPs—including add-on controls, switches to less polluting fuels, work practices, and pollution prevention projects. Morever, this final rule will minimize procedural delays in getting a PCP approved, while ensuring appropriate environmental protection.

We define a PCP as an activity, set of work practices, or project at an existing emissions unit that reduces emissions of air pollution from the unit. The PCP Exclusion may be sought when a project is installed at an existing source where it reduces the emissions rate of one air pollutant while causing an increase in emissions of a different, ''collateral'' pollutant. A common example of such a project is installation of a thermal incinerator, which forms NO_X as a collateral pollutant while reducing VOC emissions. For evaluating the environmental impact of a collateral emissions increase, the source and reviewing authority will assess the difference between the emissions unit's post-change actual emissions and its pre-change baseline actual emissions. This test is discussed in section II of today's preamble. That increase is then weighed against the emissions decrease of the primary pollutant to determine whether the PCP, as a whole, provides an environmental benefit. The source and reviewing authority also must ensure that the change does not cause or contribute to an air quality violation, that no ERCs are generated (through initial application of the PCP), and that any significant emissions increase of a nonattainment pollutant is accounted for with acceptable offsets or SIP measures. In performing the air quality analysis under this provision, the procedures established for conducting air quality analysis in conjunction with NSR permitting will be used.

This rule excludes the installation of qualifying PCPs—including add-on control devices, raw material substitutions, work practices, process changes and other pollution prevention strategies—from the definition of ''physical or operational change'' within the definition of major modification in our Federal regulations (*e.g.*, § 52.21). We are also requiring that States adopt the same exclusion in their NSR programs.

The decision to make codifying changes to the existing WEPCO PCP Exclusion and the July 1, 1994 policy guidance draws largely from recommendations of the CAAAC Subcommittee on NSR Reform. The members of the Subcommittee included representatives of State and Federal regulatory agencies, Federal natural resource managers, industry, and environmental and public health interest groups. The Subcommittee's recommendations reflected the consensus of this balanced group of stakeholders.

B. What We Proposed and How Today's Action Compares To It

Our proposed PCP Exclusion provisions essentially restated the July 1, 1994 policy guidance, and incorporated a ''primary purpose'' test as an initial hurdle for candidate PCPs. The ''primary purpose'' test would have limited the exclusion to those projects whose primary function is to reduce air pollution. The proposal, like the previous PCP Exclusion rule and policy guidance, maintained that the exclusion was not applicable to air pollution controls and emissions associated with the construction of a new emissions unit, nor to the replacement or reconstruction of an entire existing emissions unit with a newer or different one. In addition, the fabrication, manufacture, or production of pollution control/prevention equipment and inherently less polluting fuels or raw materials would not, in and of themselves, qualify as a PCP. We also incorporated two safeguards that were taken directly from the WEPCO PCP Exclusion and the July 1, 1994 policy

[35] July 1, 1994 memorandum from John S. Seitz, Director, OAQPS, ''Pollution Control Projects and New Source Review (NSR) Applicability'' and hereinafter referred to as the ''July 1, 1994 policy guidance.''

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 160 Date Filed: 06/06/2011

guidance. First, the reviewing authority would be required to determine that the PCP is ''environmentally beneficial.'' A second safeguard from our proposal would direct reviewing authorities to evaluate the air quality impacts of a proposed PCP and ensure that it does not cause or contribute to a NAAQS or PSD increment violation, or adversely impact an AQRV (such as visibility) that has been identified for a Federal Class I area by an FLM and for which information is available to the general public.

We proposed specific add-on control technologies that would be considered presumptively ''environmentally beneficial'' based on their proven history of positive environmental impact. The proposal also allowed for fuel switches to less polluting fuels and substitutions to less potent ozone depleting substances (ODS) to be presumptively environmentally beneficial projects. For other pollution prevention projects and new add-on control technologies to qualify as a PCP, the proposal required the reviewing authority to determine that the project was environmentally beneficial and, additionally for new add-on control devices, that they be ''demonstrated in practice.''

We received comments on every key aspect of the proposed PCP Exclusion. Although most parties support the PCP Exclusion, their suggestions regarding implementation of the exclusion vary considerably. Industry commenters generally desire maximum flexibility, and suggest extending the exclusion to cross-media control projects, limiting the ''environmentally beneficial'' and ''primary purpose'' requirements, allowing for the generation of ERCs from PCPs, and broadening which pollution prevention projects qualified. Other commenters, including State agencies and environmental organizations, generally favor a more restrictive approach that involves more agency oversight and creates more enforceable mechanisms to ensure that the exclusion would not be abused. All comments are specifically addressed in the Technical Support Document.

Today's rule revises the proposed PCP Exclusion in several ways, including the following.

- Eliminating the ''primary purpose'' requirement.
- Expanding the list of presumptively environmentally beneficial projects to include additional control technologies and strategies.
- Enabling projects that otherwise are PCPs and result in utilization increases to qualify for the exclusion.
- Using an actual-to-projected-actual format for determining emissions changes for all source categories to demonstrate net environmental benefit supplemented by air quality analysis under certain circumstances, regardless of their projected emissions increases resulting from utilization.
- Clarifying that the replacement, reconstruction, or modification of an existing emissions control technology could qualify for the exclusion.
- Detailing the calculations for determining whether a switch to a different ODS is environmentally beneficial.
- Changing the visibility component of the air quality analysis to ''an air quality related value (such as visibility) that has been identified for a Federal Class I area by a FLM, and for which information is available to the general public''.
- Identifying which fuel switches are presumed ''inherently less polluting''.
- Enabling work practice standards to qualify for the exclusion.
- Clarifying that modeling for air quality impacts analyses may use projected actual emissions.
- Detailing proper noticing requirements for listed projects to use this exclusion.
- Describing in detail the process for granting the PCP Exclusion for non-listed control technologies and pollution prevention strategies.
- Disqualifying projects that cannot secure acceptable offsetting emissions reductions or SIP measures for PCPs resulting in a significant net increase of a nonattainment pollutant.
- Disallowing generation of netting and offset credits from the initial application of PCPs that qualify for this exclusion.
- Clarifying that non-air pollution impacts will not be considered in the ''environmentally beneficial'' determination.

By today's action we are superseding the PCP regulatory exclusion that applied only to EUSGUs. Today's action covers all types of sources, including EUSGUs. The new, broader PCP Exclusion will ensure equitable treatment of all source categories and remove any disincentive for companies that wish to install pollution control and pollution prevention projects, to the extent allowed by the CAA. Thus, owners or operators of EUSGUs who want a PCP Exclusion may, like any other source category, use the expanded definition of ''pollution control project,'' which includes the lengthened list of environmentally acceptable control devices. Despite today's rule revisions addressing a broader array of pollution control and pollution prevention projects at a larger variety of sources, we feel that the rule's procedures are less complex than and are clearer than the WEPCO PCP Exclusion and the July 1, 1994 policy guidance. We are satisfied that the final PCP Exclusion best achieves the goals of minimizing regulatory burden and reducing procedural delays for projects that ensure net overall environmental protection.

1. Applicability

a. *What types of projects may qualify for the PCP Exclusion?*

In the WEPCO PCP Exclusion, we found that installation of add-on emissions control projects, switches to less polluting fuels, and certain clean coal demonstration projects could be PCPs, ''unless the project renders the unit less environmentally beneficial.'' 57 FR 32319. Today's rule affirms that these types of projects are appropriate candidates for the exclusion, and it expands the types of projects that can qualify to include installation of other control devices that were not previously listed in the regulations, as well as work practice standards and switches to less potent quantities of ODS. Some of the control technologies (for example, oxidation/absorption catalyst and biofiltration) listed in today's revisions were either not well known or not demonstrated in practice as of the release of the WEPCO PCP Exclusion and the July 1, 1994 policy guidance exclusion; consequently, today's rule brings the list of approved PCPs up to date.

We believe that the overall net impact of installing and operating the listed add-on control systems is environmentally beneficial and that such projects are desirable from an environmental perspective. The add-on controls in the approved list historically have been applied to many different kinds of sources to reduce emissions. They have been consistently used because it is generally understood that, from an overall environmental perspective, these controls are effective in reducing emissions when they are applied to existing plants in a manner consistent with standard and reasonable practices. Certain pollution prevention projects—for example, fuel switches and low-NO_X burners—are also presumed to be environmentally beneficial when properly applied. Consequently, as part of the exclusion for PCPs, we do not require a case-by-case ''environmentally beneficial'' demonstration for the ''listed'' PCPs, as long as they are properly applied and site-specific factors do not indicate that their

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 161 Date Filed: 06/06/2011

application would be environmentally harmful. Thus, the "environmentally beneficial" presumption created by the list may be rebutted. For companies wishing to install and operate non-listed PCPs, however, the process is more rigorous. In these cases, the reviewing authority first must consider case-specific factors to determine whether the non-listed project results in a net environmental benefit and then must provide an opportunity for, and respond to, public notice and comment before approving the project as a PCP.

b. Why does the PCP Exclusion not apply to greenfield sources?

Today's rule restricts applicability of the PCP Exclusion to physical changes being made at existing sources. Installing or implementing a project on an existing source is more likely to improve the environment than is the construction of a new source, since one can reasonably expect a PCP to reduce overall emissions, barring a considerable utilization increase. New sources, however, introduce new emissions to the air without reducing existing emissions, and consequently should be as clean as possible. Furthermore, new emissions units are among the major capital investments in industrial equipment, which are the very types of projects that Congress intended to address in the NSR provisions when such projects result in an overall emissions increase from the major stationary source. Thus, when emissions from a new source exceed the significant level, they are subject to NSR, and all emissions that are generated from the new project should be addressed in the major NSR permit evaluation for the major stationary source.

c. Does the PCP Exclusion apply to rebuilt or upgraded control devices?

We are clarifying in today's rule that upgrading or replacing existing emissions control equipment with a more effective emissions control project can qualify for the PCP Exclusion. However, the new PCP would have to result in a level of control more stringent than the original control equipment, in terms of emissions rate or output-based emissions rate, such as upgrading a scrubber to increase removal efficiency. Another example that would qualify is a control device that achieves an emissions reduction equivalent to that of the original device, but is more energy efficient. An example of this is the conversion of a thermal oxidizer to a catalytic oxidizer. As long as the catalytic oxidizer achieved emissions control equivalent to that of the thermal oxidizer, it would qualify for a PCP Exclusion since it reduces energy use.

2. Environmental Benefits

a. *What projects do we presume to be environmentally beneficial?*

Commenters recommend that we expand the list of presumptively environmentally beneficial projects to include other add-on control technologies that are commonly used to reduce emissions at major stationary sources. We agree with this recommendation and have expanded the list of presumptively environmentally beneficial PCPs accordingly in today's rule.

We presume the projects listed in Table 2 are environmentally beneficial. We based our decision to add certain projects to the list on two criteria: (1) The PCP is "demonstrated in practice"; and (2) its overall effectiveness in reducing emissions of the primary pollutant(s) when balanced against its potential for emissions increases of collateral pollutant(s).

TABLE 2.—ENVIRONMENTALLY BENEFICIAL POLLUTION CONTROL PROJECTS

Control device/PCP	Pollutant controlled
Conventional & advanced flue gas desulfurization.	SO_2
Sorbent injection	
Electrostatic precipitators	Particulates and other pollutants.
Baghouses	
High efficiency multiclones	
Scrubbers	
Flue gas recirculation	NO_X
Low-NO_X burners or combustors	
Selective non-catalytic reduction	
Selective catalytic reduction	
Low emission combustion (for internal combustion engines)	
oxidation/absorption catalyst (e.g., SCONO$_X$™)	
Regenerative thermal oxidizers	VOC and HAP.
Catalytic oxidizers	
Thermal incinerators	
Hydrocarbon combustion flares [36]	
Condensers	
Absorbers & adsorbers	
Biofiltration	
Floating roofs (for storage vessels)	

[36] For the purposes of these rules, "Hydrocarbon combustion flare" means either a flare used to comply with an applicable NSPS or MACT standard (including use of flares during startup, shutdown, or malfunction permitted under such a standard), or a flare that serves to control emissions from waste streams comprised predominantly of hydrocarbons and containing no more than 230 mg/dscm hydrogen sulfide.

Other presumed environmentally beneficial PCPs include activities or projects undertaken to accommodate: (1) switching to different ODS with a less damaging ozone-depleting effect (factoring in its ozone depletion potential and projected usage); and (2) switching to an inherently less polluting fuel, to be limited to the following.

- Switching from a heavier grade of fuel oil to a lighter fuel oil, or any grade of oil to 0.05 percent sulfur diesel. (that is, from a higher sulfur content #2 fuel, or from #6 fuel, to CA 0.05 percent sulfur #2 diesel)
- Switching from coal, oil, or any solid fuel to natural gas, propane, or gasified coal.
- Switching from coal to wood, excluding construction or demolition waste, chemical or pesticide treated wood, and other forms of "unclean" wood
- Switching from coal to #2 fuel oil (0.5 percent maximum sulfur content)
- Switching from high sulfur coal to low sulfur coal (maximum 1.2 percent sulfur content)

We are presuming that the application of a PCP listed above is environmentally beneficial and would be eligible for a PCP Exclusion. This presumption is premised on an understanding that you will design and operate the controls in a manner that is consistent with proper industry, engineering, and reasonable practices, and that you minimize increases in collateral pollutants within the physical configuration and operational standards usually associated with the emissions control device or strategy. You will be required to certify that this is true in the notification you send your reviewing authority.

As stated before, the "environmentally beneficial" determination is a presumption, so it can be rebutted in cases in which a reviewing authority determines that a particular proposed PCP project would not be environmentally beneficial. Also,

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 162 Date Filed: 06/06/2011

this presumption does not apply when: (1) The PCP is not designed, operated, or maintained in a manner consistent with standard and reasonable practices; (2) the collateral pollutant emissions increases are not minimized within the physical configuration and operational standards usually associated with the emissions control device or strategy; or (3) the unit will be less environmentally beneficial. Also, when a reviewing authority determines that an otherwise listed project would not be constructed and operated consistent with standard practices, it may rebut the ''environmentally beneficial'' presumption for that application of the technology.

Finally, it should be noted that commenters on the proposed rule list several examples of specific projects they believe we should add to the list of presumptively environmentally beneficial projects. However, some of these suggested PCP scenarios would never trigger NSR because there would not be a significant increase in emissions, from either the collateral or primary pollutant. For example, one commenter says we should consider the termination or decommissioning of an emissions unit an environmentally beneficial technology. We have never required a unit to undergo NSR before terminating operation; consequently, there is no need for a PCP Exclusion. Commenters raised other scenarios but provided few examples and insufficient detail from which we could draw any conclusions. We believe that the PCP Exclusion will benefit only a subset of all PCPs undertaken at existing sources, in part because most control projects will not cause an emissions increase of any criteria pollutant and, thus, will not trigger NSR. As always, major NSR only applies to your physical or operational changes that result in a significant net emissions increase at your source.

b. What is Meant by ''Environmentally Beneficial''?

The WEPCO PCP Exclusion defines a PCP as ''any activity or project undertaken . . . for purposes of reducing emissions.'' § 52.21(b)(32). We have explained that ''EPA expects that most, if not all, pollution control projects will reduce net actual emissions.'' 57 FR 32319 (1992). The WEPCO PCP Exclusion therefore ''avoids the need to undertake a quantitative emissions increase calculation in every case'' that a facility prepares to undertake a PCP. Rather, in recognition that while a PCP ''could theoretically cause a small collateral increase in some emissions, it will substantially reduce emissions of other pollutants,'' the rule contemplates that sources proposing PCPs that are not listed will determine in the first instance whether they are entitled to the PCP Exclusion based on the ''project's net emissions and overall impact on the environment.'' *Id.* at 32321. Nevertheless, ''the reviewing authority can require additional modeling under certain circumstances to evaluate the air quality impact of a [PCP].'' *Id.*

As for the WEPCO PCP Exclusion, ''reducing emissions'' is the bedrock of the PCP Exclusion. For the list of PCPs in today's regulation, we are satisfied that the net impact on the environment from these projects is beneficial because of our broad experience with these technologies. Consequently, such projects are desirable from an environmental protection perspective, and we have no reason to doubt the validity of the ''environmentally beneficial'' presumption when such controls are applied to existing sources consistent with standard and reasonable practices.

For those projects not listed in Table 2, there is no presumption as to whether or not the projects are environmentally beneficial, and therefore the PCP Exclusion is not self-executing. On a case-by-case basis, your reviewing authority must consider the net environmental benefit of a non-listed project and approve requests for the PCP Exclusion for a specific application of the project upon a showing that it is environmentally beneficial. You must receive this approval from your reviewing authority before beginning actual construction of the PCP. This approval must be conducted through a SIP-approved permitting process that conforms to the requirements of §§ 51.160 and 51.161, including a requirement for a public hearing and 30-day public comment period on all aspects of the project. This includes an opportunity for the public and EPA to review and comment on the environmental benefits analysis and the air quality impacts assessment. The reviewing authority's evaluation of the project's net environmental benefits is limited to air quality considerations; specifically, the air quality benefits of emissions reductions of the primary pollutant must outweigh any detrimental effects from emissions increases in the collateral pollutant, when comparing the unit's post-change emissions to its pre-change baseline actual emissions. Also, the reviewing authority's decision on a case-specific approval of a PCP Exclusion does not serve to proclaim that a given technology is environmentally beneficial for purposes of subsequent PCP Exclusion applications for the same technology.

We may add non-listed control devices, work practices, and pollution prevention projects to the approved list, such that a previously non-listed project can be considered for a self-executing PCP Exclusion. The technology must be reviewed by us to ensure that the project's overall net impact on the environment is indeed beneficial. Our evaluation would hinge on the same factors mentioned above for the reviewing authority's case-by-case reviews. Once ''listed,'' a subsequent project could be presumed environmentally beneficial unless case-specific factors or impacts would indicate otherwise.

Today's rule also provides more guidance in this rule on what constitutes an environmentally beneficial fuel switch. In general, we lack sufficient information from which to categorically determine that a switch to solid fuel will be ''inherently less polluting.'' For instance, switching from oil to woodwaste may decrease sulfur emissions while increasing particulate emissions. Switching between solid fuels, such as coal, woodwaste, or tire-derived fuels, must therefore be evaluated more closely before we can determine whether such a switch could qualify as an environmentally beneficial PCP. Accordingly, we specify which fuel switches are presumptively available for the PCP Exclusion.

c. Why are not More Pollution Prevention Projects Presumed Environmentally Beneficial?

Switching to a less polluting fuel or to a less potent quantity of ODS are prime examples of pollution prevention projects, and both are already listed as presumptively environmentally beneficial. However, some commenters point out that there are far more end-of-pipe, add-on technologies that are listed as environmentally beneficial and recommend that we include more pollution prevention technologies. Although we fully support and encourage pollution prevention projects and strategies, special care must be taken in evaluating a pollution prevention project for the PCP Exclusion. Pollution prevention projects tend to be dependent on site-specific factors and lack an historical record of performance, which proves problematic in deciding whether they are environmentally beneficial when applied universally. We believe that both add-on control devices and pollution prevention projects have equal chances of being presumed environmentally beneficial, but we have

US EPA ARCHIVE DOCUMENT

HeinOnline -- 67 Fed. Reg. 80235 2002

Case: 10-60891 Document: 00511500103 Page: 163 Date Filed: 06/06/2011

more data and history with the add-on control equipment, and this is why the list includes more of those types of pollution strategies. Pollution prevention projects can still qualify as environmentally beneficial PCPs, but they must be evaluated by the reviewing authority to confirm their environmental benefits.

d. How are Control Technologies and Pollution Prevention Strategies Added to the Presumptively "Environmentally Beneficial" List?

The proposal would have allowed the reviewing authority to add to the list of presumptively environmentally beneficial technologies, as long as it determined that a project had been "demonstrated in practice" and was comparable in effectiveness to the listed technologies on a pollutant-specific basis. We will continue to allow new control technologies that are demonstrated in practice to be added to the list of presumed environmentally beneficial technologies. However, unlike the proposed PCP Exclusion, we will not require that non-listed technologies be comparable in effectiveness on a pollutant-specific basis with the emissions reduction efficiency of currently listed technologies in order to qualify as environmentally beneficial, since this is difficult to compare when different pollutants must be considered. Also, today's rule vests the EPA Administrator with the sole authority to approve non-listed pollution strategies as presumptively environmentally beneficial. The reviewing authority may perform a case-specific approval of a PCP Exclusion in which it would determine that a non-listed technology is environmentally beneficial, but that determination only pertains to the particular case under evaluation and would not serve to presume that the technology is environmentally beneficial for subsequent applications.

Through notice and comment rulemaking, we will maintain and update the list as we deem additional technologies to be environmentally beneficial or to remove from the list any PCP that we erroneously listed.

Several commenters on the proposal suggest that we create a clearinghouse for newly added environmentally beneficial PCPs. We agree that additions to the approved PCP list need to be readily available to the public; however, since rulemaking will be used to add new PCPs to the approved list, no additional public notice will be necessary.

e. How do I Calculate Emissions Increases?

In order to calculate emissions increases for primary and collateral pollutants for the purpose of determining the environmental impact of the PCP, you must use the actual-to-projected-actual applicability test method for calculating the emissions increase. This test is discussed in section II of today's preamble, and is consistent with the remainder of today's rule revisions.

f. How do you Perform the Emissions Calculation for Switches to a Less Potent Amount of ODS?

We have determined that activities or projects undertaken to accommodate switching to an ODS with less potential for stratospheric ozone damage are presumptively environmentally beneficial, as long as the productive capacity of the equipment does not increase as a result of the activity or project.

For determining your emissions before and after the change, you must perform a weighted comparison of the switch based on ozone depleting potential (ODP), taken from 40 CFR part 82, and the past and projected future usage of each ODS. In cases where we have expressed a chemical's ODP in 40 CFR part 82 as a range, the most conservative value (that is, the upper bound value) should be used. The replaced ODP-weighted amount is then calculated by multiplying the baseline actual usage (using the annualized average of any 24 consecutive months of usage within the past 10 years) by the ODP of the replaced ODS. The projected ODP-weighted amount is computed by multiplying the projected future annual usage of the new substance by its ODP. The following example illustrates how to make these calculations in determining whether a switch to a different ODS is environmentally beneficial.

Example: Source plans to replace solvents in its batch process line. Its current solvent, CFC–12, a chlorofluorocarbon (CFC) with an ODP of 1.0, is emitted at 200 tpy. It will be substituted with a less potent solvent, a hydrochlorofluorocarbon (HCFC) with an ODP of 0.02. As a result of this change, the straight mass emissions coming from the solvent will increase twofold due to the new process solvent having a higher vapor pressure than the old solvent. However, this substitution most likely would be viewed as environmentally beneficial, since the ODP-weighted emissions would reveal a decreased risk in environmental harm. Specifically, the CFC–12 would be multiplied by its ODP of 1.0, resulting in 200 tpy for pre-change ODP-weighted emissions. In contrast, the 400 tpy of HCFC emissions would be multiplied by 0.02, giving it a post-change, ODP-weighted emission level of 8 tpy. The net effect is an emissions decrease of 192 tpy on an ODP-weighted basis.

g. Should Cross-Media Impacts be Considered in the "Environmentally Beneficial" Demonstration?

By definition, a PCP reduces emissions of air pollutants subject to regulation under the Act. Therefore, while the primary environmental benefit of the PCP would be to reduce air emissions, a secondary benefit could be reducing pollution in other media. However, these cross-media tradeoffs are difficult to compare, so it is difficult to weigh their importance in appraising the overall environmental benefit of a PCP. We solicited comments in the proposal on how to compare cross-media pollution, but we received no suggestions on how to design such a system. As a result, we have determined that it is inappropriate to consider non-air impacts when considering whether projects, activities, or work practices qualify for the PCP Exclusion.

3. Air Quality Impacts

a. What is the "Cause-or-Contribute Test"?

Another criterion for qualification for all PCPs is that the emissions from the PCP cannot cause or contribute to a violation of any NAAQS or PSD increment, or adversely impact an AQRV (such as visibility) that has been identified for a Federal Class I area by an FLM, and for which information is available to the general public. This has been called the "cause-or-contribute test." We continue to believe that the PCP Exclusion must include such safeguards to ensure protection of the environment and public health. In the WEPCO PCP Exclusion, we said that the reviewing authority "under certain circumstances" may evaluate the air quality impact of a PCP. 57 FR 32321. Generally, these circumstances would include large secondary emissions increases in areas that are nonattainment, or marginally in attainment, for the pollutant in question. We anticipate, however, that such analyses would not normally be required, since collateral emissions increases from most relevant projects will be so small that additional modeling should not be required.

Commenters from industry complain that determining whether there would be an adverse impact on an AQRV is too difficult and believe that the proposal is ambiguous in defining roles of FLMs and reviewing authorities. The intention of the statutory structure for preconstruction permit review in section 165(d) of the Act unambiguously is to protect against any adverse impact on AQRVs in Class I lands. Therefore, we continue to believe that any air

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 164 Date Filed: 06/06/2011

quality assessment for a PCP should consider all relevant AQRVs in any Class I area that are identified by the FLM at the time you submit your notice or permit application for the project. For purposes of those projects on the list of projects presumptively qualifying for the PCP Exclusion, we are limiting the consideration of AQRVs to those that have already been identified by an FLM for the Federal Class I area. You should check with the National Park Service website and other public information to determine if the FLM has already identified an AQRV for a nearby Class I area. If you are required to obtain both approval from your reviewing authority and a permit before beginning actual construction of your project, then additional AQRVs may be identified by an FLM consistent with the procedures provided for in that permitting process.

b. What is Necessary for the Air Quality Impacts Analysis?

Reviewing authorities can require you to analyze your air quality impacts whenever they have reason to believe that: (1) the project will result in a significant emissions increase of any criteria pollutant over levels in the most recent analysis; and (2) such an increase would cause or contribute to a violation of any NAAQS or PSD increment or adversely impact an AQRV (such as visibility) that has been identified for a Federal Class I area by an FLM and for which information is available to the general public. The analysis must contain sufficient data to satisfy the reviewing authority that the new levels of emissions will not cause or contribute to a violation of the NAAQS or PSD increment, or adversely impact an AQRV (such as visibility) that has been identified for a Federal Class I area by an FLM and for which information is available to the general public. If the air quality analysis shows that a resulting violation is foreseeable, your project cannot receive the PCP Exclusion.

Many industry commenters complain that the proposed air quality analysis and Class I provisions for the exclusion were overly burdensome and needed to be either eliminated or streamlined. We agree in part with this point, even though we strongly contend that there need to be safeguards to protect against misuse of the exclusion with projects that will not provide positive environmental results. Although today's final rule contains the core safeguard to prevent an adverse air quality impact, a modeling exercise is not necessarily warranted in all cases.

While you are not required to notify the FLM of any Federal Class I area located near your facility as a prerequisite for proceeding with a PCP, you must determine whether any AQRVs have been identified in these areas. FLMs have identified AQRVs for many of the Federal Class I areas and made this information available on a dedicated web site (*http://www2.nature.nps.gov*). If no AQRVs have been identified for a particular Class I area, your demonstration is simply a statement that no AQRVs exist in Class I areas that your source has the potential to affect. Similarly, if there are AQRVs in nearby Federal Class I areas, but the pollutants associated with these AQRVS either will not be emitted by your facility or will not increase by a significant amount as a result of the PCP, then your demonstration should simply indicate the lack of any association between your PCP project and the known AQRVs.

On the other hand, you should be prepared to conduct modeling with respect to any regulated NSR pollutant that your PCP will cause to increase by a significant amount when that pollutant is associated with a known AQRV in a nearby Federal Class I area. Oftentimes, a screening model may be used to estimate the ambient impacts of the increase from your facility. Special concern should be given in cases where an FLM has already identified adverse impacts for such AQRV. In such cases, you are expected to record and consider any information that the FLM has made available concerning the adverse effects, to help determine whether the pollutant impacts from your facility have the potential to cause further adverse impacts.

If a reviewing authority, upon receiving your notification of using the PCP Exclusion, believes that an air quality impacts analysis is reasonably necessary, it is entitled to request more information from you, including additional local or regional modeling.

c. How does the PCP Exclusion Apply to Projects With Collateral Pollutant Increases of Nonattainment Pollutants?

The PCP Exclusion is available, regardless of an area's attainment status or its severity of nonattainment. Nonetheless, because increases in a nonattainment pollutant contribute to the existing nonattainment problem, you or the reviewing authority must offset with acceptable emissions reductions any significant emissions increase in a nonattainment pollutant resulting from a PCP. We are promulgating the PCP Exclusion consistent with our proposal's approach of requiring mitigation of any significant emissions increase of a nonattainment pollutant resulting from a PCP.

Since less than significant collateral emissions increases (for example, less than 40 tpy of VOC in a moderate ozone nonattainment area) do not trigger major NSR, such mitigation requirements are not necessary for the PCP Exclusion when the increase of the nonattainment pollutant will be below the applicable significant level. Be aware, however, that a less than significant emissions increase may be subject to a State's minor NSR requirements.

4. Miscellaneous

a. Can you Generate ERCs From Your PCP-Excluded Project?

The proposal would have allowed certain projects approved for the PCP Exclusion to use their primary pollutant(s) emissions reductions as NSR offsets or netting credits. We included in the proposed rule a specialized "environmentally beneficial" test that would apply to PCPs that generate ERCs. Some commenters support allowing ERCs and creating more flexibility to use them. However, other commenters recommend that EPA avoid complicating the PCP Exclusion by factoring emissions trading credits with the exclusion. These commenters claim that the parceling out of the appropriate reductions for emissions credits and for the newly installed PCP would take an enormous amount of time, and cause problems with tracking emissions reductions and using the credits.

We no longer believe it would be prudent to allow PCPs to generate netting credits or offsets for the emissions reductions used to initially qualify the project for the PCP Exclusion, in light of the issues of increased complexity that the commenters raise. But perhaps more importantly, we feel that the emissions reductions initially achieved by the PCP are integral to the "environmentally beneficial" demonstration required in order for the PCP to qualify for the exclusion. The emissions reductions are traded, in effect, for the significant emissions increase of the collateral pollutants and for the benefits of being excluded from the major NSR permitting requirements. To then re-use the reductions would weaken the PCP Exclusion and would not ensure appropriate environmental protection. Consequently, you cannot use emissions reductions that initially qualified a project for the PCP Exclusion as netting credits or offsets.

However, you are allowed to continue to use these reductions to generate allowances for purposes of complying with the title IV Acid Rain program. In

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 165 Date Filed: 06/06/2011

1992, the PCP Exclusion was originally designed for use by EUSGUs because we did not envision that Congress intended for the NSR program to apply to projects undertaken to comply with title IV. Nothing in today's proposal is intended to change that design.

Moreover, once you qualify for the PCP Exclusion, you can apply for ERCs if you change your process conditions in such a way that further reduces emissions. For example, consider that you have an add-on control technology which receives a PCP Exclusion that, at full operation, allows the source to increase its emissions of a specific collateral pollutant and emit 100 tpy of a pollutant (either a targeted pollutant or a collateral pollutant). If you later decide to take an hours-of-operation limit for your process line and/or control technology that reduces your emissions of that pollutant to 75 tpy, then this 25 tpy reduction in emissions can be used as ERCs if deemed acceptable in all other respects by your reviewing authority.

b. Why Are We Deleting the "Primary Purpose" test?

The "primary purpose" test was proposed as an initial screening mechanism for reviewing authorities to screen out inappropriate projects and to streamline the approval process. This was designed to help reviewing authorities avoid dedicating unnecessary resources to non-qualifying projects. Furthermore, we recognized that all of the listed PCPs have a primary purpose of reducing air pollution, so it followed logically that any other PCP should have the same primary purpose.

However, we received comments from both industry and a State trade association stating that many activities and projects have multiple purposes in addition to reducing emissions, and they encourage EPA not to focus on the primary purpose of a project, but rather on the project's net environmental benefit, in considering it for a PCP Exclusion. A "primary purpose" requirement would disqualify projects that may be environmentally beneficial but happen to not have pollution control as their primary purpose. Further, one commenter stated that by focusing on the intent of the project rather than its end result, administrative agencies will unnecessarily be forced to devote scarce resources to making these determinations.

We concur with these comments and have determined that this test is potentially unnecessarily restrictive. Our primary objective in allowing for a PCP Exclusion is to offer NSR relief for those projects that create a net environmental benefit, and thus we should not concern ourselves with a source's motivation for undertaking its project. Therefore, by today's rule revisions, even if a project's primary purpose is not to reduce emissions, it can still qualify for the PCP Exclusion if it meets the "environmentally beneficial" and air quality tests set forth in today's regulations.

c. How Do the Listed PCP Technologies Compare to BACT or LAER Determinations?

The list of presumed environmentally beneficial technologies contains several control strategies that do not qualify as BACT or LAER. For example, installing low-NO_x burners on large-sized turbines would rarely constitute an acceptable BACT level. However, these projects are presumed environmentally beneficial and are eligible for the PCP Exclusion from major NSR because these controls are cleaner than the existing equipment is without the controls. In addition, the PCP Exclusion only applies to sources that are installing PCPs, and not to the installation of new emissions units or changes that increase the capacity of the unit, both of which would be potentially subject to BACT or LAER. We reiterate, however, that merely because a control technology is listed as environmentally beneficial does not also imply that the technology is equivalent to BACT or LAER, and you should not rely on any such implication as a presumptive BACT or LAER determination.

d. Is the Intent of the PCP Exclusion to Allow Collateral Pollutant Emissions to go Uncontrolled?

To qualify for the PCP Exclusion, you must minimize emissions of collateral pollutants within the physical configuration and operational standards usually associated with the emissions control device or strategy. This typically occurs by inherent design of the control device that causes them. In most cases, no additional control requirements will be necessary.

e. What Does "Demonstrated in Practice" Mean?

Representatives from industry comment that we should ease restrictions that require new add-on technologies to be demonstrated in practice. We are continuing to require that new technologies be demonstrated in practice before being added to the list, in part because this is an important element in a showing that the candidate technology is environmentally sound. However, we have expanded the meaning of "demonstrated in practice" to include technologies demonstrated outside of the United States.

f. How Can the Public Participate in the PCP Exclusion Decision for Your Project?

By these rule revisions, we are not requiring any review of your PCP by the public or your reviewing authority prior to enabling the use of the exclusion. Nonetheless, existing State regulations for minor NSR will continue to apply to projects that qualify for the PCP Exclusion and are not otherwise excluded under the State program. Minor NSR programs are designed to consider the impact these increases could have on air quality, including whether local conditions justify rebutting the presumption that a listed project is environmentally beneficial. Nothing in this rule voids or otherwise creates an exclusion from any otherwise applicable minor NSR preconstruction review requirement in any SIP that has been approved pursuant to section 110(a)(2)(C) of the Act and 40 CFR 51.160 through 51.164. The minor NSR permits may afford the public an opportunity to review and comment on the use of the PCP Exclusion for a specific project. *See* §§ 51.160 and 51.161. Furthermore, to undertake a PCP Exclusion, you could use the title V permit revision process to officially effect the PCP Exclusion. This would enable the public to review the PCP determination at that time.

Thus, the process for implementing a PCP Exclusion would be similar to the other exemptions within NSR (routine maintenance, change in ownership, etc.) whereby you are empowered to make the proper decision based on the facts of the case and the rule requirements.

C. Legal Basis for PCP

In 1992, we revised the NSR regulations to exclude PCPs at existing EUSGUs. *See* 57 FR 32314 (July 21, 1992), amending §§ 51.165(a)(1)(v)(C)(8), 51.166(b)(2)(iii)(h), and 52.21(b)(2)(iii)(h). There, we stated that we believed "that Congress did not intend that PCPs be considered the type of activity that should trigger NSR." 57 FR 32319. Although the 1992 rulemaking applied only to EUSGUs, we believe that Congress's intention holds true for other industry sectors as well. Congress could not have intended to require that, and the Act should not be construed such that, physical or operational changes undertaken to reduce emissions undergo NSR. Therefore, in today's action, we are revising the PCP Exclusion and

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 166 Date Filed: 06/06/2011

removing the conditions limiting it to EUSGUs.

In the event that a PCP results in a significant emissions increase of a different pollutant, the reviewing authority may require an analysis of air quality impacts which would serve the same function as an air quality impacts analysis conducted as part of NSR permitting. Providing an exclusion for PCPs enables facilities to reduce emissions without having to wait for a major NSR permit to be issued. We believe that this result is consistent with the objectives of the NSR provisions in the CAA. Thus, we are revising our rules to remove disincentives to pollution control and pollution prevention projects to the extent allowed under the CAA.

D. Implementation

1. How Do You Apply For and Receive a PCP Exclusion?

The process for obtaining a PCP Exclusion basically breaks down into two separate scenarios, depending on whether your proposed project is ''listed'' or ''non-listed'' as environmentally beneficial. Both processes are presented below.

a. What Is the Process You Must Follow for Projects Involving Listed PCPs?

Before you begin actual construction on your PCP, you must submit a notice to your reviewing authority that includes the following information (and depending on your reviewing authority's requirements, this information may be submitted with a part 70, part 71 or other SIP-approved permit application such as a minor NSR permit application): (1) A description of project; (2) an analysis of the environmentally beneficial nature of the PCP, including a projection of emissions increases and decreases (speciated, using an appropriate emissions test for the emissions unit); and (3) a demonstration that the project will not have an adverse air quality impact.

You may begin construction on the PCP immediately upon submitting your notice to the reviewing authority. However, if your reviewing authority determines that the source does not qualify for a PCP Exclusion, you may be subject to a delay in the project or an order to not undertake the project.

b. What Is the Process You Must Follow for Projects Involving Non-Listed PCPs?

For projects not listed in Table 2, on a case-by-case basis your reviewing authority must consider the net environmental benefit of a non-listed project and, within a reasonable amount of time, act upon your request for the exclusion for a specific application. You must receive this approval from your reviewing authority before beginning actual construction of the PCP. Your reviewing authority will provide an opportunity for public review and comment prior to granting its approval for the PCP.

Your application for case-specific approval of a PCP Exclusion should have the same information as required above for a notice to use a listed technology. The only difference between the two processes is that the use of a listed technology allows you to commence construction on your PCP immediately after submitting your notice to the reviewing authority, whereas the use of a non-listed technology requires you to first submit an application to your reviewing authority and obtain its approval prior to construction of your PCP.

2. What Process Will We Follow To Add New Projects to the List of Environmentally Beneficial PCPs?

We will use notice and comment rulemaking procedures to add new projects to the list of PCPs that are presumed to be environmentally beneficial. We may take this action on our own initiative or you may petition us, if you believe there is a project that should be added to the list.

If you submit a petition to us requesting that a non-listed air pollution control technology (which includes pollution prevention or work practices) be determined environmentally beneficial and presumptively qualified for the PCP Exclusion, you should describe the anticipated emissions consequence of installing the PCP, both for primary and collateral pollutants. We will review your submittal within a reasonable amount of time. If we believe that the project should be added to the list, we will amend the list of approved PCPs through rulemaking. Once the rule has been amended, you may use a newly listed PCP if you proceed in accordance with the process for implementing the PCP Exclusion for listed PCPs. (*See* section VI.D.1.a.)

3. What Are Our Operational Expectations for an Excluded PCP?

By this rule, we are creating a general duty for all sources approved to use a PCP Exclusion. This general duty clause requires you to operate the PCP in a manner consistent with reasonable engineering practices and with the basic applicability requirements for the exclusion (*i.e.*, being environmentally beneficial and having no adverse air quality impacts). This means that you have a legal responsibility to operate in a manner that is consistent with your analysis of the environmental benefits and air quality impacts analysis, and that you will minimize collateral pollutant increases within the physical configuration and operational standards usually associated with the emissions control device or strategy.

4. What Are the Implications of Not Complying With the PCP Exclusion Process?

The PCP Exclusion is a mechanism for bypassing the major NSR permitting requirements. If you do not comply with the steps necessary to qualify for the PCP Exclusion under the terms of the PCP provisions, you can become subject to major NSR.

VII. Listed Hazardous Air Pollutants

The 1990 Amendments to the CAA at section 112(b)(6) exempted HAP listed under section 112(b)(1) from the PSD requirements in part C. In our 1996 **Federal Register** Notice, we proposed changes to the regulations at §§ 51.166 and 52.21 to implement this exemption. Specifically, we proposed the following.

- The HAP listed in section 112(b)(1), as well as any pollutant that may be added to the list, are excluded from the PSD provisions of part C. These HAP include arsenic, asbestos, benzene, beryllium, mercury, radionuclides, and vinyl chloride, all of which were previously regulated under the PSD rules. This exemption applies to the provisions for major stationary sources in §§ 51.166(b)(2) and 52.21(b)(2), the significant levels in §§ 51.166(b)(23)(i) and 52.21(b)(23)(i), and the significant monitoring concentrations in §§ 51.166(i)(8) and 52.21(i)(8).
- Pollutants listed in regulations pursuant to section 112(r)(1), Accidental Release, are not excluded from the PSD provisions of part C.
- Any HAP listed in section 112(b)(1) that are regulated as constituents or precursors of a more general pollutant listed under section 108 are still subject to PSD, despite the exemption in section 112(b)(6).
- If a pollutant is removed from the list under the provisions of section 112(b)(3) of the Act, that pollutant would be subject to the applicable PSD requirements of part C if it is otherwise regulated under the Act.
- Pollutants regulated under the Act and not on the list of HAP, such as fluorides, TRS compounds, and sulfuric acid mist, continue to be regulated under PSD.

Public commenters generally agree that our proposal reflects the statutory requirements. Therefore, today we are

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 167 Date Filed: 06/06/2011

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–154–1–7590; FRL–7525–5]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve revisions of the Texas State Implementation Plan (SIP). The plan revisions include changes that Texas adopted to address deficiencies that were identified on January 7, 2002, and other changes adopted by Texas to regulations that include provisions for PBR and standard permits. This includes revisions that the Texas Commission on Environmental Quality (TCEQ) submitted to EPA on April 29, 1994; August 17, 1994; September 20, 1995; April 19, 1996; May 21, 1997; July 22, 1998; January 3, 2000; September 11, 2000; October 4, 2001; July 25, 2001; and December 9, 2002. This action is being taken under section 110 of the Federal Clean Air Act (the Act, or CAA).

DATES: The EPA must receive your written comments on this proposal no later than August 8, 2003.

ADDRESSES: Comments may be submitted to Guy Donaldson, Acting Section Chief, Air Permits Section, Environmental Protection Agency, Region 6, Air Permits Section (6PD-R), 1445 Ross Avenue, Dallas, Texas 75202–2733. Comments may also be submitted electronically or through hand delivery/courier. Please follow the detailed instructions described in Part (I)(B)(1)(i) through (iii) of the Supplementary Information.

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

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

Table of Contents

I. General Information
II. What Is a SIP?
III. What Is the Federal Approval Process for a SIP?
IV. What Does Federal Approval of a State Regulation Mean to Me?
V. What Is Being Addressed in this Document?
VI. Proposed Action Concerning the Notice of Deficiency (NOD) Issues
VII. Proposal to Approve Chapter 106—Permits by Rule
VIII. Proposal to Approve Chapter 116—Control of Air Pollution by Permits for New Construction or Modification
IX. Proposal to Approve Chapter 122—Federal Operating Permits
X. What Is Our Proposed Action?
XI. Statutory and Executive Order Reviews

I. General Information

A. How Can I Get Copies of This Document and Other Related Information?

1. The Regional Office has established an official public rulemaking file available for inspection at the Regional Office. The EPA has established an official public rulemaking file for this action under TX–154–1–7590. The official public file consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public rulemaking file does not include Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. The official public rulemaking file is the collection of materials that is available for public viewing at the Air Permits Section, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202. The EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 am to 4:30 pm excluding Federal Holidays.

2. Copies of the State submittal and EPA's Technical Support Document (TSD) are also available for public inspection during normal business hours, by appointment at the State Air Agency. TCEQ, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

3. *Electronic Access.* You may access this **Federal Register** document electronically through the Regulation.gov Web site located at *http://www.regulations.gov* where you can find, review, and submit comments on Federal rules that have been published in the **Federal Register**, the Government's legal newspaper, and that are open for comment.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at the EPA Regional Office, as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in the official public rulemaking file. The entire printed comment, including the copyrighted material, will be available at the Regional Office for public inspection. The EPA will process materials marked as CBI as described in section C.

B. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate rulemaking identification number by including the text "Public comment on proposed rulemaking TX–154–1–7590" in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *Electronic Mail (E-mail).* Comments may be sent by e-mail to *spruiell.stanley@epa.gov*). Please include the text "Public comment on proposed rulemaking TX–154–1–7590" in the subject line. EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 168 Date Filed: 06/06/2011

without going through the Regulations.gov Web site, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

ii. *Regulations.gov.* Your use of the Regulations.gov Web Site is an alternative method of submitting electronic comments to EPA. Go directly to Regulations.gov at *http://www.regulations.gov*, then select Environmental Protection Agency at the top of the page and use the go button. The list of current EPA actions available for comment will be listed. Please follow the online instructions for submitting comments. The web-based system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Section 2, directly below. These electronic submissions will be accepted in WordPerfect, Word or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments to: Mr. Guy Donaldson, Acting Chief, Air Permits Section (6PD–R), 1445 Ross Avenue, Dallas, Texas 75202–2733; ''Public comment on proposed rulemaking TX–154–1–7590'' in the subject line on the first page of your comment.

3. *By Hand Delivery or Courier.* Deliver your comments to: Mr. Guy Donaldson, Acting Chief, Air Permits Section (6PD–R), 1445 Ross Avenue, Dallas, Texas 75202–2733. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 am to 4:30 pm excluding Federal holidays.

C. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically to EPA. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the official public regional rulemaking file. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public file and available for public inspection without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section above.

D. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate regional file/rulemaking identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

II. What Is a SIP?

Section 110 of the Act requires States to develop air pollution regulations and control strategies to ensure that State air quality meets the Federal national ambient air quality standards. These ambient standards are established by EPA pursuant to sections 108 and 109 of the Act, and there are currently standards for six criteria pollutants: carbon monoxide (CO), nitrogen dioxide (NO_2), ozone, lead, particulate matter (PM_{10}), and sulfur dioxide (SO_2).

Each State must submit these regulations and control strategies to us for approval and incorporation into the State's Federally-enforceable SIP.

Each Federally-approved SIP protects air quality primarily by addressing air pollution at its point of origin. These SIPs can be extensive, containing State regulations or other enforceable documents and supporting information such as emission inventories, monitoring networks, and modeling demonstrations.

III. What Is the Federal Approval Process for a SIP?

In order to be incorporated into the Federally-enforceable SIP, States must formally adopt regulations and control strategies consistent with State and Federal requirements. This process generally includes a public notice, public hearing, public comment period, and formal adoption by a State-authorized rulemaking body.

Once a State regulation or control strategy is adopted, the State submits it to us for approval and for inclusion into its SIP. We must then provide for public notice and comment regarding our proposed action on the State submission. If we receive adverse comments, we must address them prior to taking final Federal action.

All State regulations and supporting information we approve under section 110 of the Act are incorporated into the Federally-approved SIP. Records for such SIP actions are maintained in the CFR at title 40, part 52, entitled ''Approval and Promulgations of State Implementation Plans.'' The actual State regulations which are approved are not reproduced in their entirety in the CFR, but are ''incorporated by reference,'' which means that we have approved a given State regulation with a specific effective date.

IV. What Does Federal Approval of a State Regulation Mean to Me?

Enforcement of the State regulation before and after it is incorporated into the Federally-approved SIP is primarily a State responsibility. However, after the regulation is Federally approved, we are authorized to take enforcement action against violators. Citizens are also offered legal recourse to address violations as described in the Act.

V. What Is Being Addressed in This Document?

In today's action we are proposing to approve into the Texas SIP revisions to Chapter 106—Permits by Rule, Chapter 116—Control of Air Pollution by Permits for New Construction or Modification, and Chapter 122—Federal Operating Permits. Some of these revisions were made to correct certain deficiencies identified by EPA in an NOD for Texas' title **V** Operating Permit Program. The EPA issued the NOD on January 7, 2002, (67 FR 723) under its

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 169 Date Filed: 06/06/2011

US EPA ARCHIVE DOCUMENT

authority at 40 CFR 70.10(b). The NOD was based upon EPA's finding that several State requirements for the title V operating permits program did not meet the minimum Federal requirements of 40 CFR part 70 and the Act. Texas adopted rule revisions to address the deficiencies identified in the January 7, 2002, NOD. Texas submitted parts of these rule changes as revisions to its SIP on December 9, 2002. This includes revisions to Section 106.6—Registration of Emissions, Section 116.115—General and Special Conditions, Section 116.611—Registration to Use a Standard Permit, and Section 122.122—Potential to Emit.

The December 9, 2002, submittal also includes revisions to Texas' title V Operating Permits Program. Elsewhere in today's **Federal Register**, we are proposing to approve these and other regulations which revise Texas' Operating Permits Program.

The December 9, 2002, SIP submittal included revisions to Texas' regulations for PBR and Texas' regulations for Standard Permits. In order to approve the revised regulations which affect the PBR and Standard Permits, EPA must approve earlier SIP submittals which include the adoption of Texas' programs for PBR and Standard Permits. Accordingly, we are also proposing to approve rules submitted by Texas under Chapter 106—Permits by Rule; Chapter 116, Subchapter F—Standard Permits; Section 116.14—Standard Permit Definitions in Chapter 116, Subchapter A—Definitions, and Sections 116.110 and 116.116 in Subchapter B—New Source Review Permits. Furthermore, the approval of the submitted provisions of Chapter 106 would replace the current SIP-approved Section 116.6—Exemptions. Accordingly, we are proposing to approve removal of Section 116.6 from the SIP.

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

VI. Proposed Action Concerning the Notice of Deficiency (NOD) Issues

A. What Were the Deficiencies Which Require a SIP Revision?

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

Texas has adopted regulations which enable a source to register and certify that its PTE is below that applicable major source threshold. These certified registrations contain a description of how the source will limit its PTE below the major source threshold and include appropriate operation and production limitations (106 and 116 do not require this), appropriate monitoring and recordkeeping which demonstrates compliance with the operation and production limits which the source is certifying to meet. Texas provides for such registration in Sections 106.6—Registration of Emissions, 116.611—Registration to Use a Standard Permit, and 122.122—PTE.

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

B. How Did Texas Address These Deficiencies?

To address this deficiency, TCEQ amended Section 122.122 to require certified registrations of emissions establishing a Federally-enforceable emission limit to be submitted to the Commission. In addition, the Commission submitted the amended Section 122.122 to EPA as a revision to the Texas SIP. Section 122.122 states that all representations with regard to emissions, production or operational limits, monitoring, and reporting shall become conditions upon which the stationary source shall operate and shall include documentation of the basis of emission rates (Section 122.122(b)-(c)).

The Commission also amended Chapter 106 (Section 106.6) and Chapter 116 (Sections 116.115[1] and 116.611) because they also contain language relating to documentation requirements for establishing Federally-enforceable PTE limits for PBR and for standard permits. These changes were also submitted to EPA as a SIP revision. These rules state that all representations with regard to construction plans, operating procedures, and maximum emissions rates in any certified registration under this section become conditions upon which the facility permitted by rule or a standard permit shall be constructed and operated and that registrations must include documentation of the basis of emission rates listed on the registration. Registrations must be submitted on the required form. *See* Sections 106.6(c)-(d) and 116.611(a) and (c).

C. Do the Changes Correct the Deficiencies?

The TCEQ has revised Chapters 106, 116, and 122 to require registrations to be submitted to the Executive Director, to the appropriate Commission regional office, and all local air pollution control agencies, and a copy to be maintained on-site of the facility. The rule therefore satisfies the legal requirement for practical enforceability which was cited in the NOD. Accordingly, we are proposing to approve the Sections 106.6, 116.611, and 122.122 and the amendments to Section 116.115 as revisions to the Texas SIP and to find that the revisions to Section 122.122 satisfy Texas' requirement to correct the identified program deficiency identified in the January 7, 2001, NOD.

VII. Proposal To Approve Chapter 106—Permits by Rule

A. What Are We Proposing To Approve?

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

[1] Texas revised Section 116.115 and paragraph (b)(2)(F)(vi) which provides that persons certifying and registering a Federally enforceable emission limitation under Section 116.611 must retain records demonstrating compliance with the registrations for at least five years. We discuss this change to Section 116.115 in section VIII.B.2 of this preamble.

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Case: 10-60891 Document: 00511500103 Page: 170 Date Filed: 06/06/2011

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

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

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

C. What Is a PBR?

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

A PBR is available only to sources which belong in categories for which TCEQ has adopted a PBR in Chapter 106. A PBR is available only to a facility that is authorized to emit no more that 250 tons per year (tpy) of CO or NO_X; or 25 tpy of volatile organic compounds (VOC), SO_2, or inhalable PM_{10}; or 25 tpy of any other air contaminant, except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen (Section 106.4(a)(1)). A PBR is not available to a facility or group of facilities which undergo a change which constitutes a new major source or major modification under title I of the Act, Part C (Prevention of Significant Deterioration of Air Quality) or part D (Nonattainment review) (Section 106.(a)(2)-(3)). Such major source or major modification must comply with the applicable permitting requirements under Chapter 116, Subchapter B, which meet the new source review requirements of title I, part C or part D of the Act. A facility which qualifies for a PBR must also comply with all applicable provisions of section 111 of the Act (new source performance standards) and section 112 of the Act (Hazardous Air Pollutants) (Section 106.4(a)(6)). Furthermore, a facility which qualifies for a PBR must comply with all rules and regulations of TCEQ (Section 106.4(c)).

D. Are Texas' PBR Approvable?

The PBR are approvable as meeting the provisions of 40 CFR Subpart I—Review of New Sources and Modifications (Subpart I).[2] Section 106.1 provides that only certain types of facilities or changes within facilities which do not make a significant contribution of air contaminants to the atmosphere are eligible for a PBR. This satisfies the requirements of 40 CFR 51.160(a) which provides that the SIP must include procedures that enable the permitting authority to determine whether the construction or modification will result in a violation of applicable portions of the control strategy or interfere with attainment or maintenance of a national ambient air quality standard.

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

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

The TSD contains further information on how Subchapter A meets the requirements of Subpart I.

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

Texas submitted Subchapter A because that Subchapter contains the process by which TCEQ will issue or modify PBR. Subpart A contains the provisions which apply to all PBR and which ensure that individual PBR meet the requirements of subpart I. The individual PBR are adopted in Subchapters B through X, of Chapter 106.[3] In 1996, Texas codified its existing Standard Exemptions into Subchapters B through X and redesignated them to PBR in 2000. Because these existing Standard Exemptions were adopted under Section 116.6, which is currently SIP-approved, they meet the

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 171 Date Filed: 06/06/2011

requirements of subpart I. Furthermore, new and amended PBR are adopted in accordance with the general requirements in Subchapter A, which meet the applicable requirements of subpart I as discussed above. Accordingly, our approval of Subchapter A of Chapter 106 is sufficient to assure that the PBR meet the requirements in subpart I.

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

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

VIII. Proposal To Approve Chapter 116—Control of Air Pollution by Permits for New Construction or Modification

A. Subchapter A—Definitions

1. What Are We Proposing To Approve?

We propose to approve Section 116.14—Standard Permit Definitions. Section 116.14 includes definitions of the following terms as they are used in Subchapter F—Standard Permits: off-plant receptor, oil and gas facility, and sulfur recovery unit.

2. Are These Definitions Approvable?

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

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

1. What Are We Proposing To Approve?

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

2. What Is Our Basis for Approving These Changes?

a. Section 116.110—Applicability. We propose to approve revisions to Section 116.110,[4] which Texas submitted April 29, 1994; July 22, 1998; and September 11, 2000. These changes revise Section 116.110 to add or revise references to provisions which relate to PBR and Standard Permits, which we are proposing to approve elsewhere in this action. We propose the following:

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

b. Section 116.115—General and Special Conditions.

We are proposing to approve revisions to Section 116.115,[5] which Texas submitted April 29, 1994; August 17, 1994; July 22, 1998; and December 9, 2002; as follows:

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

c. Section 116.116—Changes to Facilities.

We are proposing to approve revisions to Section 116.116,[6] which Texas submitted October 25, 1999;[7] and September 11, 2000; as follows:

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

C. Subchapter F—Standard Permits

1. What Are We Proposing To Approve?

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

2. What Is a Standard Permit?

A Standard Permit is a permit which is adopted under

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

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

[5] On October 18, 2002 (67 FR 58709), EPA approved Section 116.115, as adopted June 17, 1998. We did not approve Sections 116.115(b), (c)(2)(A)(i), and (c)(2)(A)(ii)(I). In this action, we are not approving Section 116.115(b)(2)(C)(iii). This provision relates to Mass Emissions Cap and Trade Program and was not adopted in the submittals that we are proposing to approve in this action. We will address Section 116.115(b)(2)(C)(iii) in a separate action.

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

[7] We are proposing to approve only the changes to Section 116.116, submitted October 24, 1999, which relate to PBR. This includes changes to Section 116.116(d) and (d)(1)–(2). We are taking no action on changes to Section 116.116(b)(3)–(4), submitted October 24, 1999, because these provisions do not relate to PBR or to standard permits. We will address Section 116.116(b)(3)–(4) in a separate action.

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 172 Date Filed: 06/06/2011

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

3. Are the Provisions for Standard Permits Approvable?

Texas' Standard Permits are approvable as meeting the provisions of 40 CFR Subpart I—Review of New Sources and Modifications (Subpart I). Subchapter F provides the requirements that a facility must meet to qualify for a Standard Permit. Such requirements include:

- Any facility or group of facilities which constitutes a new major source or major modification under Part C or D of title I of the Act must be permitted under regulations for Nonattainment Review of Prevention of Significant Deterioration of Air Quality. Such sources are not eligible for a Standard Permit. This meets 40 CFR 51.165 (Permit requirements) and 51.166 (Prevention of significant deterioration of air quality).
- Sources qualifying for a Standard Permit must meet all applicable requirements under section 111 of the Act (new source performance standards) and section 112 of the Act (hazardous air pollutants), and must comply with all rules of TCEQ. This satisfies the requirements of 40 CFR 51.160(d) which requires that approval or any construction or modification must not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy.
- Subchapter F includes all the administrative requirements which support the issuance and enforcement of a Standard Permit. This includes Registration of Emissions which limit a source's PTE (Section 116.611) and Recordkeeping, which requires each source subject to a Standard Permit to maintain records sufficient to demonstrate compliance with all conditions of the applicable Standard Permit. These provisions satisfy the requirements in 40 CFR 51.163 which requires the plan to contain the administrative procedures that will be followed in making the determination under 40 CFR 51.160(a). It also meets the requirements of 40 CFR 51.211 which requires the owner or operator to maintain records and to periodically report to the State the nature and amounts of emissions and information necessary to determine whether a source is in compliance.
- All Standard Permits are adopted or revised through the process described in Sections 116.601–116.605. Such new or revised Standard Permits must undergo public notice and a 30-day comment period, and TCEQ must address all comments received from the public before finalizing its action to issue or revise a Standard Permit. This meets the requirements of 40 CFR 51.161 which requires the permitting authority to provide for opportunity for public comment on the information submitted and the State's analysis of the effect on construction or modification on ambient air quality.

The TSD contains further information on how Subchapter A meets the requirements of Subpart I.

4. What Sections in Subchapter F Are We Not Proposing To Approve in This Action?

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

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

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

Sections 116.617, 116.620, and 116.621 are specific permits that Texas has issued. These Sections do not include any provisions relating to the process by which they (or any Standard Permit) must be issued of modified. The Sections, which address the process for issuing and modifying Standard Permits (as identified above), are not dependent on the provisions of Sections 116.617, 116.620, and 116.621, and can be implemented without the approval of Sections 116.617, 116.620, and 116.621. Thus, today's proposal does not include action on Sections 116.617, 116.620, and 116.621. We will review and take appropriate action on Sections 116.617, 116.620, and 116.621, separately.

IX. Proposal To Approve Chapter 122—Federal Operating Permits

A. What Are We Proposing To Approve?

We are proposing to approve Section 122.122—PTE, as submitted December 9, 2002.

B. Is Section 122.122 Approvable?

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

X. What Is Our Proposed Action?

We are proposing the approval of revisions of the Texas SIP to address Texas' SIP submittal dated December 9, 2002. This includes Sections 106.6, revisions to Section 116.115, and Sections 116.611 and 122.122. These SIP revisions relate to Texas' programs

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 173 Date Filed: 06/06/2011

for PBR, Standard Permits, and Operating Permits.

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

The revisions submitted December 9, 2002, are parts of Texas' regulations for PBR and Standard Permits, which EPA has not approved to date. Because the revisions concerning the certification and registration or PTE limits affect the regulations for PBR and Standard Permits, we also propose to approve other provisions of Chapters 106 and 116 which incorporate Texas' regulations for PBR and Standard Permits that Texas submitted to EPA on April 29, 1994; August 17, 1994; September 20, 1995; April 19, 1996; May 21, 1997; July 22, 1998; January 3, 2000; September 11, 2000; October 4, 2001; July 25, 2001; and December 9, 2002.

XI. Statutory and Executive Order Reviews

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

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

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

List of Subjects in 40 CFR Part 52

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

Dated: June 30, 2003.

Richard E. Greene,

Regional Administrator, Region 6.

[FR Doc. 03–17339 Filed 7–8–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[TX–154–2–7609; FRL–7525–4]

Proposed Approval of Revisions and Notice of Resolution of Deficiency for Clean Air Act Operating Permits Program in Texas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve revisions to the Texas title V Operating Permit Program submitted by the Texas Commission on Environmental Quality (TCEQ) on December 9, 2002. In a Notice of Deficiency (NOD) published on January 7, 2002, EPA notified Texas of EPA's finding that the State's periodic monitoring regulations, compliance assurance monitoring (CAM) regulations, periodic monitoring and CAM general operating permits (GOP), statement of basis requirement, applicable requirement definition and potential to emit (PTE) registration regulations did not meet the minimum Federal requirements of the Clean Air Act and the regulations for State operating permit programs. This action proposes approval of revisions TCEQ submitted to correct the identified deficiencies. Today's action also proposes approval of other revisions to the Texas title V Operating Permit Program submitted on December 9, 2002, which relate to concurrent review and credible evidence. The December 9, 2002, submittal also included revisions to the Texas State Implementation Plan (SIP). Elsewhere in today's **Federal Register**, we are proposing to approve those SIP revisions which were submitted on December 9, 2002.

DATES: The EPA must receive your written comments on this proposal no later than August 8, 2003.

ADDRESSES: Comments may be submitted to Guy Donaldson, Acting Section Chief, Air Permits Section, Environmental Protection Agency, Region 6, Air Permits Section (6PD-R), 1445 Ross Avenue, Dallas, Texas 75202–2733. Comments may also be submitted electronically or through hand delivery/courier. Please follow the detailed

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 174 Date Filed: 06/06/2011

EPA-APPROVED REGULATIONS IN THE DELAWARE SIP

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

[FR Doc. 03–28417 Filed 11–13–03; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–154–1–7590; FRL–7585–8]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

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

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

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

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

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

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

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

Table of Contents

I. What Is Being Addressed in This Document?
II. Final Action Concerning the Notice of Deficiency Issues
III. Final Action Concerning Chapter 106—Permits by Rule
IV. Final Action Concerning Revisions to Chapter 116—Control of Air Pollution by Permits for New Construction or Modification
V. Final Action Concerning Chapter 122—Federal Operating Permits
VI. Summary of Today's Final Action
VII. Statutory and Executive Order Reviews

I. What Is Being Addressed in This Document?

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 175 Date Filed: 06/06/2011

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

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

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

II. Final Action Concerning the Notice of Deficiency Issues

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

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

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

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

B. How Did Texas Address This Deficiency?

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

C. Do the Changes Correct the PTE Registration Deficiency?

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

III. Final Action Concerning Chapter 106—Permits by Rule

A. What Are We Approving?

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

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

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

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

C. What Is a PBR?

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 176 Date Filed: 06/06/2011

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

D. Are Texas' PBR Approvable?

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

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

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

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

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

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

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

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

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

A. Subchapter A—Definitions

1. What Are We Approving?

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

2. Are These Definitions Approvable?

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

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

1. What Are We Approving?

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 177 Date Filed: 06/06/2011

2. What Is Our Basis for Approving These Changes?

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

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

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

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

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

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

C. Subchapter F—Standard Permits

1. What Are We Approving?

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

2. What Is a Standard Permit?

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

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

3. Are Texas' Provisions for Standard Permits Approvable?

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 178 Date Filed: 06/06/2011

US EPA ARCHIVE DOCUMENT

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

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

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

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

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

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

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

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

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

V. Final Action Concerning Chapter 122—Federal Operating Permits

A. What Are We Approving?

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

B. Is Section 122.122 Approvable?

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

VI. Summary of Today's Final Action

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

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

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

VII. Statutory and Executive Order Reviews

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

HeinOnline -- 68 Fed. Reg. 64547 2003

Case: 10-60891 Document: 00511500103 Page: 179 Date Filed: 06/06/2011

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

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

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

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

List of Subjects in 40 CFR Part 52

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

Dated: November 5, 2003.

Richard E. Greene,

Regional Administrator, Region 6.

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

PART 52—[AMENDED]

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

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

Subpart SS—Texas

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

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

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

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

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

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

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

The additions and revisions read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE TEXAS SIP

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 180 Date Filed: 06/06/2011

EPA-APPROVED REGULATIONS IN THE TEXAS SIP—Continued

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 181 Date Filed: 06/06/2011

Incorporation by Reference

(h) Unless otherwise specified in this AD, the actions must be done in accordance with EMBRAER Service Bulletin 145–53–0027, Revision 03, dated February 5, 2004; and SICMA Aero Seat Service Bulletin 147–25–020, Issue 2, dated December 22, 2003; as applicable. (Pages 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, and 28 of EMBRAER Service Bulletin 145–53–0027 specify an incomplete document date; the date on those pages should read "05/Feb/2004.") This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To get copies of this service information, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil; or SICMA Aero Seat, 7 Rue Lucien Coupet, 36100 ISSOUDUN, France. To inspect copies of this service information, go to the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or to the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Note 4: The subject of this AD is addressed in Brazilian airworthiness directive 2002–09–01R1, effective June 2, 2004.

Effective Date

(i) This amendment becomes effective on March 13, 2006.

Issued in Renton, Washington, on January 24, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 06–990 Filed 2–3–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 17

Change of Address; Technical Amendment

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending its regulations to reflect a change in the address for the Departmental Appeals Board (DAB). This action is editorial in nature and is intended to improve the accuracy of the agency's regulations.

DATES: This rule is effective February 6, 2006.

FOR FURTHER INFORMATION CONTACT: Joyce A. Strong, Office of Policy (HF–27), Food and Drug Administration, 5600 Fishers Lane, rm. 12A–31, Rockville, MD 20857, 301–827–7010.

SUPPLEMENTARY INFORMATION: This document amends FDA's regulations to reflect the address change of the DAB by removing the outdated address in § 17.47(a) (21 CFR 17.47(a)) and by adding the new address in its place.

Publication of this document constitutes final action on these changes under the Administrative Procedure Act (5 U.S.C. 553). Notice and public procedures are unnecessary because FDA is merely correcting nonsubstantive errors.

List of Subjects in 21 CFR Part 17

Administrative practice and procedure, Penalties.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 17 is amended as follows:

PART 17—CIVIL MONEY PENALTIES HEARINGS

■ 1. The authority citation for 21 CFR part 17 continues to read as follows:

Authority: 21 U.S.C. 331, 333, 337, 351, 352, 355, 360, 360c, 360f, 360i, 360j, 371; 42 U.S.C. 262, 263b, 300aa–28; 5 U.S.C. 554, 555, 556, 557.

§ 17.47 [Amended]

■ 2. Section 17.47 is amended in paragraph (a) by removing "rm. 637–D, Hubert H. Humphrey Bldg., 200 Independence Ave. SW., Washington, DC 20201" and by adding in its place "Appellate Division MS6127, Departmental Appeals Board, United States Department of Health and Human Services, 330 Independence Ave. SW., Cohen Bldg., rm. G–644, Washington, DC 20201".

Dated: January 30, 2006.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 06–1040 Filed 2–3–06; 8:45 am]

BILLING CODE 4160–01–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR PART 52

[EPA–R05–OAR–2005–WI–0003; FRL–8020–1]

Approval and Promulgation of Implementation Plans; Wisconsin; General and Registration Permit Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve revisions to the Wisconsin State Implementation Plan (SIP) submitted by the State of Wisconsin on July 28, 2005. These revisions include General and Registration permit programs that provide for the issuance of general and registration permits as part of the State's construction permit and operation permit programs. In addition, these permit programs may include the regulation of hazardous air pollutants (HAPs) which may be regulated under section 112 of the Clean Air Act (the Act). Thus, EPA is also approving Wisconsin's general and registration permit program under section 112(l) of the Act.

These SIP revisions also contain changes to definitions related to Wisconsin's air permit program, as well as a minor technical change to provide correct references to the updated chapter NR 445, which was inadvertently omitted in the processing of that rule package. Additionally, these revisions clarify an existing construction permit exemption and operation permit exemption for certain grain storage and drying operations. This clarification is necessary to ensure that column dryers and rack dryers are included in the exemption criteria.

DATES: This final rule is effective on March 8, 2006.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2005–WI–0003. 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, *i.e.*, Confidential Business Information (CBI) 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 Environmental Protection

US EPA ARCHIVE DOCUMENT

HeinOnline -- 71 Fed. Reg. 5979 2006

Case: 10-60891 Document: 00511500103 Page: 182 Date Filed: 06/06/2011

Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Susan Siepkowski, Environmental Engineer, at (312) 353–2654 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Susan Siepkowski, Environmental Engineer, Air Permit Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–2654, *siepkowski.susan@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

I. Background Information for Today's Action.
II. What Comments Did We Receive and What Are Our Responses?
III. What Action Is EPA Taking Today?
IV. Statutory and Executive Order Reviews.

I. Background Information for Today's Action

On September 20, 2005, EPA published a proposal to approve Wisconsin's July 28, 2005 SIP revision request, pertaining to registration and general permits. (70 FR 55062). This revision provides for the issuance of general and registration permits as part of the State's construction permit and operation permit programs. It also proposed to approve Wisconsin's general and registration permit program under section 112(l) of the Act, changes to definitions related to Wisconsin's air permit program, and clarifications to permit exemptions for certain grain storage and drying operations. EPA provided in the proposal a summary of these revisions as well as its analysis for determining whether the revisions complied with Federal requirements.

In the proposal EPA solicited comments, which were due October 20, 2005. EPA received one timely adverse comment on the proposed rule. A copy of this comment letter is available in the RME Docket, both electronically and a hard copy. A summary of the comments received and our responses are discussed in the section below.

II. What Comments Did We Receive and What Are Our Responses?

The comments EPA received on the September 20, 2005, proposal object to giving final approval to Wisconsin's registration and general permit programs. Some of the comments pertain to the draft registration permit templates recently public noticed by WDNR. We will address in this rulemaking only the comments pertaining to the September 20, 2005, proposal. The following is a summary of the comments received and our responses.

Comment: Contrary to EPA's proposed rule, Wisconsin's proposed general and registration permit program is not limited to "Nonmetallic mineral processing plants, asphalt plants, small natural gas fired generators, small heating units, printing presses, and hospital sterilization equipment."

Response: The proposal stated, "Categories of sources that are or could be eligible for general permits include nonmetallic mineral processing plants, asphalt plants, small natural gas fired generators, small heating units, printing presses and hospital sterilization equipment." The proposal did not state that these were the only sources eligible, nor did it state the list was inclusive. The list was only meant to provide examples of source types that WDNR had given as examples in its proposal.

Comment: The proposed changes do not comply with the requirements of 40 CFR Part 51, section 110 of the Act and fail to ensure the protection of the National Ambient Air Quality Standards (NAAQS). 40 CFR 51.160 requires states to have legally enforceable procedures to prevent construction or modification of a source if it would violate any control strategies in the SIP or interfere with attainment or maintenance of the NAAQS. NR 406.11(1)(g), the proposed provision that would prevent coverage for sources that cause or exacerbate a NAAQS (or increment) does not actually include a pre-construction determination of air quality impacts. The air quality review in this provision is retrospective, not prospective pre-construction review.

The general and registration permits being proposed allow construction or modification in areas of the state with very different existing background air pollution concentrations, number of sources, and terrain. There can be no pre-permit air analysis that will determine whether air quality standards will be violated by any specific source that will construct or modify under a general or registration permit. Additionally, there is no limit on the emission rate or the number of sources that can be covered by a general or registration permit. As a result, a large number of relatively-small sources can locate into the same area and, cumulatively, cause a violation of NAAQS, or a facility can emit large quantities of pollutants over a short period of time.

Response: WDNR must assure that these permit programs do not violate the NAAQS. WDNR is requiring the applicant to perform an air dispersion modeling analysis as part of its application for coverage. The analysis must include modeling for all criteria pollutants; however, because there are no increments for volatile organic compounds (VOC) (a pre-curser to ozone), an applicant must submit an analysis for VOC only if the emissions are above the major source threshold for permitting. Regarding ozone, "No significant ambient impact concentration has been established. Instead, any net emissions increase of 100 tons per year of VOC subject to PSD would be required to perform an ambient impact analysis." 1990 New Source Review Workshop Manual, Page C.28, footnote b. However, because the pollutant of concern is ozone and the standard Gaussian models used for PSD (*i.e.*, ISCST3 or AERMOD) don't estimate ozone concentrations, determining ozone impacts from individual sources is difficult. Thus, states often use another type of analysis for VOC.

Upon receipt of the application and analysis, the WDNR has 15 days to determine whether the source is eligible for coverage under a general or registration construction permit, as provided in NR 406.16(3)(c) and 407.17(4)(c).

NR 406.11(1)(g) provides that the source may conduct the air quality determination after the determination that the source is covered under the general or registration construction permit. However, NR 406.16(2)(c) and 406.17(3) also provide that if an emissions unit or units cause or exacerbate, or may cause or exacerbate, a violation of any ambient air quality standard or ambient air increment, a source is ineligible for coverage under the general or registration construction permit. By requiring the permittee to submit a modeling analysis, combined with these provisions in NR 406, WDNR will ensure that a source will not violate the NAAQS.

Further, nothing in the proposed revisions relieves any source from the requirement to submit its yearly emissions for inclusion in the emissions inventory. A note in the rule after section NR 406.17(4)(e) and 407.105(4)(e) states, "**Note:** The permit terms and conditions may include capture and control efficiencies. The Air Emissions Management System (AEMS) requires the owner or operator of a source to calculate actual annual emissions for reporting to the inventory using the terms and conditions in a

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 183 Date Filed: 06/06/2011

permit." The data in the emissions inventory is also used for purposes of determining compliance with NAAQS.

Comment: Even when the WDNR revokes a permit due to a violation of NAAQS or an increment, the violating source is authorized to continue operating under the general or registration permit until a subsequent permit is issued. NR 406.11(1)(g)(2) provides that the permittee is "deemed to be in compliance with the requirement to obtain a construction permit until the department takes final action on a subsequent application for a construction permit. . ."

Section NR 407.105 of the proposed revisions, also allow a facility to be deemed "in compliance" with the SIP for 90 days even if the facility did not determine that a SIP requirement applied and is not in compliance with the limit. Additionally, the "safe harbor" language in the proposed provision is essentially a permit shield, which extends to requirements which were never included specifically in a permit, either as an applicable requirement or in a non-applicability determination.

Response: Since EPA's September 20, 2005, proposed approval of this rule, WDNR has withdrawn provisions NR 406.11(1)(g)(2), 407.105(7), and 407.15(8)(b) for inclusion in its SIP.

Comment: The proposed changes do not comply with the public participation requirements and procedures required by 40 CFR parts 51 and 70. The public notice and comment procedure required by part 51 is not satisfied by merely allowing notice and comment on a generic permit, which WDNR later-applies to specific facilities. The required public notice and comment process requires public inspection of the information provided by the applicant and the agency's analysis of the effect on air quality. There is no provision in the proposed general and registration permit program whereby the public gets notice and the ability to comment on "the information submitted by the owner or operator and of the State or local agency's analysis of the effect on air quality." 40 CFR 51.161(b).

Further, proposed section NR 406.16(1)(c) states that "the procedural requirements in s. 285.61(2) to (8), Stats., do not apply to the determination of whether an individual source is covered by a general construction permit for a source category." Proposed section NR 406.17(1)(b) contains similar language for registration permits.

In addition, the general part 70 permits don't comply with the public notice requirements of part 70. The WDNR must provide the public with, *inter alia*: the identity of the affected facility; the name and address of the permittee; the name and address of the permitting authority processing the permit; the activity or activities involved in the permit action; the emissions change involved in any permit modification; the name, address, and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, all relevant supporting materials, and all other materials available to the permitting authority that are relevant to the permit decision. The Act also requires application materials, including compliance certification and compliance plans, to be made public.

Response: As discussed in the proposal, EPA has determined that, in cases where standardized permits have been adopted, EPA and the public need not be involved in their application to individual sources as long as the standard permits themselves have been subject to notice and opportunity to comment. Specifically, EPA's January 25, 1995 memorandum "Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits" states that "since the rule establishing the program does not provide the specific standards to be met by the source, each general permit, but not each application under each general permit, must be issued pursuant to public and EPA notice and comment." P.10

EPA's April 14, 1998, guidance from John S. Seitz, "Potential to Emit (PTE) Guidance for Specific Source Categories" states, "There are two overall approaches that States and local agencies can use to establish enforceable emission limits* * * Under the second approach, generally appropriate for less complex sources, States and local agencies create a standard set of terms and conditions for many similar sources at the same time. The terms air quality agencies use to describe this approach include "general permits," "prohibitory rules," "exclusionary rules," and "permits-by-rule." (From this point on, rather than to repeat each of these terms, this guidance will use the term "prohibitory rule" for the latter three terms.)" This guidance further states, "State "prohibitory rules" are similar to general permits, but States or local agencies put them in place with a regulation development process rather than a permitting process."

Additionally, EPA's January 25, 1995, Memorandum from John S. Seitz, "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act", states, "A concept similar to the exclusionary rule is the establishment of a general permit for a given source type. A general permit is a single permit that establishes terms and conditions that must be complied with by all sources subject to that permit. The establishment of a general permit provides for conditions limiting potential to emit in a one-time permitting process, and thus avoids the need to issue separate permits for each source within the covered source type or category."

The State of Massachusetts, "Summary of Comments and Responses to Comments from Public Hearing on Proposed Amendments to 310 CMR 7.00", to which the commenters cite, states, "EPA interprets its regulations at 40 CFR 51.160 to require that all proposed sources undergo full permit review before construction, with the exception of sources constructed pursuant to prohibitory rules."

EPA has stated in guidance that prohibitory rules and general permits are essentially similar, and that neither require individual permit review. Thus, a one-time permit process can be used if the general permit receives full review. While EPA's guidance documents pertaining to general permits generally apply to operation permits, the concept can also be applied to general construction permits, as these are similar to construction pursuant to prohibitory rules. Every general permit issued to a source would not need to go through full review if the general permit did, provided certain materials are still made available to the public.

WDNR must make available to the public all of the permit information listed in parts 51 and 70. Similar to the construction and operation permits WDNR issues, the registration and general permits will also be available on a WDNR Web site. An up-to-date list of sources covered by registration or general permits, with all of the required permittee and facility information, as well the electronic application, will be available to view on-line. In addition, anyone can request to view any permit related materials by contacting the WDNR.

Regarding NR 406.16(1)(c) which states that, "The department may issue the general construction permit if the applicable criteria in s. 285.63, Stats., are met. The procedural requirements in s. 285.61(2) to (8), Stats., do not apply to the determination of whether an individual source is covered by a general construction permit for a source category." There is a note that follows

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 184 Date Filed: 06/06/2011

this section which states, "The statutes cited above require that when issuing a general construction permit, the department distribute a notice of the availability of the proposed general construction permit and of the department's analysis and preliminary determination, a notice of the opportunity for public comment and a notice of the opportunity to request a public hearing. There will be a 30-day public comment period and the department may hold a public hearing within 60 days after the deadline for requesting one."

Wisconsin Stat. 285.63, which contains the criteria for permit approval, requires the source to meet all applicable emission limitations; and prohibits the source from violating or exacerbating an air quality standard or ambient air increment, and from precluding construction or operation of other sources. Wisconsin Stat. 285.61(2) to (8) contains the procedural requirements for construction permit application and review, and requires the WDNR to: prepare an analysis regarding the effect of the proposed construction, distribute and publicize the analysis and a notice of the opportunity to request a public hearing, receive public comments, and hold a public hearing on the construction permit if requested.

As discussed above, because the general permit will go through the procedures in Stat. 285, these procedures will not be required each time the general permit is issued to a specific source.

Comment: The proposed revisions allow the WDNR to determine that the requirements of NR 424.03(2)(a) or (b) are technologically infeasible for every source that will potentially be covered under a general or registration permit. Provision NR 424.03 requires WDNR to determine whether 85% reduction of VOCs is technologically infeasible.

Response: NR 406.16(1)(d) states, "* * * Notwithstanding the requirement in s. NR 424.03(2)(c) to determine the latest available control techniques and operating practices demonstrating best current technology (LACT) for a specific process line, the department may include conditions in the general construction permit that represent LACT, if the requirements of s. NR 424.03(2)(a) or (b) are determined to be technologically infeasible." Similar language is included in and 406.17(1)(d), 407.10(1)(d), and 407.105(1)(c).

Wisconsin Stat. NR 424.03 requires 85% control of VOCs for certain sources. NR 424.03(2)(b)(2) states, "Where 85% control has been demonstrated to be technologically infeasible for a specific process line, control organic compound emissions by the use of the latest available control techniques and operating practices demonstrating best current technology, as approved by the Department." NR 424.03(3) further states, "Surface coating and printing processes subject to the requirements of this section may instead elect, with the approval of the Department, to meet the emission limitations of s. NR 422.01 to 422.155, notwithstanding ss. NR 422.03(1), (2), (3) or (4) and 425.03, provided that: (a) The process line meets the specific applicability requirements of ss. NR 422.05 to 422.155; and (b) The owner or operator submits a written request to the department * * *" (NR 422.01 to 422.155 provides specific conditions for the control of VOC emissions for various types of surface coating, printing and asphalt surfacing operations.)

Wisconsin's rule 424.03(2)(b)(2) does not require a case-by-case or permit-by-permit analysis, and gives the WDNR the authority to made such determinations. The WDNR is making such a determination for the general construction permits. EPA believes this is consistent with Wisconsin's authority under 424.03.

Comment: The proposed rule provides that no construction permit is required if construction, reconstruction, or modification does not violate the term of a general operating permit. However, many requirements in the Wisconsin SIP are triggered, and become more stringent, when a source is modified or reconstructed. The proposed NR 407.10(4) does not prevent construction and modification, but does not require compliance with the more stringent SIP limits, which may become applicable, such as opacity. In fact, it does not require the source to notify the WDNR or EPA that it made the change. Instead, the proposed NR 407.10(4) merely requires the source to comply with the existing SIP limit.

Response: If a source with a general permit becomes subject to an applicable requirement, such as an opacity limit, that is different from the limit included in the general permit, or that is not included in the general permit, then the source no longer qualifies for that general permit. NR 407.10(4)(a)(1) provides, "Notwithstanding the provisions in s. NR 406.04(1) and (2), no construction permit is required prior to commencing construction, reconstruction, replacement, relocation or modification of a stationary source if the source is covered under a general operation permit and all of the following criteria are met: 1. The construction, reconstruction, replacement, relocation or modification will not result in the source violating any term or condition of the general operation permit."

Furthermore, if construction causes a new requirement to become applicable that is not in the general permit, the source would no longer be eligible for the general permit and would need to apply for another permit. NR 407.10(3)(b) provides "(b) An owner or operator of a stationary source who requests or *requires* emission limits, terms or conditions other than, or in addition to, those contained in the general operation permit shall apply for a different type of permit." (Emphasis added.) Further, coverage under a general permit does not preclude a source from complying with Stat. 285.63, which requires sources to comply with all applicable requirements.

Comment: The operating permit program will not require that all emissions, limitations, controls and other requirements imposed by such permits will be at least as stringent as any other applicable imitation or requirement contained in the SIP.

Further, the rules and the draft permits already issued by WDNR under the proposed SIP revision do not identify what limits, controls and requirements apply to a source. Instead, the permit requires the owner or operator to "meet all applicable air pollution requirements in ch. 285, Wis. Stats., and chs. NR 400–NR 499, and therefore, there is no way for the requirement to be enforced.

Response: The registration and general permit rule is not a prohibitory rule and, thus, the permits, not the rule itself, will contain the emissions limitations, controls and other requirements applicable to the source. The rule requires the operation permits to contain these conditions, and NR 407.105(1)(c) provides, "The registration operation permit shall contain applicability criteria, emission caps and limitations, monitoring and record keeping requirements, reporting requirements, compliance demonstration methods and general conditions appropriate for determining compliance with the terms and conditions of the registration operation permit. The permit terms and conditions shall be those required to comply with the Act and those required to assure compliance with applicable provisions in ch. 285, Stats., and chs. NR 400 to 499." NR 407.10(1)(d) also provides, "The general operation permit shall contain applicability criteria, emission limits, monitoring and record keeping requirements, reporting

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 185 Date Filed: 06/06/2011

requirements, compliance demonstration methods and general conditions applicable to the stationary source category. The permit terms and conditions shall be those required to comply with the Act and those required to assure compliance with applicable provisions in ch. 285, Stats., and chs. NR 400 to 499."

As discussed in the previous response, coverage under a general or registration permit does not preclude a source from complying with Stat. 285.63, which requires sources to comply with all applicable requirements. Therefore, the permits must contain conditions that will be at least as stringent as any other applicable imitation or requirement contained in the SIP.

Comment: The proposed permit programs do not ensure that limitations, controls, and requirements are permanent, quantifiable, and otherwise enforceable as a practical matter. The proposed provisions rely on an annual 25 tons per year (TPY) cap on emissions, rather than a production limit. This violates EPA policy that synthetic minor permits must contain a limit on production to be practically enforceable.

Response: The limitations, controls, and requirements in the general and registration construction and minor operation permits are permanent, as these permits do not expire. However, general part 70 permits have a permit term of 5 years as required by 40 CFR 70.6(a)(2). NR 407.10(1)(e) provides, "The term of a general operation permit issued to a part 70 source category, or granted to an individual part 70 source, may not exceed 5 years. General operation permits issued to a non-part 70 source category, or granted to an individual non-part 70 source, shall only expire if an expiration date is requested by the source owner or operator or the department finds that expiring coverage would significantly improve the likelihood of continuing compliance with applicable requirements, compared to coverage that does not expire."

The limitations in the permits must be quantifiable. NR 407.15(2)(a)(1) requires, "The calendar year sum of actual emissions of each air contaminant from the facility may not exceed 25% of any major source threshold in s. NR 407.02(4), except that for lead, emissions may not exceed 0.5 tons per calendar year." The permits must provide a mechanism to demonstrate the source will meet these limitations, and the rule requires the permits to contain emission limits, monitoring and record keeping requirements, reporting requirements, compliance demonstration methods in order to determine compliance with all limits.

Additionally, the limitations, controls, and requirements in the permits must be practically enforceable. EPA has discussed practical enforceability in various guidance documents. EPA's January 25, 1995, John S. Seitz memorandum, "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act", states,

> Consequently, in all cases, limitations and restrictions must be of sufficient quality and quantity to ensure accountability (see 54 FR 27283). * * * In general, practicable enforceability for a source-specific permit means that the permit's provisions must specify: (1) A technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, and annual limits such as rolling annual limits); and (3) the method to determine compliance including appropriate monitoring, record keeping, and reporting. For rules and general permits that apply to categories of sources, practicable enforceability additionally requires that the provisions: (1) Identify the types or categories of sources that are covered by the rule; (2) where coverage is optional, provide for notice to the permitting authority of the source's election to be covered by the rule; and (3) specify the enforcement consequences relevant to the rule.

Wisconsin's rule meets these requirements. The rule at NR 407.105(1)(c) and 407.10(1)(d) requires the permits to contain adequate emission caps and limitations, monitoring and record keeping requirements, reporting requirements, compliance demonstration methods and general conditions for determining compliance. Additionally, the rule at NR 407.10(1)(b) identifies the types or categories of sources that can be covered by the general permit, and coverage is elective, as provided by NR 407.10(3)(a). Further, if a facility covered by a registration or general permit emits more than its permitted cap, or does not comply with a permit term, it will no longer be eligible for the registration or general permit.

III. What Action Is EPA Taking Today?

After carefully reviewing and considering the issues raised by the commenter, EPA is taking final action to approve the proposed SIP revision. EPA is approving all revisions to Wisconsin SIP rules NR 400, 406, 407, and 410 submitted by the State on July 28, 2005, except the sections which Wisconsin later withdrew from consideration. The general construction and operation permit provisions are codified at NR 406.16 and NR 407.10 of the Wisconsin Administrative Code, respectively. Registration construction and operation permit provisions are codified at NR 406.17 and NR 407.105, respectively. EPA is also approving Wisconsin's general permit program under section 112(l) of the Act for the purpose of creating federally enforceable limitations on the potential to emit HAPs regulated under section 112.

This SIP revision amends provisions of Wisconsin's construction and operation permit programs, NR 406.04(1) and NR 407.03(1), respectively, relating to an existing exemption for certain grain storage and processing facilities from needing to obtain a construction or operation permit. Additionally, several sections in NR 406 and NR 407 are renumbered because of the addition of new provisions and definitions, and changes are being made to NR 410.03(1)(a)(5), NR 410.03(1)(a)(6) and (7), Wisconsin's air permit fee rules. EPA is not approving NR 406.11(1)(g)(2), 407.107(7), and 407.15(8)(b) which were included in the State's July 28, 2005, submittal because WDNR has since withdrawn these provisions from inclusion in its SIP. *See* letter from Lloyd L. Eagan, Director, to Thomas Skinner, Regional Administrator, dated November 14, 2005, in which Wisconsin withdrew the cited sections from its July 28, 2005 submission.

Specifically, the approved SIP revision repeals NR 406.04(1)(c) and 407.03(1)(c); renumbers NR 406.02(1) to (4); amends NR 406.04(1)(ce), (cm) and (m)(intro.), 406.11(1)(intro.) and (c), 407.03(1)(ce) and (cm), 407.05(7), 407.15(intro.) and (3), 410.03(1)(a)(5), and 484.05(1); repeals and recreates NR 407.02(3) and 407.10; and creates NR 400.02(73m) and (131m), 406.02(1) and (2), 406.04(2m), 406.11(1)(g)(1), 406.11(3), 406.16, 406.17, 406.18, 407.02(3m), 407.105(1) to (6), 407.107, 407.14 Note, 407.14(4)(c), 407.15(8)(a) and 410.03(1)(a)(6) and (7).

IV. Statutory and Executive Order Reviews

Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (*58 FR 51735*, September 30, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget.

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 186 Date Filed: 06/06/2011

Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Because it is not a "significant regulatory action" under Executive Order 12866 or a "significant energy action," this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (*66 FR 28355*, May 22, 2001).

Regulatory Flexibility Act

This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Unfunded Mandates Reform Act

Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (*65 FR 67249*, November 9, 2000).

Executive Order 13132: Federalism

This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (*64 FR 43255*, August 10, 1999). This action merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (*62 FR 19885*, April 23, 1997), because it is not economically significant.

National Technology Transfer Advancement Act

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

Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Congressional Review Act

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

Under Section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 7, 2006. 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: December 27, 2005.

Bharat Mathur,

Acting Regional Administrator, Region 5.

■ For the reasons stated in the preamble, part 52, chapter I, of title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart YY—Wisconsin

■ 2. Section 52.2570 is amended by adding paragraph (c)(113) to read as follows:

§ 52.2570 Identification of plan.

* * * * *

(c) * * *

(113) Approval—On July 28, 2005, Wisconsin submitted General and Registration construction and operation permitting programs for EPA approval into the Wisconsin SIP. EPA also is approving these programs under section 112(l) of the Act. EPA has determined that these permitting programs are approvable under the Act, with the exception of sections NR 406.11(1)(g)(2), 407.105(7), and 407.15(8)(b), which Wisconsin withdrew from consideration on November 14, 2005. Finally, EPA is removing from the state SIP NR 406.04(1)(c) and 407.03(1)(c), the exemption for certain grain storage and processing facilities from needing to obtain a construction or operation permit, previously approved in paragraphs (c)(75) and (c)(76) of this section.

(i) Incorporation by reference.

(A) NR 406.02(1) through (4), amended and published in the (Wisconsin) Register, August 2005, No. 596, effective September 1, 2005.

(B) NR 406.04(1) (ce), (cm) and (m) (intro.), 406.11(1) (intro.) and (c), 407.03(1) (ce) and (cm), 407.05(7), 407.15 (intro.) and (3), 410.03(1)(a)(5), and 484.05(1) as amended and

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 187 Date Filed: 06/06/2011

published in the (Wisconsin) Register, August 2005, No. 596, effective September 1, 2005.

(C) NR 407.02(3) and 407.10 as repealed, recreated and published in the (Wisconsin) Register, August 2005, No. 596 effective September 1, 2005.

(D) NR 400.02(73m) and (131m), 406.02(1) and (2), 406.04(2m), 406.11(1)(g)(1), 406.11(3), 406.16, 406.17, 406.18, 407.02(3m), 407.105 (1) through (6), 407.107, 407.14 Note, 407.14(4)(c), 407.15(8)(a), and 410.03(1)(a)(6) and (7) as created and published in the (Wisconsin) Register, August 2005, No. 596, effective September 1, 2005.

[FR Doc. 06–1030 Filed 2–3–06; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL–8028–2]

RIN 2060–AN18

Protection of Stratospheric Ozone: The 2006 Critical Use Exemption From the Phaseout of Methyl Bromide

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to exempt methyl bromide production and import for 2006 critical uses. Specifically, EPA is authorizing uses that will qualify for the 2006 critical use exemption, and the amount of methyl bromide that may be produced, imported, or made available from inventory for those uses in 2006. EPA's action is taken under the authority of the Clean Air Act (CAA) and reflects recent consensus Decisions taken by the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol) at the 16th and 17th Meetings of the Parties (MOPs) and the 2nd Extraordinary Meeting of the Parties (ExMOP).

DATES: This final rule is effective on February 1, 2006.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–OAR–2005–0122. 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., CBI 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 *www.regulations.gov* or in hard copy at the Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (202) 566–1742. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Marta Montoro, Office of Atmospheric Programs, Stratospheric Protection Division, Mail Code 6205 J, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 343–9321; fax number: (202) 343–2337; e-mail address: *mebr.allocation@epa.gov*.

SUPPLEMENTARY INFORMATION: This final rule concerns Clean Air Act restrictions on the consumption, production, and use of methyl bromide (class I, Group VI controlled substance) for critical uses during calendar year 2006. Under the Clean Air Act, methyl bromide consumption and production was phased out on January 1, 2005 apart from certain exemptions, including the critical use exemption and the quarantine and preshipment exemption. With this action, EPA is listing the uses that will qualify for the 2006 critical use exemption, as well as authorizing specific amounts of methyl bromide that may be produced, imported, or made available from inventory for critical uses in 2006.

Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. Chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. EPA is issuing this final rule under section 307(d) of the CAA, which states: "The provisions of section 553 through 557 * * * of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies." CAA section 307(d)(1). Thus, section 553(d) of the APA does not apply to this rule. EPA nevertheless is acting consistently with the policies underlying APA section 553(d) in making this rule effective on February 1, 2006. APA section 553(d) provides an exception for any action that grants or recognizes an exemption or relieves a restriction. This final rule grants an exemption from the phaseout of methyl bromide.

Table of Contents

I. General Information
A. Regulated Entities
II. What Is the Background to the Phaseout Regulations for Ozone-Depleting Substances?
III. What Is Methyl Bromide?
IV. What Is the Legal Authority for Exempting the Production and Import of Methyl Bromide for Critical Uses Authorized by the Parties to the Montreal Protocol?
V. What Is the Critical Use Exemption Process?
A. Background of the Process
B. How Does This Final Rulemaking Relate to Previous Rulemakings Regarding the Critical Use Exemption?
C. What Are the Approved Critical Uses?
D. What Are the Uses That May Obtain Methyl Bromide for Research?
E. What Amount of Methyl Bromide Is Necessary for Critical Uses?
F. What Are the Sources of Critical Use Methyl Bromide?
G. What Are the Critical Use Allowance Allocations?
H. What Are the Critical Stock Allowance Allocations?
I. Clarifications to the Framework Rule
J. Supplemental Critical Use Exemptions for 2006
VI. Statutory and Executive Order Reviews
A. Executive Order No. 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility
D. Unfunded Mandates Reform Act
E. Executive Order No. 13132: Federalism
F. Executive Order No. 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order No. 13045: Protection of Children From Environmental Health & Safety Risks
H. Executive Order No. 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Congressional Review Act

I. General Information

A. Regulated Entities

Entities potentially regulated by this action are those associated with the production, import, export, sale, application and use of methyl bromide covered by an approved critical use exemption. Potentially regulated categories and entities include:

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 188 Date Filed: 06/06/2011

Dated: February 24, 2006.

Julie M. Hagensen,

Acting Regional Administrator, Region 10.

[FR Doc. 06–2700 Filed 3–21–06; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 70

[EPA–R07–OAR–2005–MO–0005; FRL–8048–3]

Approval and Promulgation of Implementation Plans and Operating Permits Program; State of Missouri

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing four actions in response to Missouri's request to revise the State Implementation Plan (SIP) and Part 70 Operating Permit program to include two new rules and three revised rules. Missouri requested approval of portions of rules adopted on June 26, 2003. Because of the state's request for approval of portions of the rules, EPA is not proposing action on all of the state-adopted rules. All of the rules pertain to Missouri's air permits program. EPA is proposing to approve revisions to Definitions and Common Reference Tables in the SIP and Part 70 Operating Permit program. EPA is proposing to conditionally approve the Construction Permits By Rule. EPA is proposing to approve a SIP revision for changes to the Construction Permits Required rule and to conditionally approve portions of the Construction Permits Required rule, which reference the Construction Permits By Rule. EPA is proposing SIP approval of a new rule, Construction Permit Exemptions.

DATES: Comments must be received on or before April 21, 2006.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R07–OAR–2005–MO–0005, by one of the following methods:

1. *http://www.regulations.gov:e Follow the on-line instructions for submitting comments.*
2. E-mail: *algoe-eakin.amy@epa.gov.*
3. Mail: Amy Algoe-Eakin, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101.
4. Hand Delivery or Courier. Deliver your comments to: Amy Algoe-Eakin, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101.

Instructions: Direct your comments to Docket ID No. EPA–R07–OAR–2005–MO–0005. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket. All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas. EPA requests that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

FOR FURTHER INFORMATION CONTACT: Amy Algoe-Eakin at (913) 551–7942 or by e-mail at *algoe-eakin.amy@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This section provides additional information by addressing the following questions:

What is a SIP?
What is the Federal approval process for a SIP?
What does Federal approval or disapproval of a state regulation mean to me?
What is the Part 70 operating permits program?
What is the Federal approval process for an operating permits program?
What is being addressed in this document?
Have the requirements for approval of a SIP revision and a Part 70 revision been met?
What action is EPA proposing?

What is a SIP?

Section 110 of the Clean Air Act (CAA or Act) requires states to develop air pollution regulations and control strategies to ensure that state air quality meets the national ambient air quality standards (NAAQS) established by EPA. These ambient standards are established under section 109 of the CAA, and they currently address six criteria pollutants. These pollutants are: Carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide.

Each state must submit these regulations and control strategies to us for approval and incorporation into the Federally-enforceable SIP.

Each Federally-approved SIP protects air quality primarily by addressing air pollution at its point of origin. These SIPs can be extensive, containing state regulations or other enforceable documents and supporting information such as emission inventories, monitoring networks, and modeling demonstrations.

What is the Federal approval process for a SIP?

In order for state regulations to be incorporated into the Federally-enforceable SIP, states must formally adopt the regulations and control strategies consistent with state and Federal requirements. This process generally includes a public notice, public hearing, public comment period, and a formal adoption by a state-authorized rulemaking body.

Once a state rule, regulation, or control strategy is adopted, the state submits it to us for inclusion into the SIP. We must provide public notice and seek additional public comment regarding the proposed Federal action on the state submission. If adverse comments are received, they must be addressed prior to any final Federal action by us.

US EPA ARCHIVE DOCUMENT

HeinOnline -- 71 Fed. Reg. 14439 2006

Case: 10-60891 Document: 00511500103 Page: 189 Date Filed: 06/06/2011

All state regulations and supporting information approved by EPA under section 110 of the CAA are incorporated into the Federally-approved SIP. Records of such SIP actions are maintained in the Code of Federal Regulations (CFR) at title 40, part 52, entitled "Approval and Promulgation of Implementation Plans." The actual state regulations which are approved are not reproduced in their entirety in the CFR outright but are "incorporated by reference," which means that we have approved a given state regulation with a specific effective date.

What does Federal approval or disapproval of a state regulation mean to me?

Enforcement of the state regulation before and after it is incorporated into the Federally-approved SIP is primarily a state responsibility. However, after the regulation is Federally approved, we are authorized to take enforcement action against violators. Citizens are also offered legal recourse to address violations as described in section 304 of the CAA. If a state regulation is disapproved, it is not incorporated into the Federally-approved SIP and is not enforceable by EPA or by citizens under section 304. In the case of a revision to a Federally-approved state regulation, disapproval of the revision means that the underlying state regulation prior to the state's revision remains as the Federally enforceable requirement.

What is the part 70 operating permits program?

The CAA amendments of 1990 require all states to develop operating permits programs that meet certain federal criteria. In implementing this program, the states are to require certain sources of air pollution to obtain permits that contain all applicable requirements under the CAA. One purpose of the part 70 operating permits program is to improve enforcement by issuing each source a single permit that consolidates all of the applicable CAA requirements into a Federally-enforceable document. By consolidating all of the applicable requirements for a facility into one document, the source, the public, and the permitting authorities can more easily determine what CAA requirements apply and how compliance with those requirements is determined.

Sources required to obtain an operating permit under this program include "major" source of air pollution and certain other sources specified in the CAA or in our implementing regulations. For example, all source regulated under the acid rain program, regardless of size, must obtain permits. Examples of major sources include those that emit 100 tons per year or more of volatile organic compounds, carbon monoxide, lead, sulfur dioxide, nitrogen dioxide or PM10 ; those that emit 10 per year of any single hazardous air pollutant (HAP) (specifically listed under the CAA); or those that emit 25 tons per year or more of a combination of HAPs.

Revisions to the state and local agencies operating permits program are also subject to public notice, comment and our approval.

What is the Federal approval process for an operating permits program?

In order for state regulations to be incorporated into the Federally enforceable Part 70 operating permits program, states must formally adopt regulations consistent with state and Federal requirements. This process generally includes a public notice, public hearing, pubic comment period, and formal adoption by a state-authorized rulemaking body.

Once a state rule, regulation, or control strategy is adopted, the state submits it to us for inclusion into the approved operating permits program. We must provide public notice and seek additional public comment regarding the proposed Federal action on the state submission. If adverse comments are received, they must be addressed prior to any final Federal action by us.

All state regulations and supporting information approved by EPA under section 502 of the CAA are incorporated into the Federally-approved operating permits program. Records of such actions are maintained in the CFR at Title 40, part 70, appendix A, entitled, "Approval Status of State and Local Operating Permits Programs."

What is being addressed in this document?

On July 14, 2004, Missouri requested that EPA revise the SIP to include two new rules and three revised rules and revise the Part 70 program to include revisions to two rules. All of these rules pertain to Missouri's air permit program and will assist in effective management of Missouri's air permitting program and provide clarity to several confusing elements of the program. These rules were adopted by the Missouri Air Conservation Commission on June 26, 2003, and became effective under state law on October 30, 2003. When Missouri submitted these rules to EPA, Missouri included the comments made on the rules during the state's adoption process, the state's response to comments, and other information necessary to meet EPA's completeness criteria. For additional information on the completeness criteria, the reader should refer to 40 CFR part 51, appendix V.

EPA is proposing four actions in response to this request.

The first action we are proposing is to approve the Missouri Department of Natural Resources' (MDNR) request to include, as a revision to Missouri's SIP and Part 70 Operating Permit program, amendments to rule 10 CSR 10–6.020, Definitions and Common Reference Tables. This proposed approval would incorporate changes in definitions of "cold cleaner," "nonattainment area," "opacity," "portable equipment installation," "significant," and "visible emissions." These changes are minor and are consistent with EPA requirements.

The second action we are proposing is to approve and conditionally approve revisions to the Construction Permits Required rule, 10 CSR 10–6.060. These changes clarify and correct rule applicability sections for consistency with Federal regulations. The parts of rule 10 CSR 10–6.060 that are proposed for conditional approval are the references to 10 CSR 10–6.062, Construction Permits By Rule, which is being proposed for conditional approval in its entirety, as discussed later in this proposal.

The third action we are proposing is to approve certain sections of a new Missouri rule, Construction Permit Exemptions, 10 CSR 10–6.061. This rule lists specific categories of construction or modification projects which are not required to obtain permits to construct under the Construction Permits Required rule, 10 CSR 10–6.060. Many of the exemptions previously listed in the Construction Permits Required rule had been previously approved by EPA. For those exemptions which were not previously listed in the Construction Permit Required rule or were not intuitively *de minimis*, EPA Region 7 requested a demonstration that these exemptions do not impact attainment or maintenance of the National Ambient Air Quality Standards (NAAQS). Missouri submitted this demonstration with the June 14, 2004, SIP submittal. EPA believes that this demonstration satisfactorily illustrates that the construction permit exemptions proposed for approval in this action will not interfere with attainment of the NAAQS.

However, one exemption included in the June 2003 state rulemaking is not included in today's proposal. In an October 25, 2005, request from the Director of Missouri's Air Pollution

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 190 Date Filed: 06/06/2011

Control Program to the EPA Region 7 Regional Administrator, Missouri withdrew subparagraph (3)(A)2.D, of 10 CSR 10–6.061 from the SIP submission. This exemption is for "Livestock markets and livestock operations" constructed on or before November 30, 2003. EPA proposes to approve the exemptions in 10 CSR 10–6.061, which do not include the livestock exemption found in subparagraph (3)(A)2.D per Missouri's request. EPA also proposes to approve the renumbering of the exemptions previously approved into the SIP, which Missouri has moved from 10 CSR 10–6.060 to 10 CSR 10–6.061. This latter proposal involves an administrative change and does not substantively reopen EPA's approval of the exemptions previously contained in 10 CSR 10–6.060.

The fourth action we are proposing is to conditionally approve the Construction Permits By Rule, 10 CSR 10–6.062. This is a new rule that creates a process by which sources can be exempted from the Construction Permits Required rule, because the rule establishes conditions under which specific sources can construct and operate. It also establishes notification requirements and standard review fees. The rule authorizes sources to construct and operate upon submission of notice to MDNR.

We are proposing conditional approval of rule 10 CSR 10.6–062. This proposed conditional approval does not include paragraph (3)(B)4., which is a permit by rule for livestock operations. In an October 25, 2005, request from the Director of MDNR's Air Pollution Control Program to EPA Region 7 Regional Administrator, Missouri withdrew the paragraph for EPA approval. EPA anticipates that Missouri will revise and submit new rules relating to livestock operations in the near future.

EPA proposes a conditional approval because this rule, as adopted by the Missouri Air Conservation Commission on June 26, 2003, does not expressly include a mechanism for pre-construction review of applications received from the facilities that want to operate under this rule. Section 110(a)(2)(C) of the CAA requires that each SIP include a program to regulate construction and modification of sources to ensure that the NAAQS are achieved. EPA's implementing regulation provides that the plan must include procedures, "by which the state * * * will prevent such construction or modification" where the source or modification would violate a control strategy or interfere with attainment or maintenance of the NAAQS (see 40 CFR 51.160(b)). Because Missouri's Construction Permits By Rule appears to authorize construction to begin before any air quality review occurs, and the rule only provides for revocation of a permit after the source begins construction or operation, EPA believes that Missouri's preconstruction permit program is deficient with respect to sources which may qualify for the Permit By Rule. With respect to these sources, the rule does not clearly authorize Missouri to prevent construction or modification before construction or modification begins.

In order to rectify these deficiencies, the Missouri Air Conservation Commission (MACC) adopted a resolution on December 8, 2005, which is intended to clarify that Missouri, in administering this rule, will require a preconstruction review period before sources may begin construction and will amend the Construction Permits by Rule to expressly include a preconstruction review period. The MACC also directed the Missouri Department of Natural Resources' Air Pollution Control Program to complete revisions to this rule within twelve months of the December 2005 resolution. During the interim period required to promulgate an effective rule, the program is directed to conduct a maximum seven day review period procedure for permit by rule notifications submitted in accordance with Missouri rule 10 CSR 10–6.062, Construction Permits by Rule.

Because the MACC resolution serves to clarify the preconstruction review, which is an issue of significant concern to EPA, we propose to conditionally approve into the SIP Missouri rule 10 CSR 10–6.062, Construction Permits by Rule. Section 110(k)(4) of the Clean Air Act states that EPA may conditionally approve a plan based on a commitment from the state to adopt specific enforceable measures within one year from the date of approval. If the state fails to meet its commitment within the one-year period, the approval is treated as a disapproval. As such, this rule is proposed for approval with the condition that Missouri must revise the Construction Permits By Rule to incorporate a preconstruction review period and submit this revised rule for inclusion into the SIP to EPA within one year of the date EPA finalizes this action.

Finally, Missouri's submittal includes revisions to Missouri's Operating Permits Rule in 10 CSR 10–6.065. These revisions relate to Missouri's operating permit program for minor sources which are not subject to the state's Title V program for major sources (and other specified source categories) and are not seeking limits to avoid any major source requirements. The rule revisions for rule 10 CSR 10–6.065 relate solely to the state's basic operating permit program that are not included in Missouri's approved Part 70 Operating Permits program or SIP. Therefore, we are not acting on these revisions.

Have the requirements for approval of a SIP revision and a Part 70 revision been met?

The state submittal has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submittal also satisfied the completeness criteria of 40 CFR part 51, appendix V. In addition, as explained above and in more detail in the Technical Support Document (TSD) that is part of this rule, except as noted with respect to the permits by rule provision discussed above, the revisions meet the substantive SIP requirements of the CAA, including section 110 and implementing regulations. Finally, the submittal met the substantive requirements of Part 70 of the 1990 CAA Amendments and 40 CFR part 70.

What action is EPA proposing?

EPA is proposing four actions:

(1) EPA is proposing to approve, as an amendment to the Missouri SIP and Part 70 program, revisions to Definitions and Common Reference Tables, Missouri Rule 10 CSR 10–6.020.

(2) EPA is proposing to approve, as an amendment to the Missouri SIP, revisions to the Construction Permits Required, Missouri Rule 10 CSR 10.060. We are proposing to conditionally approve portions of the Construction Permits Required rule, which reference the Construction Permits by Rule, 10 CSR 10–6.062.

(3) EPA is proposing approval into the SIP of a new rule, Construction Permit Exemptions, 10 CSR 10–6.061, except for the livestock markets and livestock operations exemption found in this rule, which was withdrawn in an October 25, 2005, request from the state of Missouri.

(4) EPA is proposing to conditionally approve, as an amendment to the Missouri SIP, the Construction Permits By Rule, 10 CSR 10–6.062, except for the livestock markets and livestock operations exemption found in this rule, which was withdrawn in an October 25, 2005, request from the state of Missouri.

We are soliciting comments on these proposed actions. Final rulemaking will occur after consideration of any comments.

Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 191 Date Filed: 06/06/2011

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

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

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

List of Subjects

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.

40 CFR Part 70

Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Dated: March 13, 2006.

James B. Gulliford,

Regional Administrator, Region 7.

[FR Doc. E6–4146 Filed 3–21–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 281

[FRL–8048–2]

Indiana; Tentative Approval of State Underground Storage Tank Program

ACTION: Proposed rule; notice of tentative determination on application of State of Indiana for final approval, public hearing and public comment period.

SUMMARY: The State of Indiana has applied for approval of the underground storage tank program under Subtitle I of the Resource Conservation and Recovery Act (RCRA). The Environmental Protection Agency (EPA) has reviewed the Indiana application and has made the tentative decision that Indiana's underground storage tank program satisfies all of the requirements necessary to qualify for approval. The Indiana application for approval is available for public review and comment. A public hearing will be held if sufficient public interest is expressed.

DATES: A public hearing will be held if sufficient public interest is expressed and communicated to EPA in writing by April 11, 2006. EPA will determine by April 21, 2006, whether there is significant interest to hold the public hearing. The State of Indiana will participate in any public hearing held by EPA on this subject. Written comments on the Indiana approval application, as well as requests to present oral testimony, must be received by the close of business on April 11, 2006.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–UST–2006–0188. 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.*, CBI 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 form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy as follows. You can view and copy Indiana's approval application at the following addresses:

Indiana Department of Environmental Management, File Room located on the 12th floor of the Indiana Government Center—North, 100 North Senate Avenue 46204, Telephone: (317) 234–0963, Monday through Friday, 8:30 a.m. through 4:30 p.m.; and

U.S. EPA Region 5, Underground Storage Tank Section, 77 West Jackson Blvd., Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. We recommend you telephone Sandra Siler, Enforcement Officer, at (312) 886–0429 before visiting the Region 5 office.

Submit written comments, identified by Docket ID No. EPA–R05–UST–2006–0188, by one of the following methods: *http://www.regulations.gov:* Follow the online instructions for submitting comments.

E-mail: *tschampa.andrew@epa.gov.*

Fax: (312) 353–3159.

Mail: Mr. Andrew Tschampa, Chief of Underground Storage Tank Section, U.S. EPA Region 5, DU–7J, 77 West Jackson Blvd., Chicago, Illinois 60604.

Hand Delivery: Andrew Tschampa, Chief of Underground Storage Tank Section, U.S. EPA, DU–7J, 77 W. Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 192 Date Filed: 06/06/2011

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

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

F. Executive Order 13175, Coordination With Indian Tribal Governments

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

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

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

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

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

I. National Technology Transfer and Advancement Act

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

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

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

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

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

List of Subjects in 40 CFR Part 52

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

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

Dated: September 8, 2009.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

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

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2006–0133; FRL–8958–7]

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

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 193 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

SUPPLEMENTARY INFORMATION:

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

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

Table of Contents

I. What Action is EPA Proposing?
II. What are the Other Relevant Proposed Actions on the Texas Permitting SIP Revision Submittals?
III. What has the State Submitted?
IV. Do the Submitted SIP Revisions Meet the Major PSD NSR SIP Requirements?
A. What are the Requirements for EPA's Review of a Submitted Major NSR SIP Revision?
B. Do the Submitted SIP Revisions Meet the Act and the PSD SIP requirements?
V. Do the Submitted SIP Revisions Meet the Major Nonattainment NSR SIP Requirements for the 1-Hour and the 1997 8-Hour Ozone NAAQS?
A. What are the Anti-Backsliding Major Nonattainment NSR SIP Requirements for the 1-hour Ozone NAAQS?
B. What are the Major Nonattainment NSR SIP Requirements for of the 1997 8-hour Ozone NAAQS?
VI. Do the Submitted SIP Revisions Meet the Major NSR SIP Requirements?
A. Do the SIP Revision Submittals Meet the Major NSR SIP Requirements with a PALs Provision?
B. Do the Submitted SIP Revisions Meet the Non-PAL Aspects of the Major NSR SIP Requirements?
VII. Does the Submitted PCP Standard Permit Meet the Minor NSR SIP Requirements?
VIII. What is Our Evaluation of Other SIP Revision Submittals?
IX. Proposed Action
X. Statutory and Executive Order Reviews

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 194 Date Filed: 06/06/2011

US EPA ARCHIVE DOCUMENT

I. What Action is EPA Proposing?

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

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

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

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

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

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

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

III. What has the State Submitted?

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

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

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

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

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

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

HeinOnline -- 74 Fed. Reg. 48469 2009

Case: 10-60891 Document: 00511500103 Page: 195 Date Filed: 06/06/2011

- *Revisions to the following sections:* 30 TAC 116.12—Nonattainment and Prevention of Significant Deterioration Review Definitions, 30 TAC 116.150—New Major Source or Major Modification in Ozone Nonattainment Areas, 30 TAC 116.151—New Major Source or Major Modification in Nonattainment Areas Other Than Ozone, 30 TAC 116.160—Prevention of Significant Deterioration Requirements, and 30 TAC 116.610(a), (b), and (d) —Applicability;
- *Addition of the following new sections:* 30 TAC 116.121—Actual to Projected Actual Test for Emissions Increases, 30 TAC 116.180—Applicability, 30 TAC 116.182—Plant-Wide Applicability Limit Application, 30 TAC 116.184—Application Review Schedule, 30 TAC 116.186—General and Special Conditions, 30 TAC 116.188—Plantwide Applicability Limit, 30 TAC 116.190—Federal Nonattainment and Prevention of Significant Deterioration Review, 30 TAC 116.192—Permit Amendments and Alterations, 30 TAC 116.194—Public Notice and Comment, 30 TAC 116.196—Renewal of Plant-Wide Applicability Limit Permit, and 30 TAC 116.198—Expiration or Voidance.
- *Removal of 30 TAC 116.617—* Standard Permit for Pollution Control Projects and replacement with new 30 TAC 116.617—State Pollution Control Project Standard Permit.

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 196 Date Filed: 06/06/2011

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 197 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 198 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 199 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 200 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 201 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 202 Date Filed: 06/06/2011

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

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

IX. Proposed Action

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

Specifically, we are proposing:

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

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

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

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

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

X. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

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

B. Paperwork Reduction Act

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

C. Regulatory Flexibility Act

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

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

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

D. Unfunded Mandates Reform Act

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

E. Executive Order 13132, Federalism

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 203 Date Filed: 06/06/2011

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

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

F. Executive Order 13175, Coordination With Indian Tribal Governments

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

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

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

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

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

I. National Technology Transfer and Advancement Act

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

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

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

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

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

List of Subjects in 40 CFR Part 52

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

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

Dated: September 8, 2009.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

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

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2007–0359; FRL–8960–8]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

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

US EPA ARCHIVE DOCUMENT

PART 52—[AMENDED]

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

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

Subpart V—Maryland

■ 2. In § 52.1070, the table in paragraph (c) is amended by removing the entry for COMAR 26.11.10.06[2] and by adding new COMAR 26.11.10.05–1 to read as follows:

§ 52.1070 Identification of plan.

* * * * *

(c) * * *

EPA–APPROVED REGULATIONS IN THE MARYLAND SIP

Code of Maryland Administrative Regulations (COMAR) citation	Title/subject	State effective date	EPA approval date	Additional explanation/citation at 40 CFR 52.1100
26.11.10 Control of Iron and Steel Production Installations				
* *	* *	* *	* *	*
26.11.10.05–1	Control of Carbon Monoxide Emissions from Basic Oxygen Furnaces.	9/12/05	2/9/10 [Insert page number where the document begins].	
* *	* *	* *	* *	*

[FR Doc. 2010–2678 Filed 2–8–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2007–0113–200709(a); FRL–9098–5]

Approval and Promulgation of Implementation Plans Georgia: State Implementation Plan Revision

AGENCY: Environmental Protection Agency (EPA)

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Georgia State Implementation Plan (SIP), submitted by the Georgia Environmental Protection Division (GA EPD) on September 26, 2006, with a clarifying revision submitted on November 6, 2006. The revisions include multiple modifications to Georgia's Air Quality Rules found at Chapter 391–3–1. These revisions are part of Georgia's strategy to meet the national ambient air quality standards (NAAQS). The revisions include, but are not limited to, changes to Chapters such as "Definitions;" "Emissions Limitations and Standards;" "Open Burning;" "Exemptions;" "Permits;" and "Regulatory Exceptions." EPA is approving Georgia's SIP revisions pursuant to section 110 of the Clean Air Act (CAA).

EPA is not acting on revisions to rules 391–3–1–.01(qqqq), 391–3–1–.02(2)(zz), 391–3–1–.02(2)(mmm), 391–3–1–.02(6)(a), 391–3–1–.03(6)(g), and 391–3–1–.03(6)(i) at this time. EPA is also not acting on revisions to rule 391–3–1–02(2)(ooo), as Georgia has submitted a revised version of the rule. Additionally, we are not acting on several revisions to the September 26, 2006, SIP submittal, that are not part of the federally approved SIP.

DATES: This direct final rule is effective April 12, 2010 without further notice, unless EPA receives adverse comment by March 11, 2010. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number, "EPA–R04–OAR–2007–0113," by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: benjamin.lynorae@epa.gov.*
3. *Fax:* 404–562–9019.
4. *Mail:* "EPA–R04–OAR–2007–0113," Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Ms. Lynorae Benjamin, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding federal holidays.

Instructions: Direct your comments to Docket ID Number, "EPA–R04–OAR–2007–0113." EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *http://www.regulations.gov* or e-mail, information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center home page at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 205 Date Filed: 06/06/2011

information is not publicly available, i.e., CBI 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 in *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Stacy Harder, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9042. Ms. Harder can also be reached via electronic mail at *harder.stacy@epa.gov.*

Table of Contents

I. Background
II. Summary of Action
III. Final Action
IV. Statutory and Executive Order Reviews

SUPPLEMENTARY INFORMATION:

I. Background

On September 26, 2006, with a clarifying revision submitted on November 6, 2006, GA EPD submitted proposed SIP revisions to EPA for review and approval into the Georgia SIP. The revisions include the following changes made by the State of Georgia to its Air Quality Rules, found at Chapter 391–3–1. The changes that were made to update Georgia's regulations include, but are not limited to, "Definitions;" "Emissions Limitations and Standards;" "Open Burning;" "Exemptions;" "Permits;" and "Regulatory Exceptions." The changes are discussed below.

EPA is not acting on revisions to rules 391–3–1–.01(qqqq), 391–3–1–.02(2)(zz), 391–3–1–.02(2)(mmm), 391–3–1–.02(6)(a), 391–3–1–.03(6)(g), and 391–3–1–.03(6)(i) at this time. EPA is also not acting on revisions to rule 391–3–1–02(2)(ooo), as Georgia has submitted a revised version of the rule. Additionally, we are not acting on revisions to rules 391–3–1–.02(ppp), 391–3–1–.02(8)(a), 391–3–1–.02(9), 391–3–1–.03(9), 391–3–1–.03(10)(b)2, 391–3–1–.03(10)(e)(6), and 391–3–1–.03(10)(g)2, as they are not part of the federally approved SIP.

II. Summary of Action

Rule 391–3–1–.01 "Definitions"

1. 391–3–1–.01(llll) "Volatile Organic Compound"

Georgia is amending its definition of volatile organic compounds (VOC) by inserting five additional compounds in the list of compounds excluded from the definition of VOC. GA EPD is taking an action that was similarly approved by the EPA on November 29, 2004 (69 FR 69298). The revision adds the five compounds to the list of those excluded from the definition of VOC, on the basis that they make a negligible contribution to ozone formation.

EPA's policy is that compounds of carbon with a negligible level of reactivity need not be regulated to reduce ozone (42 FR 35314, July 8, 1977). EPA determines whether a given carbon compound has "negligible" reactivity by comparing the compound's reactivity to the reactivity of ethane. EPA lists these compounds in its regulations at 40 CFR 51.100(s), and excludes them from the definition of VOC. The chemicals on this list are often called "negligibly reactive." EPA may periodically revise the list of negligibly reactive compounds to add compounds to or delete them from the list.

The revision updates Georgia's definition of VOC, to be consistent with the Federal definition of VOC, by adding: 1,1,1,2,2,3,3-heptafluoro-3-methoxy-propane (n-$C_3F_7OCH_3$) (known as HFE–7000); 3-ethoxy-1,1,1,2,3,4,4,5,5,6,6,6-dodecafluro-2-(trifluoromethyl) hexane (known as HFE–7500); 1,1,1,2,3,3,3-heptafluoropropane (known as HFC–227ea); methyl formate ($HCOOOCH_3$); and t-butyl acetate to its list of compounds excluded from the definition of VOC. We are approving this rule to maintain consistency with the Federal definition of VOC, pursuant to Section 110 of the CAA. This rule change became State effective on July 20, 2005.

2. 391–3–1–.01(nnnn) "Procedures for Testing and Monitoring Sources of Air Pollutants"

Georgia is amending the effective date to the definition of "Procedures for Testing and Monitoring Sources of Air Pollutants" to reflect the current version, dated January 1, 2006. The purpose of the document is to identify those procedures used for the purposes of testing and monitoring air pollutant sources. This revision is approvable because it merely updates a definition in the "Definitions" section of Georgia's rule, and is consistent with Section 110 of the CAA. This revision became State effective on July 13, 2006.

Rule 391–3–1–.02 "Provisions"

1. 391–3–1–.02(2) "Emission Standards"

a. 391–3–1–.02(2)(d) "Fuel-Burning Equipment"

Georgia is amending subparagraphs 1(ii) and 2(ii), relating to "Fuel Burning Equipment," to correct the existing rule. The revision clarifies the existing rule language regarding applicability for boiler sizes. The language previously read "for equipment equal to or greater than 10 million BTU heat input per hour, or equal to or less than 2,000 million BTU heat input per hour * * *" The intent of the rule is for the limit in subparagraph (2)(d)1(ii) to apply to equipment with both a heat input of greater than or equal to 10 Million British thermal units per hour (MMBtu/hr) and less than or equal to 2,000 MMBtu/hr constructed on or before January 1, 1972. Similarly, subparagraph 2(d)2(ii) will be limited to apply to boiler sizes equal to or greater than 10 MMBtu/hr, and (rather than or) equal to or less than 250 MMBtu/hr, constructed after January 1, 1972. EPA is approving this revision to correct an inadvertent error by revising the language in this subparagraph, consistent with Section 110 of the CAA. The revision became State effective on July 20, 2005.

b. 391–3–1–.02(2)(tt) "VOC Emissions From Major Sources"

Georgia is amending paragraph (2), titled "Emission Limitations and Standards," subparagraph (tt), relating to "VOC Emissions from Major Sources," by adding new subparagraphs (tt)6 and (tt)7, relating to Reasonable Available Control Technology (RACT) demonstrations.

The revised rule requires Georgia to issue a public notice to allow the public an opportunity for comment, for any RACT demonstration approved pursuant to this subsection of Georgia's regulation, relating to VOC emission from major sources. The revision will also require GA EPD to submit all approved RACT determinations to EPA as a SIP revision. EPA is approving this revision to be consistent with Section 110 of the CAA, as it allows the public an opportunity to comment on, and requires EPA approval of, any RACT demonstration or revision to a RACT demonstration. This revision became State effective January 9, 2005.

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 206 Date Filed: 06/06/2011

c. 391–3–1–.02(2)(yy) "Emissions of Nitrogen Oxides From Major Sources"

Georgia is amending paragraph (2), titled "Emission Limitations and Standards," subparagraph (yy), relating to "Emissions of Nitrogen Oxides from Major Sources," by adding new subparagraphs (yy)7 and (yy)8.

The revised rule requires Georgia to issue public notice and provide an opportunity for public comment for RACT determinations approved pursuant to this subsection of Georgia's regulation, relating to nitrogen oxides (NO_X) emissions from major sources. The revision also states that Georgia will submit any modifications or changes to the approved RACT demonstrations to EPA as a revision to the SIP. EPA is approving this revision to be consistent with Section 110 of the CAA, as it allows the public an opportunity to comment on, and requires EPA approval of, any RACT demonstration or revision to a RACT demonstration. This revision became State effective on January 9, 2005.

d. 391–3–1–.02(2)(rrr) "NO_X Emissions from Small Fuel-Burning Equipment"

Georgia is adding a new rule (rrr), titled "NO_X Emissions from Small Fuel-Burning Equipment" to Chapter 391–3–1–.02(2) "Emission Limitations and Standards." This new rule establishes new RACT requirements for sources emitting NO_X emissions in excess of one ton per year (tpy), or 25 tpy in the Atlanta 1-hour ozone nonattainment area (or "Atlanta Area"). This was a result of the January 1, 2004, reclassification (68 FR 55469, September 26, 2003) of the Atlanta 1-hour ozone nonattainment area from "serious" to "severe." Subparagraph 1 explains the requirements for performing an annual tune-up and documentation of the maintenance records. It also requires that only natural gas be used during the months of May through September. An affected unit is exempt from the requirements of subparagraph 1, provided the owner or operator submits the documentation specified in the facility's permit confirming the unit will not be operated during the months of May through September. The Atlanta Area is currently nonattainment for the 1997 8-hour ozone standard, therefore, these requirements continue to apply to the Atlanta Area in accordance with anti backsliding provisions set forth in the CAA. EPA is approving these revisions consistent with Section 110 of the CAA. These revisions became State effective on January 9, 2005, and March 27, 2006.

2. 391–3–1–.02(4) "Ambient Air Standards"

Georgia is amending subparagraph (4)(b)4, relating to sulfur dioxide, to correct an error in the standard condition for temperature. The revision changes the standard condition in subparagraph 4 to read as 25 degrees Celsius, rather than 26 degrees. This revision became State effective on July 20, 2005. Georgia is also amending paragraph (4), subparagraphs (4)(c) and (e), relating to particulate matter and ozone, respectively. The revisions remove the outdated air quality standards, and update the rules to reflect the 1997 NAAQS for these pollutants. (July 18, 1997, 62 FR 38652). The 1997 standard was set at 50 micrograms per cubic meter ($\mu g/m^3$) for PM_{10}. The 1997 standards for 24-hour $PM_{2.5}$ and annual $PM_{2.5}$ were set at 65 $\mu g/m^3$ and 15 $\mu g/m^3$, respectively. This revision is being approved to maintain consistency with the current NAAQS under Section 110 of the CAA at the time the submission was provided to EPA. This revision became State effective on January 9, 2005.

3. Rule 391–3–1–.02(5) "Open Burning"

Georgia is amending paragraph (5) relating to "Open Burning." The revision deletes the definition of "slash burning," and revises the definition of "prescribed burning" to be consistent with the Georgia Prescribed Burning Act. What was previously considered "slash burning" is now included in the definition for "prescribed burning." Georgia is also revising subparagraph (b)2 to add the counties of Bibb, Catoosa, Columbia, Crawford, Houston, Peach, Richmond, Twiggs, and Walker to those that have open burning restrictions. Additionally, Georgia is adding language to subparagraph (5)(e), to require Federal facilities not mandated to obtain burn permits from the Georgia Forestry Commission, to institute measures to ensure prescribed burning is not conducted during the months of May through September. EPA is approving these revisions to clarify language, as well as to be consistent with the counties that are part of the current 1997 8-hour ozone nonattainment area, pursuant to Section 110 of the CAA. This revision became State effective on July 13, 2006.

Rule 391–3–1–.03 "Permits"

1. 391–3–1–.03(6) "Exemptions"

a. 391–3–1–.03(6)(b) "Combustion Equipment"

Georgia is revising subparagraph (6)(b)8 to correct a typographical error in the combustion equipment exemption for air curtain incinerators used for land clearing at a construction site, which became State effective on April 19, 2006. Georgia is also revising subparagraph (6)(b)11, to clarify language relating to emergency generators used for peaking power. EPA is approving this revision, to clarify language, under Section 110 of the CAA. This rule became State effective on July 13, 2006.

The State is also changing the permit exemption requirements in subparagraph (6)(b)11 for stationary engines used for emergency generation, located within 45 north Georgia counties, such that only engines with a rated capacity of less than 100 kilowatts shall be exempt, rather than the previous exemption at 300 kilowatts and below. This rule became State effective on March 27, 2006.

Additionally, Georgia is revising paragraph (6), subparagraph (b)11(v)(I). The revision modifies the definition of "emergency generator" which states the generator may provide back-up power when power from the local utility is interrupted, and which operates for less than 500 hours-per-year, by adding the counties of Banks, Barrow, Bartow, Butts, Carroll, Chattanooga, Cherokee, Clarke, Clayton, Cobb, Coweta, Dawson, Dekalb, Douglas, Fayette, Floyd, Forsyth, Fulton, Gordon, Gwinnett, Hall, Haralson, Heard, Henry, Jackson, Jasper, Jones, Lamar, Lumpkin, Madison, Meriwether, Monroe, Morgan, Newton, Oconee, Paulding, Pickens, Pike, Polk, Putnam, Rockdale, Spalding, Troup, Upson, and Walton, where such generators may only operate less than 200 hours-per-year. The additional counties are part of the current 1997 8-hour ozone nonattainment area. Therefore, this revision is being approved, consistent with maintenance of the NAAQS, under Section 110 of the CAA. This rule became State effective on March 27, 2006.

Finally, Georgia is adding new subparagraphs (6)(b)14 and (6)(b)15. These paragraphs exempt temporary stationary sources that install boilers and electric generators to replace the source's primary boiler or generator during periods of maintenance or repair, from obtaining a permit for the temporary equipment. Actual and potential emissions of the temporary sources must not exceed that of the main source, and temporary fuel-burning equipment may not remain at a location for longer than 180 consecutive days. EPA is approving the revised permit exemptions as actual and potential emissions of the temporary source may not exceed that of the main source, consistent with Section 110(l) of

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 207 Date Filed: 06/06/2011

the CAA. This revision became State effective on April 19, 2006.

b. 391–3–1–.03(6)(j) "Construction Permit Exemption for Pollution Control Projects"

Georgia is adding a new subparagraph (j) relating to "Exemptions." The revision adds an exemption for pollution control projects from the requirement to obtain a construction permit, under GA EPD's minor new source permitting regulations. This rule applies to minor sources only, and limits any emissions increases from the pollution control project to below the major source threshold for all pollutants. A project subject to major new source review permitting does not qualify for this exemption. EPA is approving the revised permit exemption, as emissions may not exceed the limits set for major sources, and is consistent with Section 110 of the CAA. This revision became State effective on July 13, 2006.

2. 391–3–1–.03(11) "Permit by Rule"

a. 391–3–1–.03(11)(b)3(i) "Permit by Rule Standards"

Georgia is revising subparagraph (b)3(i) to clarify the language for the specific equipment covered by the permit-by-rule for on-site power generation. Specifically, the language "fuel-burning equipment" is being replaced by "internal combustion engines," to best describe the equipment. This rule revision is being approved to more clearly define the equipment named in this subparagraph, and is consistent with Section 110 of the CAA. The rule became State effective on July 20, 2005.

b. 391–3–1–.03(11)(b)5(i) "Permit by Rule Standards"

Georgia is amending subparagraph (b)5(i) to clarify the specific equipment covered by permit-by-rule for hot mix asphalt plants. Specifically, the language "with external combustion fuel-burning equipment rated as less than or equal to 100 million BtU per hour" is replaced by "hot mix asphalt facilities," to best describe the facilities. This rule revision is being approved to more clearly define the equipment named in this subparagraph, and is consistent with Section 110 of the CAA. The revision became State effective on July 20, 2005.

Rule 391–3–1–.05 "Regulatory Exceptions"

Georgia is repealing Rule 391–3–1–.05 "Regulatory Exceptions" on the basis that it is unnecessary and non-mandatory. The basis of the rule was to allow the Director of GA EPD to grant exceptions to particular requirements of any rule or regulation. In order for a regulatory exception to be granted, it must first be submitted to EPA, and approved as a SIP revision. Therefore, this rule is repealed in its entirety. The repeal of this revision is being approved, as any regulatory exception must first be submitted to EPA for approval, pursuant to Section 110 of the CAA. This revision became State effective on July 13, 2006.

III. Final Action

EPA is taking direct final action to approve the aforementioned revisions, specifically, Air Quality Rules Chapter 391–3–1, into the Georgia SIP. The revision was submitted by GA EPD on September 26, 2006, with a clarifying revision submitted on November 6, 2006. These revisions meet CAA requirements and are consistent with EPA policy and regulations.

EPA is publishing this rule without prior proposal because the Agency views these as noncontroversial submittals and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revisions should adverse comments be filed. This rule will be effective April 12, 2010 without further notice unless the Agency receives adverse comments by March 11, 2010.

If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on April 12, 2010 and no further action will be taken on the proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- 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 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to 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.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 208 Date Filed: 06/06/2011

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 action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 12, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. 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, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 11, 2009.

Beverly H. Banister,

Acting Regional Administrator, Region 4.

■ 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. 7401 *et seq.*

Subpart L—Georgia

■ 2. Section § 52.570(c) is amended by
■ a. Revising the entries for "391–3–1–.01, and "391–3–1–.02(2)(d)," "391–3–1–.02(2)(tt)," "391–3–1–.02(2)(yy)," "391–3–1–.02(2)(rrr)," "391–3–1–.02(4)," "391–3–1–.02(5)," and "391–3–1–.03;"
■ b. Removing the entry for "391–3–1–.05," to read as follows:

§ 52.570 Identification of plan.

* * * * *

(c) * * *

EPA Approved Georgia Regulations

State citation	Title/subject	State effective date	EPA approval date	Explanation
391–3–1–.01	Definitions	7/13/06	2/9/09 [Insert citation of publication]	
*	*	*	*	*
391–3–1–.02(2)(d)	Fuel-burning Equipment	7/20/05	2/9/09 [Insert citation of publication]	
*	*	*	*	*
391–3–1–.02(2)(tt)	VOC Emissions from Major Sources	1/9/05	2/9/09 [Insert citation of publication]	
*	*	*	*	*
391–3–1–.02(2)(yy)	Emissions of Nitrogen Oxides from Major Sources.	1/9/05	2/9/09 [Insert citation of publication]	
*	*	*	*	*
391–3–1–.02(2)(rrr)	NO_x Emissions from Small Fuel-Burning Equipment.	3/27/06	2/9/09 [Insert citation of publication]	
*	*	*	*	*
391–3–1–.02(4)	Ambient Air Standards	1/9/05	2/9/09 [Insert citation of publication]	
391–3–1–.02(5)	Open Burning	7/13/06	2/9/09 [Insert citation of publication]	
*	*	*	*	*
391–3–1–.03	Permits	7/13/06	2/9/09 [Insert citation of publication]	
*	*	*	*	*
391–3–1–.05	Repealed	7/13/06	2/9/09 [Insert citation of publication]	
*	*	*	*	*

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 209 Date Filed: 06/06/2011

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[FR Doc. 2010–2706 Filed 2–8–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0601; FRL–8812–3]

Inert Ingredients; Extension of Effective Date of Revocation of Certain Tolerance Exemptions with Insufficient Data for Reassessment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: This document moves the effective date of the revocation of six inert ingredient tolerance exemptions as set forth in the **Federal Register** on October 9, 2009 (74 FR 52148).

DATES: In the final rule published August 9, 2006 (71 FR 45415), and delayed on August 4, 2008 (73 FR 45312), August 7, 2009 (74 FR 39543), and October 9, 2009 (74 FR 52148):

1. The effective date is delayed from February 9, 2010, to May 9, 2010, for the following amendments to §180.910: 2.m., n., and cc.

2. The effective date is delayed from February 9, 2010, to May 9, 2010, for the following amendments to §180.930: 4.t., u., and v.

Objections and requests for hearings must be received on or before April 12, 2010, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0601. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Kerry Leifer, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8811; e-mail address: *leifer.kerry@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing electronically available documents at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR cite at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0601 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before April 12, 2010.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2009–0601, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Background and Statutory Findings

A. Background

In a final rule published in the **Federal Register** on August 9, 2006 (71 FR 45415)(FRL–8084–1), EPA revoked inert ingredient tolerance exemptions because insufficient data were available to the Agency to make the safety determination required by Federal Food, Drug, and Cosmetic Act (FFDCA) section 408(c)(2). In reassessing the safety of the tolerance exemptions, EPA considered the validity, completeness, and reliability of the data that are available to the Agency [FFDCA section 408 (b)(2)(D)] and the available information concerning the special susceptibility of infants and children (including developmental effects from *in utero* exposure) [FFDCA section 408(b)(2)(C)]. EPA concluded it has insufficient data to make the safety finding of FFDCA section 408(c)(2) and revoked the inert ingredient tolerance

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 210 Date Filed: 06/06/2011

US EPA ARCHIVE DOCUMENT

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

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

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

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

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

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

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

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

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

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

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

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

SUPPLEMENTARY INFORMATION:

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

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

Table of Contents

I. What action is EPA taking?
II. What is the background?
III. Did we receive public comments on the proposed rulemaking?
IV. What are the grounds for these actions?
A. The Submitted Minor NSR Definition of BACT SIP Revision
1. What is the background for the submitted definition of BACT under 30 TAC 116.10(3) as proposed under Docket No. EPA–R06–OAR–2005–TX–0025?
2. What is EPA's response to comments on the submitted minor NSR definition of BACT SIP revision?
3. What are the grounds for disapproval of the submitted minor NSR definition of BACT SIP revision?
B. The Submitted Anti-Backsliding Major NSR SIP Requirements for the 1-hour Ozone NAAQS
1. What is the background for the submitted anti-backsliding major NSR SIP requirements for the 1-hour ozone NAAQS?
2. What is EPA's response to comments on the submitted anti-backsliding major NSR SIP requirements for the 1-hour ozone NAAQS?

Case: 10-60891 Document: 00511500103 Page: 211 Date Filed: 06/06/2011

3. What are the grounds for disapproval of the submitted anti-backsliding major NSR SIP requirements for the 1-hour ozone NAAQS?
C. The Submitted Major Nonattainment NSR SIP Requirements for the 1997 8-hour Ozone NAAQS
1. What is the background for the submitted major nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS?
2. What is EPA's response to comments on the submitted major nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS?
3. What are the grounds for disapproval of the submitted major nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS?
D. The Submitted Major NSR Reform SIP revision for Major NSR with PAL Provisions
1. What is the background for the submitted major NSR reform SIP revision for major NSR with PAL provisions?
2. What is EPA's response to comments on the submitted major NSR reform SIP revision for major NSR with PAL provisions?
3. What are the grounds for disapproval of the submitted major NSR reform SIP revision for major NSR with PAL provisions?
E. The Submitted Non PAL Aspects of the Major NSR SIP Requirements
1. What is the background for the submitted non PAL aspects of the major NSR SIP requirements?
2. What is EPA's response to comments on the submitted non PAL aspects of the major NSR SIP requirements?
3. What are the grounds for disapproval of the submitted non-PAL aspects of the major NSR SIP requirements?
F. The Submitted Minor NSR Standard Permit for Pollution Control Project SIP Revision
1. What is the background for the submitted minor NSR standard permit for pollution control project SIP revision?
2. What is EPA's response to comments on the submitted minor NSR standard permit for pollution control project SIP revision?
3. What are the grounds for disapproval of the submitted minor NSR standard permit for pollution control project SIP revision?
G. No Action on the Revisions to the Definitions under 30 TAC 101.1
H. No Action on Provisions that Implement Section 112(g) of the Act and for Restoring an Explanation that a Portion of 30 TAC 116.115 is not in the SIP Because it Implements Section 112(g) of the Act.
I. No Action on Provision Relating to Emergency and Temporary Orders.
J. Responses to General Comments on the Proposal
V. Final Action
VI. Statutory and Executive Order Reviews

I. What action is EPA taking?

A. What regulations is EPA disapproving?

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

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

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

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

B. What other actions is EPA taking?

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 212 Date Filed: 06/06/2011

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

II. What is the background?

A. Summary of Our Proposed Action

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

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

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

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

B. Summary of the Submittals Addressed in This Final Action

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 213 Date Filed: 06/06/2011

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 214 Date Filed: 06/06/2011

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

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

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

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

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

IV. What are the grounds for these actions?

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

A. The Submitted Minor NSR State BACT Definition SIP Revision

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 215 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 216 Date Filed: 06/06/2011

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

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

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

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

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

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

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

Response: See response to Comment 1.

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

HeinOnline -- 75 Fed. Reg. 56430 2010

Case: 10-60891 Document: 00511500103 Page: 217 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 218 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Response: EPA agrees with this comment.

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 219 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 220 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 221 Date Filed: 06/06/2011

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

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

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

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

TCEQ will address these items in a future rulemaking.

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

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

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

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

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

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

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

[10] *See* 31 Tex. Reg. 516, 527 & 528 (Jan. 27, 2006).
[11] 67 FR 80,186, at 80,208 (Dec. 31, 2002).
[12] *Id.*

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 222 Date Filed: 06/06/2011

stringent as the Federal PAL SIP Program requirements.

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 223 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 224 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

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

Under the Major NSR SIP requirements, for any physical or

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 225 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 226 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 227 Date Filed: 06/06/2011

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 228 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 229 Date Filed: 06/06/2011

startup, and shutdown emissions in its projected actual emissions.

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 230 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 231 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 232 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 233 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 234 Date Filed: 06/06/2011

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

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

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

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

J. Responses to General Comments on the Proposal

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 235 Date Filed: 06/06/2011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 236 Date Filed: 06/06/2011

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

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

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

V. Final Action

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

Specifically, we are disapproving the following regulations:

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

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

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

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

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

VI. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

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

B. Paperwork Reduction Act

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

C. Regulatory Flexibility Act

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

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

D. Unfunded Mandates Reform Act

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 237 Date Filed: 06/06/2011

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

E. Executive Order 13132, Federalism

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

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

F. Executive Order 13175, Coordination With Indian Tribal Governments

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

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

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

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

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

I. National Technology Transfer and Advancement Act

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

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

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

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

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

K. Congressional Review Act

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

L. Petitions for Judicial Review

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

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 238 Date Filed: 06/06/2011

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

List of Subjects in 40 CFR Part 52

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

Dated: August 31, 2010.

Al Armendariz,

Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart SS—Texas

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

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA—APPROVED REGULATIONS IN THE TEXAS SIP

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

* * * * *

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

§ 52.2273 Approval status.

* * * * *

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

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

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

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

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

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

(3) The following sections in 30 TAC Chapter 116, Subchapter B—New Source Review Permits, Division 5—Nonattainment Review:

(i) Revisions to 30 TAC 116.150—New Major Source or Modification in Ozone Nonattainment Area—revisions adopted May 25, 2005, and submitted June 10, 2005; and revisions adopted January 11, 2006, and submitted February 1, 2006;

(ii) Revisions to 30 TAC 116.151—New Major Source or Modification in Nonattainment Areas Other Than Ozone—revisions adopted January 11, 2006, and submitted February 1, 2006;

(4) The following sections in 30 TAC Chapter 116, Subchapter C—Plant-Wide Applicability Limits, Division 1—Plant-Wide Applicability Limits:

(i) 30 TAC 116.180—Applicability—adopted January 11, 2006, and submitted February 1, 2006;

(ii) 30 TAC 116.182—Plant-Wide Applicability Limit Permit Application—adopted January 11, 2006, and submitted February 1, 2006;

(iii) 30 TAC 116.184—Application Review Schedule—adopted January 11, 2006, and submitted February 1, 2006;

(iv) 30 TAC 116.186—General and Special Conditions—adopted January 11, 2006, and submitted February 1, 2006;

(v) 30 TAC 116.188—Plant-Wide Applicability Limit—adopted January 11, 2006, and submitted February 1, 2006;

(vi) 30 TAC 116.190—Federal Nonattainment and Prevention of Significant Deterioration Review—adopted January 11, 2006, and submitted February 1, 2006;

(vii) 30 TAC 116.192—Amendments and Alterations—adopted January 11, 2006, and submitted February 1, 2006;

(viii) 30 TAC 116.194—Public Notice and Comment—adopted January 11, 2006, and submitted February 1, 2006;

(ix) 30 TAC 116.196—Renewal of a Plant-Wide Applicability Limit Permit—adopted January 11, 2006, and submitted February 1, 2006;

(x) 30 TAC 116.198—Expiration and Voidance—adopted January 11, 2006, and submitted February 1, 2006;

US EPA ARCHIVE DOCUMENT

Case: 10-60891 Document: 00511500103 Page: 239 Date Filed: 06/06/2011

(5) The following sections in 30 TAC Chapter 116, Subchapter F—Standard Permits:

(i) Revisions to 30 TAC 116.610—Applicability—paragraphs (a)(1) through (a)(5) and (b)—revisions adopted January 11, 2006, and submitted February 1, 2006;

(ii) 30 TAC 116.617—State Pollution Control Project Standard Permit—adopted January 11, 2006, and submitted February 1, 2006;

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