accommodation. Experience under a similar provision of the regulations implementing section 504 of the Rehabilitation Act indicates that challenges to selection criteria are, in fact, most often resolved by reasonable accommodation. It is therefore anticipated that challenges to selection criteria brought under this part will generally be resolved in a like manner.

This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests. See Senate Report at 37–39; House Labor Report at 70–72; House Judiciary Report at 42. As previously noted, however, it is not the intent of this part to second guess an employer's business judgment with regard to production standards. (See section 1630.2(n) Essential Functions). Consequently, production standards will generally not be subject to a challenge under this provision.

The Uniform Guidelines on Employee Selection Procedures (UGESP) 29 CFR part 1607 do not apply to the Rehabilitation Act and are similarly inapplicable to this part.

Section 1630.10(b)—Qualification Standards and Tests Related to Uncorrected Vision

This provision allows challenges to qualification standards based on uncorrected vision, even where the person excluded by a standard has fully corrected vision with ordinary eyeglasses or contact lenses. Because the statute does not limit the provision on uncorrected vision standards to individuals with disabilities, a person does not need to be an individual with a disability in order to challenge such qualification standards. Nevertheless, the Commission believes that such individuals will usually be covered under the ''regarded as'' prong of the definition of disability. Someone who wears eyeglasses or contact lenses to correct vision will still have an impairment, and a qualification standard that screens them out on the basis of the impairment by requiring a certain level of uncorrected vision to perform a job will amount to an action prohibited by the ADA based on an impairment. (See § 1630.2(*l*); Appendix to § 1630.2(*l*)).

A covered entity may still defend a qualification standard requiring a certain level of uncorrected vision by showing that it is job-related and consistent with business necessity. For example, an applicant or employee with uncorrected vision of 20/100 who wears glasses that fully correct his vision may challenge a police department's qualification standard that requires all officers to have uncorrected vision of no less than 20/40 in one eye and 20/100 in the other, and visual acuity of 20/20 in both eyes with correction. The department would then have to establish that the standard is job-related and consistent with business necessity.

* * * * *

[FR Doc. E9–22840 Filed 9–22–09; 8:45 am]

BILLING CODE 6570–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2005–TX–0025; FRL–8958–8]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

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

EPA also proposes to take action on revisions to the SIP submitted by Texas for definitions severable from the definitions in the Qualified Facilities submittals. EPA proposes to take action on some of the submitted severable definitions (General Definitions). We propose to approve three definitions, grandfathered facility, maximum allowable emission rate table (MAERT), and new facility. We propose to disapprove the definition for best available control technology (BACT) and two subparagraphs, A and B, and paragraph G under the definition for modification of existing facility. We propose to make an administrative correction to the SIP-approved definition of facility, and take no action on the addition to the SIP-approved definition of federally enforceable because it relates to a Federal program that is implemented separately from the SIP. Third, EPA is proposing to take no action on a provision not in the Texas SIP that includes, among other things, a trading provision containing a cross-reference that no longer is in Texas' rules; EPA will act upon all of it in a separate notice.

We are proposing action under section 110, part C, and part D of the Federal Clean Air Act (the Act or CAA). EPA is taking comments on this proposal and intends to take a final action.

DATES: Comments must be received on or before November 23, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R06–OAR–2005–TX–0025, 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:* Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Mr. 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 8:00 a.m. and 4:00 p.m. 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–2005–TX–0025. 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. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the 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 Air Permits Section (6PD–R), Air Branch, Multimedia Planning and Permitting Division, 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 submittals, which are part of the EPA docket, 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" or "CAA" means Federal Clean Air Act.
- "40 CFR" means Title 40 of the Code of Federal Regulations—Protection of Environment.
- "SIP" means State Implementation Plan as established under section 110 of the Act.
- "NSR" means new source review, a phrase intended to encompass the statutory and regulatory programs that regulate the construction and modification of stationary sources as provided under CAA section 110(a)(2)(C), CAA Title I, parts C and D, and 40 CFR 51.160 through 51.166.
- "Minor NSR" means NSR established under section 110 of the Act and 40 CFR 51.160.
- "Major NSR" means any new or modified source that is subject to NNSR and/or PSD.
- "NNSR" means nonattainment NSR established under Title I, section 110 and part D of the Act and 40 CFR 51.165.
- "PSD" means prevention of significant deterioration of air quality established under Title I, section 110 and part C of the Act and 40 CFR 51.166.
- "Program" means the SIP revision submittals from the TCEQ concerning the Texas Qualified Facilities State Program.
- "NAAQS" means any national ambient air quality standard established under 40 CFR part 50.
- "TSD" means the Technical Support Document for this action.

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I. What Action is EPA Proposing?

We are proposing to disapprove the Texas Qualified Facilities State Program, as submitted by Texas in Title 30 of the Texas Administrative Code (30 TAC) at 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction or Modification. This includes the following regulations under Chapter 116: 30 TAC 116.116 (e), 30 TAC 116.117, 30 TAC 116.118, and the definitions in 30 TAC 116.10 for qualified facility, actual emissions, allowable emissions, and modification of existing facility at (E) for qualified facilities, as not meeting the Act and EPA's NSR regulations. It is EPA's position that none of these identified elements for the submitted Qualified Facilities State Program is severable from each other.

First, we are proposing to disapprove the submitted Texas Qualified Facilities State Program as not meeting the requirements for a substitute Major NSR SIP revision. Our grounds for proposing disapproval as a substitute Major NSR SIP revision include the following:

- It is not clearly limited to Minor NSR thereby allowing major modifications to occur without a Major NSR permit;
- It has no regulatory provisions clearly prohibiting the use of this Program from circumventing the Major NSR SIP requirements thereby allowing changes at existing facilities to avoid the requirement to obtain preconstruction permit authorizations for projects that would otherwise require a Major NSR preconstruction permit;
- It does not require that first an applicability determination be made whether the modification is subject to Major NSR thereby exempting new major stationary sources and major

modifications from the EPA Major NSR SIP requirements;

• It does not include a demonstration from the TCEQ showing how the use of ''modification'' is at least as stringent as the definition of ''modification'' in the EPA Major NSR SIP program;

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

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

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

• It fails to ensure protection of the national ambient air quality standards (NAAQS), and noninterference with the Texas SIP control strategies and reasonable further progress (RFP).

We are proposing to disapprove the submitted Program as not meeting the Minor NSR SIP requirements. It is not clearly limited to Minor NSR. It has no regulatory provisions clearly prohibiting the use of this Program from circumventing the Major NSR SIP requirements. This Program does not require that first an applicability determination be made whether the modification is subject to Major NSR.

In addition to the failures to protect Major NSR SIP requirements, EPA cannot find that the submitted Program, as a Minor NSR SIP program, will ensure protection of the NAAQS, and noninterference with the Texas SIP control strategies and RFP. We are proposing to disapprove this Program as a Minor NSR SIP revision because it does not meet certain provisions of the Act and EPA's Minor NSR SIP requirements. Our grounds for proposing disapproval as a Minor NSR SIP revision include the following:

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

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

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

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

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

• It is not an enforceable Minor NSR permitting program;

• It lacks safeguards to ensure that the changes will not violate a Texas control strategy and would not interfere with attainment and maintenance of a NAAQS;

• It fails to demonstrate that the requested relaxation to the Texas Minor NSR SIP will not interfere with any applicable requirement concerning attainment and RFP, or any other applicable requirement of the Act.

Secondly, in a proposed action separate from the above action on the submitted Texas Qualified Facilities State Program, we are proposing to disapprove severable definitions as submitted by Texas for ''best available control technology (BACT)'' and subparagraphs (A) and (B) addressing insignificant increases and subparagraph (G) of ''modification of existing facility,'' as not meeting the Act and EPA's NSR regulations. We are proposing to approve the severable definitions as submitted for ''grandfathered facility,'' ''new facility'' and ''maximum allowable emission rate table (MAERT).'' We are proposing to take no action on the submitted severable new subparagraph relating to the SIP definition of ''federally enforceable'' because it is outside the scope of the SIP and the submitted severable provision in 30 TAC 116.116(f) concerning trading for which we will take action later in a separate notice. It is EPA's position that these definitions are separate from those in the submitted Texas Qualified Facilities State Program; moreover, each is severable from each other but for subparagraphs (A) and (B) in the definition for ''modification of existing facility.'' Subparagraphs (A) and (B) in ''modification of existing facility'' are not severable from each other. The submitted definition for ''best available control technology'' is not severable, however, from another action appearing in today's **Federal Register**. *See* sections IV through VIII for further information.

We have evaluated the submitted Texas Qualified Facilities State Program. Based upon our evaluation, we have concluded that the portions of the submitted SIP revisions specifically applicable to the Program do not meet the requirements of the Act and 40 CFR part 51. All these portions of the submittals for the Program are not severable and therefore are not approvable.

We have evaluated other (but not all) additional definitions in the submitted General Definitions that are not part of the submitted Texas Qualified Facilities State Program. Based upon our evaluation, we have concluded that some of the evaluated definitions do not meet the Federal requirements and therefore, are not approvable whereas other evaluated definitions meet the Federal requirements and are approvable. Each definition that we evaluated in the submitted General Definitions (that is not identified above as part of the Program) is severable from each other but for the subparagraphs (A) and (B) identified above.

As authorized in sections 110(k)(3) and 301(a) of the Act, where portions of the State submittals are severable, EPA may approve the portions of the submittals that meet the requirements of the Act, take no action on certain portions of the submittals,[1] and disapprove the portions of the submittals that do not meet the requirements of the Act. When the deficient provisions are not severable from all of the submitted provisions, EPA must propose disapproval of the submittals, consistent with sections 301(a) and 110(k)(3) of the Act. The submitted provisions work together to form the Texas Qualified Facilities State Program and are not severable from each other. Therefore, EPA is proposing disapproval of the submitted Program. The submitted provisions for the General Definitions that EPA evaluated do not work together and are severable from each other. Therefore, EPA is proposing to disapprove the submitted definition for BACT and subparagraphs (A) and (B) (that are not severable from each other), and subparagraph (G) in the definition for modification of existing facility. The submitted definition for BACT is not severable from another action proposed in today's **Federal Register.** *See* section II and footnote 2 for additional information.

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 relating to the Texas Qualified Facilities State Program and the General Definitions were not

[1] In this action, we are taking no action on a submitted revision to a definition that is outside the scope of the SIP and a submitted revision to a regulatory provision that is currently undergoing review for appropriate action.

submitted to meet a mandatory requirement of the Act. Therefore, if EPA takes final action to disapprove the submitted Texas Qualified Facilities State Program or to disapprove either the submitted definition for BACT or subparagraphs (A) and (B) or subparagraph (G) in the submitted definition of modification of existing facility in the General Definitions, 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, including PSD, NNSR for the 1997 8–Hour Ozone Standard, NSR Reform, and a Minor NSR Standard Permit (NSR SIP); [2] and (2) proposed action on the Texas NSR SIP, Flexible Permits. 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 to protect the health of the communities where these sources are located. Our proposal is based upon our interpretation of the Texas preconstruction permitting program, which 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).

After review of public comment, we may take action to finalize the approvable portions of the submittals and the disapprovable portions of the submittals in separate actions; wherever severable, we may take final action on some portions in a separate action.

III. What Has the State Submitted?

This notice provides a summary of our evaluation of Texas' March 13, 1996, SIP revision submittal, as replaced by severable portions in the July 22, 1998 SIP revision submittal; and as revised by severable portions in the September 11, 2000; July 31, 2002, and September 4, 2002, 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 this submitted Program based on the inconsistencies and deficiencies discussed herein, we have not attempted to review and discuss all of the issues that would need to be addressed for approval of this submitted Program as a Major NSR SIP revision.

A. Qualified Facilities State Program Submittals

On March 13, 1996, Texas submitted revisions affecting 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction or Modification. These revisions include adding a new (e) to 30 TAC 116.116—Changes to Facilities, concerning Qualified Facilities, a new 30 TAC 116.117—Documentation and Notification of Changes at Qualified Facilities, a new 116.118—Pre-Change Qualification, a new definition relating to modifications of existing Qualified Facilities in 30 TAC 116.10, and new definitions in 30 TAC 116.10 for ''qualified facility,'' ''actual emissions,'' and ''allowable emissions.'' On July 22, 1998, Texas submitted severable revisions that included the repeal of the contents of the 1996 submittal. Among other things, the 1998 submittal included a new 30 TAC 116.10, General Definitions, ''actual emissions'' at (1), ''allowable emissions'' at (2), ''modification of existing facility'' at (9)(F), and ''qualified facility'' at (16), a new 30 TAC 116.116(e), a new 30 TAC 116.117, and a new 30 TAC 116.118. On September 11, 2000, Texas submitted a revision in 30 TAC 116.10 to the definition of ''allowable emissions'' and a revision to subparagraph (e)(5)(B) of 30 TAC 116.116. On September 4, 2002, TCEQ submitted a revision to 30 TAC 116.10 that included the renumbering of the definitions.

General Definitions Submittals

On March 13, 1996, Texas submitted revisions to 30 TAC 116.10—General Definitions. This submittal included, among other definitions, new state regulatory definitions for ''BACT,'' ''facility,'' ''grandfathered facility,'' ''maximum allowable emission rate table (MAERT),'' ''modification of existing facility'' at subparagraphs (A), (B), and (G), and ''new facility.'' On July 22, 1998, Texas submitted severable revisions that included, among other things, repeal of the 1996 submitted definitions. Texas adopted a new 30 TAC 116.10—General Definitions, that included among other definitions, new definitions for ''BACT,'' ''facility,'' ''grandfathered facility,'' ''maximum allowable emission rate table (MAERT),'' ''modification of existing facility,'' and ''new facility.'' On September 11, 2000, Texas submitted a new definition for ''federally enforceable.'' On July 31, 2002, Texas submitted a revision to the definition of ''facility.'' On September 4, 2002, Texas submitted a revision to add two new definitions in 30 TAC 116.10 and renumber the other definitions to accommodate the new definitions.

On September 18, 2002 (67 FR 58697), EPA approved the definition of ''federally enforceable,'' introductory paragraph and (A) through (E), as submitted July 22, 1998. On September 6, 2006 (71 FR 52698), EPA approved the definition ''facility'' as submitted July 22 1998. On August 28, 2007 (72 FR 49198), EPA approved the two new definitions submitted on September 4, 2002, and the renumbering of existing SIP approved definitions. EPA's August 28, 2007, action also included a typographical error that inadvertently removed the definition of ''facility'' that was previously approved September 6, 2006, as part of the Texas SIP.

Summary of the Submittals Addressed in This Proposed Action

The table below summarizes the changes that are in the SIP revision submittals. A summary of EPA's evaluation of each section and the basis for this proposal is discussed in sections IV through VIII of this preamble. The

[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 final action on the NSR SIP rather than on the Qualified Facilities or the General Definitions final action. 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 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.

TSD includes a detailed evaluation of the submittals.

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

Section	Title	Submittal dates	Description of change	Proposed action
30 TAC 116.10 General Definitions				
30 TAC 116.10(1)	Definition of "actual emissions"	03/13/1996	Added new definition	Disapproval.
		07/22/1998	Repealed and a new definition submitted as paragraph (1).	
30 TAC 116.10(2)	Definition of "allowable emissions".	03/13/1996	Added new definition	Disapproval.
		07/22/1998	Repealed and a new definition submitted as paragraph (2).	
		09/11/2000	Revised paragraphs (2)(A) through (D).	
30 TAC 116.10(3)	Definition of "BACT"	03/13/1996	Added new definition	Disapproval.
		07/22/1998	Repealed and a new definition submitted as paragraph (3).	
30 TAC 116.10(6)	Definition of "facility"	03/13/1996	Added new definition	Administrative correction to clarify the definition of "facility" is in the SIP.
		07/22/1998	Repealed and a new definition submitted as paragraph (4).	
			Approved 09/06/06 (71 FR 52698).	
		09/04/2002	Redesignated to paragraph (6).	
			Inadvertently identified as non-SIP provision in 08/28/07 SIP revision.	
30 TAC 116.10(7)	Definition of "Federally enforceable".	09/11/00	New subparagraph (5)(F)	No action.
		09/04/02	Subparagraph (5)(F) redesignated to subparagraph (7)(F).	
			Implements section 112(g) of Act.	
30 TAC 116.10(8)	Definition of "grandfathered facility".	03/13/1996	Added new definition	Approval.
		07/22/1998	Repealed and a new definition submitted as paragraph (6).	
		07/31/2002	Revised definition.	
		09/04/2002	Redesignated to paragraph (8).	
30 TAC 116.10(10)	Definition of "maximum allowable emission rate table".	03/13/1996	Added new definition	Approval,
		07/22/1998	Repealed and a new definition submitted as paragraph (8).	
		09/04/2002	Redesignated to paragraph (10).	
30 TAC 116.10(11)	Definition of "modification of existing facility".	03/13/1996	Added new definition	Disapproval of (A), (B), (E), and (G).
		07/22/1998	Repealed and a new definition submitted as paragraph (9).	
		09/11/2000	Revised paragraph (9).	
		09/04/2002	Redesignated to paragraph (11).	
30 TAC 116.10(12)	Definition of "new facility"	03/13/1996	Added new definition	Approval.
		07/22/1998	Repealed and a new definition submitted as paragraph (10).	
		09/04/2002	Redesignated to paragraph (12).	
30 TAC 116.10(16)	Definition of "qualified facility"	03/13/1996	Added new definition	Disapproval.
		07/22/1998	Repealed and a new definition submitted as paragraph (14).	
		09/04/2002	Redesignated to paragraph (16).	
30 TAC 116.116	Changes to Facilities	03/13/1996	Added subsection (e)	Disapproval.
		07/22/1998	Repealed and a new 116.116 (e) submitted.	Disapproval.
30 TAC 116.117	Documentation and Notification of Changes to Qualified Facilities.	03/13/1996	Added new section	Disapproval.
		07/22/1998	Repealed and a new 116.117 resubmitted.	
30 TAC 116.118	Pre-Change Qualification	03/13/1996	Added new section	Disapproval.
		07/22/1998	Repealed and a new 116.118 submitted.	

IV. Is the Texas Qualified Facilities State Program Submittal for a Major or Minor NSR SIP Revision?

A. Description of the Submitted Program

This part of today's action describes the Qualified Facilities State Program submitted by Texas to EPA for approval into the State's SIP. The submitted Program adds an exemption under State law allowing a change to an existing facility that is ''qualified,'' to net out of the NSR SIP permitting requirements.

First, EPA wishes to acknowledge that its interpretation of the Texas law and the Texas NSR SIP inclines it to the legal position that the State uses a ''dual definition'' for the term ''facility.'' 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). EPA encourages comment on whether its understanding of Texas law is correct for the definition of ''facility.'' If a commenter does not believe this legal position is correct, we encourage the commenter to submit any applicable case law, Texas legislative history, etc., that can further our legal understanding of the State's meaning of the term ''facility.'' The State legal meaning of the term ''facility'' is critical to EPA's understanding of the Texas permitting program, both minor and major. We also are requesting comment on the meaning of ''a TCEQ air quality account number.'' This too is critical to our legal positions discussed today in this notice.

The SIP revision submittals establish the criteria by which a physical change in, or change in the method of operation of, an existing minor or major Qualified Facility is not a modification and does not trigger the permitting requirements for a case-by-case NSR SIP permit, amendment, or alteration, or coverage under a minor NSR SIP permit by rule or standard permit. They also include the criteria for becoming a Qualified Facility, the permitting process required for a Qualified Facility, and the methods for determining the net effect of emission increases and decreases, compound interchanges,[3] and intraplant trading of emissions (*i.e.,* relying upon emission reductions from other existing Qualified Facilities in the applicability netting analysis).

Under the submittals, a facility[4] is designated as a Qualified Facility if either of the following criteria is met:

(1) The existing facility was issued a case-by-case Major or Minor NSR SIP permit or permit amendment, or was covered under a Minor NSR SIP permit by rule, within 10 years before the change occurs. *See* submittals at 30 TAC 116.10(11)(E)(i).

(2) The existing facility was issued a case-by case Major or Minor NSR permit or permit amendment, or was covered under a Minor NSR SIP permit by rule, for the voluntarily installed additional air pollution control methods (see submittals at 30 TAC 116.116(e)(6)), within 10 years before the change occurs (*see* submittals at 30 TAC 116.10(1)). We request comment on whether our interpretation of the regulatory language is correct that a permit is required for a facility to be a Qualified Facility. This interpretation is critical to our position on whether all Qualified Facilities have undergone an ambient air quality analysis, as required before issuance of any Minor or Major NSR SIP permit in Texas.

Under the second criterion, the additional air pollution controls methods must be at least as effective as the Minor NSR BACT[5] that would have been required in a case-by-case Minor NSR SIP permit or permit amendment at the time the additional control methods were applied. An emissions limitation is established based upon the application of Minor NSR SIP BACT, which is reflected as an allowable emission rate in a permit. *See* the submittals at 30 TAC 116.116(e)(6)(A) and (B) and page 148 of the 1996 SIP revision submittal. The permit under the second criterion must have been issued within 10 years before the change occurs. *See* the submittals at 30 TAC 116.10(1) and (11)(E). The Texas legislature envisioned this second criterion as a ''carrot'' to encourage grandfathered facilities[6] to apply for a permit to become qualified and thereby be able to participate in the netting. See *e.g.,* submittals at 30 TAC 116.10(2)(C). At the time of the State's adoption of this submitted Program, the State did not have the statutory authority to impose controls on or require permits for grandfathered facilities.

The submitted Program applies only to Qualified Facilities with the same TCEQ air quality account number.[7] *See* submittals at 30 TAC 116.116(e)(2). The first step in determining whether there is a modification subject to NSR review

[3] Section 382.003(2) of the TCAA defines ''air contaminant'' as ''particulate matter, radioactive matter, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural.'' SB 1126 did not revise this statutory term. TCEQ interpreted the legislative intent to allow individual compounds to be interchanged with other compounds in the same air contaminant category. Submitted 30 TAC 116.116(e)(3)(F) defines an ''air contaminant category'' as ''a group of related compounds, such as VOCs, particulate matter, nitrogen oxides, and sulfur compounds.'' An example is if the owner or operator wishes to make a change that will increase emissions of heptane, a VOC. The reductions relied upon in the applicability netting analysis will be acetone, another VOC. TCEQ has established an ''interchange'' methodology to ensure that compounds within the VOCs air contaminant category, as interchanged, will have an equivalent impact on the air quality.

[4] ''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. A mine, quarry, well test, or road is not a facility.'' In this action, we are also proposing an administrative correction to clarify that the definition of ''facility'' is in the SIP. See section VII.C.

[5] Texas adopted a revised NSR State rule on July 27, 1972, to add the requirement that a proposed new facility and proposed modification utilize at least best available control technology (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, presently codified in the Texas SIP at 30 TAC 116.111(a)(2)(C). 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.

[6] Grandfathered facilities are facilities that were once exempt from most State air permitting requirements because the facilities predated the 1971 Texas Clean Air Act that required preconstruction review and operating permits for construction of any new source and modification of any existing source that may emit air contaminants into the atmosphere of the State.

[7] ''Account'' for NSR purposes is defined in 30 TAC 101.1(1), second sentence, as ''any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of way, waterways, or similar divisions.'' This definition was approved as part of the Texas SIP (March 30, 2005 (70 FR 16129)).

is to evaluate the type of proposed change. The change cannot be an increase in emissions of any air contaminant not previously emitted. *See* submittals at 30 TAC 116.116(e)(1)(B). The change cannot be any physical change to the existing permitted Major or Minor Qualified Facility that creates a discrete or identifiable structure, device, item, equipment, or enclosure, which constitutes or contains a stationary source. *See* submittals at 30 TAC 116.116(e)(5)(A). If the change is not either of these types of change, next one evaluates whether the change's increased emissions will be above the most stringent of the Qualified Facility's permitted emissions rate or an applicable state or federal rule. There is no modification subject to NSR review if the change does not cause an increase in emissions above the Facility's most stringent applicable emissions rate (imposed by NSR SIP permit or applicable state or federal rule). *See* the submittals at 30 TAC 116.116(e)(3) and 30 TAC 116.116(e)(1)(A)–(B). In no way can a Qualified Facility's existing most stringent applicable emissions rate be lessened by using this submitted Program. *See* submittals at 30 TAC 116.116(e)(8).

If the change will cause an increase in emissions above the Qualified Facility's most stringent applicable emissions rate (imposed by NSR SIP permit or applicable state or federal rule), then the holder of the permit may perform an applicability netting analysis. The applicability netting analysis considers emissions increases from the change and reductions from the Qualified Facility making the change and reductions from any other existing permitted minor or major Qualified Facility at the same air quality account number. These reductions relied upon in the applicability netting analysis must be *surplus* to each Qualified Facility's most stringent applicable emissions rate (imposed by NSR SIP permit or applicable state or federal rule). *See* the submittals at 30 TAC 116.116(e)(2) -(3) and 30 TAC 116.10(2). *See* also Texas NSR SIP-codified rule at 30 TAC 116.115(b)(2)(I)(ii).

No emissions increases are considered from the other participating existing permitted minor or major permitted Qualified Facilities. If the sum of the increase in emissions from the projected change and an equivalent decrease in emissions from the Qualified Facility making the change is zero, *i.e.,* no net increases, the change is not a modification and is not subject to the NSR permitting requirements. *See* submittals at 30 TAC 116.116(e)(3). If the sum is above zero, then the holder of the permit that is making the change can use the netting process to offset the change by an equivalent decrease at other participating Qualified Facilities. Id. If the sum is zero, *i.e.,* no net increases, the change is not a modification and not subject to NSR permitting requirements. *Id.* If the sum is above zero, *i.e.,* net increases, the change is a modification subject to NSR permitting requirements. *See* submittals at 30 TAC 116.116(e)(1(A).

B. Is the Submitted Program Clearly a Minor NSR SIP Revision?

Our evaluation of Texas' submitted SIP revisions is guided by whether the submitted Qualified Facilities State Program applies to Major NSR or Minor NSR, or both. From our review of the record with the SIP revision submissions and other correspondence and TCEQ guidance, we believe that Texas intends its Qualified Facilities State Program to apply only to *minor* modifications at minor and major existing Qualified Facilities. *See e.g.,* 20 Tex. Reg. 8306 (October 10, 1995), 21 Tex. Reg. 1579 (1996), the 1996 SIP revision submittal particularly at pages 141, 142, 143, 148, 153, 154 of 215 pages, December 2000 Guidance for Air Quality, Qualified Changes under Senate Bill 1126, Air Permits Division, TCEQ (see particularly pages 3, 20), and TCAA Section 382.003(9), introductory paragraph and (A)–(G). As a matter of fact, EPA sent a comment letter to Texas during its public comment period and EPA said in its 1995 letter that Texas had adequately satisfied our concern that its Qualified Facilities State Program, as proposed, would not circumvent or supersede any Major NSR SIP requirements. Since we sent the 1995 letter, however, the State legislators have revised the Texas Clean Air Act (TCAA) significantly.

For the submitted Program, the TCAA definition for ''modification of existing facility'' at Section 382.003, Health and Safety Code, was revised by Senate Bill 1126 of the 1995 74th Texas Legislature. The statutory definition was revised to add, among other things, subsection at (E), a new category for when a physical change in, or change in the method of operation of, an existing major or minor NSR Qualified Facility is not a modification subject to the NSR SIP permitting requirements.[8] It provides that increases in emissions are not a modification if the increases occur at an existing permitted Qualified Facility and there are sufficient emission reductions from it and other participating existing permitted Qualified Facilities, to offset the increase.

The Legislature in 1995 also changed the factors for determining whether a modification occurs by adding a new subsection (b) to TCAA Section 382.0512. In all situations but for modifications of existing Qualified Facilities, in determining whether a proposed change at an existing facility is a modification, there can be no consideration of the effect on emissions of any pollution control method applied to the source and no consideration of any decreases in emissions from other sources, including the source proposing to make the change. *See* TCAA Section 382.0512 (a), introductory paragraph, and (1)–(2). The legislative intent was to allow under the Qualified Facilities State Program, consideration of any pollution control method applied to the Qualified Facility (see the submittals at 30 TAC 116.116(e) (2)) and any decreases in emissions from other Qualified Facilities in determining if an increase in emissions had occurred by a change made at a Qualified Facility, *i.e.,* a netting analysis now was allowed to net out of *minor* NSR permitting requirements. Additionally, grandfathered facilities could voluntarily install emission controls, obtain a permit reflecting the highest achievable actual emissions rate after the installation of the emission controls, and participate in this new Program. *See* SB 1126 Bill Analysis, April 10, 1995.

In 1999, the Texas legislature made extensive revisions to the TCAA. Relevant to today's proposed action is the legislature's adding an explicit statutory prohibition against the use of an Exemption or Permit by Rule or a Standard Permit for major modifications. *See* sections 382.05196 and .057. These 1999 legislative actions required a new legal review of the statutory definition for ''modification of existing facility'' to see if it was still limited to minor modifications. It is EPA's interpretation that the 1999 legislative changes made this statutory definition ambiguous.

The statutory definition on its face does not prohibit the use of the Program for a major modification as defined by the CAA and EPA's Major NSR SIP regulations. This Texas statutory definition has never been explicitly revised to prohibit major modifications. There are no prohibitions against using the submitted Program for major modifications, as there now are for the minor NSR SIP permits/exemptions by rule and standard permits. There are no

[8] At the time of this 1995 statutory revision to the definition of ''modification of existing facility,'' the consensus legal interpretation of this definition was that it applied only to minor modifications, not major modifications.

statutory provisions in the TCAA that clearly limit modifications under the submitted Program to minor modifications.

Similarly, the regulatory provisions submitted by Texas do not prohibit the use of the submitted Program for major modifications of existing minor and major stationary sources. The submitted rules do not limit the use of the Program to Minor NSR. The Program does not contain any emissions limitations, applicability statement, or regulatory provision restricting the modification to minor as do the Texas Minor NSR SIP rules for Permits by Rule in Chapter 106 and Standard Permits in Chapter 116, Subchapter F.[9] Moreover, unlike the Minor NSR SIP rules for Standard Permits in 30 TAC 116.610(b) and Permits by Rule in 30 TAC 106.4(a)(4), the submitted rules do not require that a major modification, as defined in the Major NSR SIP regulations, must meet the Major NSR permitting requirements.

Although there are recordkeeping requirements in the Program at new 30 TAC 116.117(a)(4) requiring owners and operators to maintain documentation containing sufficient information as may be necessary to demonstrate that the project will comply with the Federal CAA, Title I, parts C and D, these are the same general provisions as those in the Minor NSR SIP Permits by Rule, Minor NSR SIP Standard Permits, and the general provisions of the SIP at 30 TAC 116.111 (a) (2)(H) and (I) for Minor and Major NSR SIP permits. These recordkeeping requirements, although necessary for NSR SIP approvability, cannot substitute for a clear and enforceable provision that limits applicability in the submitted Program to Minor NSR and to minor modifications only.

If Texas truly intends for the submitted Qualified Facilities State Program to apply only to Minor NSR, at a minimum, Texas must amend its rules to include additional provisions that clearly limit this Program's applicability to Minor NSR as it did in the Texas Minor NSR SIP at 30 TAC Chapter 106 for Permits by Rule and 30 TAC Chapter 116 Subchapter F for Standard Permits.

The submittals contain no applicability statement or regulatory provision that limits applicability to minor modifications. Without a clear statement of the applicability of the Program, the Program as submitted is confusing to the public, regulated sources, government agencies, or a court, because it can be interpreted as an alternative to evaluating the new modification as a major modification under Major NSR requirements. The Program fails to limit clearly its use to only the Texas Minor NSR SIP requirements. Because of the overbroad nature of the regulatory language in the State's SIP revision submittal and the lack of any Texas statutory prohibitions, we propose to find that the State has failed to limit its submitted Program only to Minor NSR.

Consequently, we are compelled to evaluate this submitted Program as being a substitute for the Texas Major NSR SIP. Accordingly, as discussed below in Section V, we evaluated whether the submitted Program meets the requirements for a Major NSR SIP revision, the general requirements for regulating construction of any stationary sources contained in Section 110(a)(2)(C) of the CAA, and the applicable statutory and regulatory requirements for an approvable SIP revision. Below is a summary of our evaluation of the submitted Program as a Substitute Major NSR SIP revision submittal. Section VI contains a summary of our evaluation of the submitted Program as a Minor NSR SIP revision submittal.

V. What is EPA's Evaluation of the Submitted Texas Qualified Facilities State Program as a Substitute Major NSR SIP Revision?

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 requirements in section 110(l) where 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 EPA SIP policy and guidance. These can include, among other things, enforceability, compliance assurance, replicability of an element in the program, accountability, test methods, whether the submitted rules are vague. There are four fundamental principles for the relationship between the SIP and any implementing instruments, *e.g.,* Major NSR permits. These four principles as applied to the review of a Major or Minor NSR SIP revision include: (1) The baseline emissions from a permitted source be quantifiable; (2) the NSR program be enforceable by specifying clear, unambiguous, and measurable requirements, including a legal means for ensuring the sources are in compliance with the NSR program, and providing means to determine compliance; (3) the NSR program's measures be replicable by including sufficiently specific and objective provisions so that two independent entities applying the permit program's procedures would obtain the same result; and (4) the Major NSR permit program be accountable, including means to track emissions at sources resulting from the issuance of permits and permit amendments. See EPA's April 16, 1992, ''General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990'' (57 FR 13498) (''General Preamble''). In particular, there is a specific discussion illustrating the principles and elements of SIPs that apply to sources in implementing a SIP's control strategies

[9] The Texas SIP does not include the State Pollution Control Project Standard Permit. In a separate action in today's **Federal Register**, EPA is proposing action on this individual standard permit. Please see the proposal notice concerning the Texas NSR SIP submittals for PSD, NNSR for the 1997 8-hour ozone NAAQS, NSR Reform, and a Standard Permit. Those interested in this other action are encouraged to review and comment on it as well.

beginning on page 13567 of the General Preamble.

B. Does the Submitted Program Prohibit Circumvention of Major NSR?

There are no express regulatory provisions in the submitted Program similar to the Texas Minor NSR SIP provisions for Minor NSR Permits by Rule and Minor NSR Standard Permits that prohibit circumvention of the Major NSR requirements. See 30 TAC 106.4(b) and 30 TAC 116.610(c). Both the SIP-codified Chapter 106, Subchapter A for Permits by Rule and the SIP-codified Chapter 116, Subchapter F for Standard Permits, contain clear regulatory applicability requirements limiting their use to Minor NSR, clear regulatory requirements prohibiting their use for any project that constitutes a major modification subject to Major NSR, and clear regulatory provisions prohibiting the use of these Minor NSR permits from circumventing Major NSR. There are no similar regulatory applicability requirements, regulatory provisions prohibiting the use for Major NSR, and no regulatory provisions prohibiting circumvention of Major NSR, in the submitted Qualified Facilities State Program's rules and definitions.

There is no express provision clearly requiring that this submitted Program cannot be used to circumvent the requirements of Major NSR. We are proposing to find that the State failed to demonstrate that the submitted Program prevents the circumvention of Major NSR. Therefore, we are proposing to disapprove the Program as not meeting the Major NSR SIP requirements to prevent circumvention of Major NSR.

C. Does the Submitted Program Meet the Major NSR Applicability Determination Criteria?

Because there is no express provision in the TCAA and/or in the submitted Program clearly limiting this Program to Minor NSR, and there is no explicit provision prohibiting circumvention of the Major NSR SIP requirements, we must evaluate the submitted Program with respect to the criteria for Major stationary source NSR applicability determinations. This includes the absence of a requirement to evaluate if a project triggers Major NSR pursuant to the applicability criteria of the applicable regulations.

We do not find any provisions in the submitted Program that require a Major NSR applicability determination for changes. The submitted Program's rules and definitions are not clear on their face that *first* one must determine the threshold question of whether the change is a major stationary source or a major modification subject to Major NSR. The modifications that would be authorized under the submitted Program can include major modifications. The change that could be a major modification, including PSD BACT or NNSR LAER, could bypass the Major NSR SIP requirements, in the absence of an express requirement to perform the Major NSR SIP applicability review.

The submitted Program fails to require that the applicability of the Major NSR requirements be evaluated prior to considering whether making a change can be authorized to use the Program. We are proposing to find that the State failed to demonstrate that the Program requires an evaluation of Major source NSR applicability based on the currently approved SIP provisions or upon the current federal rules. Therefore, we are proposing to disapprove the Program as not meeting the Major NSR SIP requirements that require the Major NSR applicability requirements be met.

D. Does the Submitted Program Meet the CAA and Major NSR SIP Requirements for a Major Modification?

In evaluating Major NSR SIP revision submittals impacting ''major modifications,'' that differ from EPA's, our review is primarily guided by section 111(a)(4) of the Act that describes when a ''source'' is to be considered modified: ''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.'' Texas did not submit any demonstration showing how its use of the definition ''modification'' was at least as stringent as the definition of ''modification'' in EPA's revised Major NSR SIP rules.

In conducting our review, we particularly were mindful of the United States Court of Appeals for the District of Columbia Circuit regarding the scope and requirements of Section 111(a)(4) for determining whether a change is a ''major modification.'' *See e.g., New York* v. *EPA,* 413 F.3d 3 (D.C. Cir. 2005) (''New York I'') (evaluating EPA's 2002 revised major NSR rules and interpreting Section 111(a)(4)). As discussed below, there are a number of principles associated with Section 111(a)(4) that the Program appears to violate. Moreover, the State failed to submit a demonstration showing how its use of ''modification'' is at least as stringent as the definition of ''modification'' in EPA's revised Major NSR SIP rules.

1. Does the Submitted Program require an evaluation of Emission Increases from the Major Stationary Source?

As noted above, Section 111(a)(4) requires an evaluation of whether a project has resulted in an increase in emissions from ''such source.'' Under this requirement, an evaluation of whether a physical change has resulted in an emission increase must be evaluated based on whether the project resulted in an emission increase across the major stationary source, not by an evaluation of increases outside the major stationary source or a subset of units at the major stationary source. *See Alabama Power* v. *Costle,* 636 F.2d 323, 401–403 (D.C. Cir. 1980) (holding that Agency appropriately allowed consideration of emission increases across the stationary source); *Asarco* v. *EPA,* 578 F.2d 320 (D.C. Cir. 1978) (holding that EPA inappropriately allowed a determination if a modification had occurred based on emission decreases from outside of the facility).[10] We are concerned that the submitted Program in certain circumstances, may allow an emission increase to be avoided by taking into account emission decreases outside of the major stationary source and, in other circumstances, allow an evaluation of emissions of a subset of units at a major stationary source.

First, we are concerned that the submitted Program violates the requirements of the Act and the Major NSR SIP rules, because applicability can be determined based on decreases outside of the major stationary source. The submitted Program allows for netting reductions to come from outside a major stationary source, as defined by the Major NSR rules. It allows existing permitted Qualified Facilities at the same air quality account site, to participate in the applicability netting analysis for another Qualified Facility on the company site that is making the change. The Texas SIP defines an ''account'' to include an entire company site, which could include more than one plant and certainly more than one major stationary source. SIP rule 30 TAC 101.1(1), second sentence. Accordingly,

[10] While the court's analysis regarding the scope of what constitutes a source in these two cases was rejected by the Supreme Court in *Chevron* that decision did not call into question the holding that once the EPA has defined what constitutes a ''source'' (facility for Major Stationary Source) that this is the unit of analysis for applicability. *See Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837 (1984).

Given the plain language of Section 111, EPA agrees that the appropriate unit of analysis for determining if there is an emission increase is the ''source'' as section 111(a)(4) provides that a modification occurs if the project ''increases the amount * * * emitted by such source.''

under the Program, the netting analysis can include multiple participating major stationary sources [11], and if there is no net emission increase, Major NSR preconstruction review is not triggered.

The submitted SIP revisions may allow a major stationary source to net a significant emissions increase against a decrease occurring outside the major stationary source, from facilities on the account's site that are participating in the netting analysis by contributing offsetting emission reductions. This approach is not consistent with the Court's findings in *Alabama Power* and *Asarco,* and it does not meet the CAA's definition of modification and the Major NSR SIP requirements.

Second, we are concerned that the submitted Program may allow an emission increase to be determined based on an evaluation of a subset of facilities within a major stationary source. There are no regulatory provisions addressing how one meets the applicable Major NSR netting requirements at a site when the unit making the change and the participating units contributing emission reductions are not all of the facilities within a major stationary source. Under the submitted Program, not all emission points, units, facilities, major stationary sources, minor modifications at the site or their increases in emissions are required to be evaluated in the applicability netting analysis. In essence, neither the submitted regulations nor the supporting documentation from Texas explain how emissions increases are calculated (both the significant emissions increase from a project, and a significant net emissions increase over the contemporaneous period) for the entire major stationary source if the major stationary source is subject to two different permitting regulations, the Qualified Facilities regulations and the Major NSR SIP regulations. As a result, the regulated community may apply these regulations inconsistently and in a way that fails to evaluate emissions changes at the entire major stationary source correctly as required by the Major NSR SIP regulations. This approach is not consistent with the Court's finding in *Alabama Power,* and it does not meet the CAA's definition of modification and the Major NSR SIP requirements.

Therefore, we propose to find that the State has failed to demonstrate the approaches are consistent with the Court's findings in *Alabama Power and Asarco,* meet the Act, and include the necessary replicability and accountability for approval as a SIP revision. Therefore, we are proposing to disapprove the submitted Program as not meeting the Major NSR SIP requirements that require an evaluation of emission increases from the major stationary source.

2. Does the Submitted Program require the Use of Actual Emissions, rather than Allowables?

Under Section 111(a)(4) of the Act since the 1977 CAA Amendments, a comparison of existing actual emissions before the change and projected actual (or potential emissions) after the change in question is required. *See* New York I at 38–40. Therefore, to determine whether a change at a unit will be subject to Major NSR requires an evaluation that, after netting, an actual to projected actual test or an actual to potential emissions test (or alternatively a PAL based on actual emissions) be used. *See* 40 CFR 51.165(f) and 51.166(w). EPA lacks the authority to approve any submitted Program that does not meet this statutory requirement. We therefore are proposing disapproval because the submitted Program would authorize existing allowable, rather than actual emissions to be used to determine applicability in violation of the Act and the Major NSR SIP requirements.

Our concerns arise regarding the requirement that an increase in emissions must be measured based on actual emissions, not permitted or potential. Under the submitted Program, the project's increases in emissions are calculated based upon its projected allowable emissions. The baseline uses the permitted allowable emission rate (lowered by any applicable state or federal requirement) if the Facility qualified under option 1. Otherwise, the baseline uses the permitted actual emission rate (minus any applicable state or federal requirement). *See* 30 TAC 116.10(2). In the applicability netting analysis, the baseline for all the other participating minor and major existing Qualified Facilities is calculated in the same way. The emission reductions are calculated similarly, *i.e.,* reductions beyond the permitted allowable or actual emission rates (minus the applicable state and federal requirements). Thus, this submitted Program allows an evaluation using allowable, not actual emissions as the baseline to calculate the project's proposed emission increase and for many of the netting emission reductions, thereby in many cases possibly circumventing the major modification applicability requirements under the Major NSR rules, rules that are based upon using actual emissions to calculate baseline emissions. Baseline actual emissions are required in the Major NSR SIP requirements for major source netting as the starting point from which the amount of creditable emission increases or decreases is determined.

We propose to find that the State's procedures do not meet the CAA and EPA's Major NSR SIP requirements that emissions increases from facility changes must be measured in terms of changes from existing baseline actual emissions, rather than allowable emissions.

E. Does the Submitted Program Meet Section 110(l) of the Act for a Major NSR SIP Revision?

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 RFP, or any other applicable requirement of the Act.

The State did not provide any demonstration showing how the submitted Program would not interfere with any applicable requirement concerning attainment and reasonable further progress, or meet any other CAA requirement.

VI. What Is EPA's Evaluation of the Submitted Texas Qualified Facilities State Program as a Minor NSR SIP Revision?

Section 110(a)(2)(C) of the Act requires that States have Minor NSR SIP permitting programs as well as Major NSR SIP permitting programs under part C (PSD) and part D (nonattainment NSR) of Title I. 40 CFR 51.160–51.163 contain the Minor NSR SIP regulatory requirements and provide that a Minor NSR SIP must include legally enforceable procedures enabling the State to determine whether construction or modification would violate a control strategy or interfere with attainment or maintenance of a NAAQS. 40 CFR 51.160(e) provides that States may exempt certain sources from regulation based on the type and size of the facility

[11] The Federal regulations define a stationary source as, among other things, all of the pollutant emitting activities that belong to the same industrial grouping. An industrial grouping is defined based on the Standard Industrial Classification (SIC code). *See, e.g.* 40 CFR 51.166(b)(5) and (6). If a stationary source has the potential to emit or actually emits at certain specified levels then the stationary source is a ''major stationary source'' for purposes of major NSR applicability. *See Id.* at 166(b)(1). By not limiting an ''account'' to pollutant-emitting activities within the same SIC code, an account can include pollutant-emitting activity that includes one or more major stationary sources. While under certain circumstances it may be appropriate to lump units/facilities from differing SIC codes into a single stationary source, this is generally based on an interdependence of the various units. Texas's rule does not require such interdependence.

and requires that ''the plan must discuss the basis for determining which facilities will be subject to review.''

At a minimum, a minor NSR SIP revision must include the requirement for minor sources and modifications to undergo public review, be subject to enforceable emissions limits, monitoring, recordkeeping, and reporting requirements, and inspection and enforcement provisions. Additionally, the State must demonstrate that the Minor NSR SIP revision does not violate a control strategy or interfere with attainment or maintenance of a NAAQS.

A. Does the Submitted Program Meet the Minor NSR SIP Requirements for Noninterference With the Major NSR SIP Requirements?

There are no statutory and/or regulatory provisions that clearly prohibit the use of the Program for major modifications. Nor are there any statutory and/or regulatory provisions clearly limiting the use of the Program to minor modifications. There are no provisions that prohibit the use of the Program for major modifications of existing major stationary sources and minor sources. There are no regulatory applicability requirements limiting use of the Program to Minor NSR and no regulatory requirements prohibiting using it for Major NSR. There is no express provision in the submittals requiring that this Program cannot be used to circumvent the requirements of Major NSR. There are no statutory and/or regulatory provisions clearly prohibiting circumvention of Major NSR. The Program further fails to require that the applicability of the Major NSR requirements be evaluated prior to considering whether the making of a change can be netted out from the Minor NSR SIP requirements. The regulatory provisions in the submitted Program fail to require that *first* one must determine the threshold question of whether the change is a major stationary source or a major modification subject to Major NSR, based upon an actual emissions baseline. See section V and the TSD for additional discussion and information.

Therefore, EPA is proposing to find that the submitted Program fails to prevent noninterference with the Texas Major NSR SIP requirements. We are proposing to disapprove the submitted Program as not meeting the Minor NSR SIP requirements to ensure that the Major NSR SIP requirements continue to be met.

B. Does the Submitted Program Meet the Request for an Exemption or a Relaxation From the Minor NSR SIP Requirements?

As noted above, EPA may approve an exemption to a State's Minor NSR SIP if certain statutory requirements are met. But any such exemption must be consistent with the requirement at 40 CFR 51.160(a)–(b) that a plan contain legally enforceable procedures to ensure that the construction or modification of a source will not result in a violation of applicable portions of a control strategy or interfere with NAAQS attainment. Consequently, EPA may approve exempting certain sources and modifications from obtaining a Minor NSR permit as part of a State's Minor NSR SIP, if the Act and regulations are met and the State shows that the sources will have only a *de minimis* effect.

Moreover, the approvability of a State's proposed *de minimis* threshold is not determined solely by mechanically comparing it with other thresholds approved for other states. The legal test for whether a plan's threshold can be approved is whether it is consistent with the need for a plan to include legally enforceable procedures to ensure that the State will not permit a source that will violate the control strategy or interfere with NAAQS attainment. That is a requirement that all minor source thresholds must meet.

The submitted Program could be considered an exemption from Minor NSR. It is a netting program allowing certain changes to net out of being subject to Minor NSR. These certain changes without the netting would be Minor NSR modifications subject to Minor NSR. To be approvable as an exemption from the Texas Minor NSR SIP, the State must demonstrate that this exemption will not permit changes that will violate the Texas control strategies or interfere with NAAQS attainment.

Furthermore, EPA does view the submitted Program as a SIP relaxation. In order to approve a SIP relaxation, EPA must find pursuant to section 110(l) that the SIP relaxation does not interfere with any applicable requirements concerning attainment and reasonable further progress, or any other applicable requirement of the Act.

1. Noninterference With the NAAQS and State Control Strategies by the Existing Qualified Facilities

The Minor NSR and Major NSR existing Qualified Facilities, no matter by which of the two options they chose to become qualified, will have a Minor or Major NSR SIP permit. A Minor and Major NSR SIP permit under the Texas NSR SIP requirements includes an air quality analysis, *i.e.,* a demonstration there will be no adverse impact on the NAAQS. Each of the Minor or Major NSR SIP permits for the existing Qualified Facilities will include emissions limitations based on the chosen control technology, with a determination that the permitted Qualified Facility will not interfere with attainment and maintenance of the NAAQS or violate any State control strategies. As noted above in IV.A, we request comment on whether our interpretation of the State's regulatory language is correct that a permit is required for a facility to be a Qualified Facility.

2. Ensuring Noninterference With the NAAQS and State Control Strategies by the Netting Reductions

We propose to find that because the participating Qualified Facilities are permitted through an existing SIP approved process, the allowable level established in that permit assures that the Qualified Facility can operate up to that level of emissions without interfering with attainment and maintenance of the NAAQS and not violating any State control strategy, as required by the Texas NSR SIP. The next step requires EPA to evaluate whether the Minor NSR applicability netting analysis itself includes sufficient safeguards to protect the NAAQS and State control strategies. For aid in evaluating this submitted applicability netting analysis as a Minor NSR SIP revision submittal, EPA used the fundamental principles of the Major NSR SIP netting requirements as a yardstick for appropriate comparison since their intent is to prevent violations of the NAAQS and State control strategies.

Before the netting analysis comes into play, there must be a physical or operational change at the Qualified Facility. The change must result in an emissions increase above the authorized allowable (the most stringent of the SIP permit, permit amendment, standard permit, or permit by rule or any applicable state or federal requirement) at that Qualified Facility. Under the Texas Minor NSR SIP, the change must cause an increase in the emission rate of any source, change the method of control of emissions, or cause a change in the character of the emissions. *See* SIP-codified rule at 30 TAC 116.116(b)(1)(A)—(C). If any of these three changes are to occur, the owner or operator must obtain a Minor or Major NSR SIP permit amendment or coverage under a Minor NSR SIP permit by rule. Therefore, the Texas Minor NSR SIP

relies upon allowable emissions, *i.e.,* the most stringent emissions rate for a facility, as required by the most stringent of the SIP permit or any applicable state or federal requirement, to determine whether a modification has occurred.[12]

Once the Minor NSR netting comes into play, we compared the fundamental principles of Major NSR netting to the submitted Minor NSR netting program. We did this because these fundamental principles were established to ensure there would be no interference with the NAAQS and control strategies by using the Major NSR netting. The Major NSR netting program includes the following: (1) An identified contemporaneous period, (2) the reductions must be contemporaneous and creditable, (3) the reductions must be of the same pollutant as the change, (4) the reductions must be real, (5) the reductions must be permanent, and (6) the reductions must be quantifiable. See the definition of ''net emissions increase at 40 CFR 51.165(a)(1)(vi) and 51.166(b)(3). To be considered creditable, the reduction's old level of emissions must exceed the new level of emissions, the reduction must be enforceable as a practical matter at and after the time the actual change begins, and the reduction must have approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

Major NSR netting is based upon all contemporaneous increases and decreases at the same major stationary source. The submitted Program's netting is not based upon all contemporaneous increases at the same major stationary source and not all decreases at the same major stationary source. We propose, however, to find that such an approach satisfies the minimum requirements for an approvable Minor NSR netting program as long as the ambient air is protected in the trading.

The reductions in the Program's netting are based upon the most stringent of the permitted emissions rate (which includes the highest achievable actual emission rate) or any applicable state or federal rule. Therefore, this Program's netting is not based totally on changes in actual emissions. We are proposing to find that this still is acceptable as a Minor NSR netting program as long as the ambient air is protected in the trading.

It is not clear in the submitted rules when the equivalent decreases in emissions must have occurred, other than it is clear that they must occur before the change occurs. The intent of the State was that there would be no look back period, *i.e.,* no window or contemporaneous period. The State discusses in the SIP revision submittals and in its Texas Register that any relied-upon reductions must occur simultaneously at the time of the increase. *See* 21 Tex. Reg. 1573 (February 27, 1996). It wanted to ensure that there would not be any net reductions associated with this Program available to be used later in a demonstration of attainment or reasonable further progress in the Texas SIP. See page 154 of the 1996 SIP revision submittal. In this vein, it did not want a netting window; the State saw a netting window as an unnecessary complication for this Program. Therefore, the State's clear intent was that each time there is a proposed change wishing to use the Program's netting, the holder of the permit is required to perform a new, separate netting analysis to demonstrate that a net increase has not occurred.

Each project was to require a separate demonstration that a net increase has not occurred. As each project requires a separate demonstration, the decrease can be used only for that project. For an additional separate project, the reductions must occur at the time of that additional project which will need to obtain additional reductions to net out. This should prevent double counting of the netting reductions. EPA specifically solicits comment on this point of double counting.

Although the State's intent is clear, EPA cannot find any provisions in the Program that address this, much less require there be a separate netting analysis performed for each proposed change. Therefore, the State at a minimum, must revise its rule at 30 TAC 116.116(e) to explicitly require that each proposed change requires a new, separate netting analysis.

Concerning the fifth principle that the reductions must be permanent, we cannot find any provision in the submitted rules that specifically addresses this. Texas should include a prohibition against future increases at the Qualified Facility, or include regulatory language that assures that any future increase at a Qualified Facility at which a previous netting reduction occurred is analyzed in totality to assure that the NAAQS remains protected from the original increase. For example, we are concerned that if Qualified Facility ''A'' relies on decreases from Qualified Facility ''B,'' Qualified Facility ''B'' could undertake a future change and increase emissions above its new allowable level. Although under the State's program, Qualified Facility ''B'' would have to seek emission reductions from another Qualified Facility before increasing emissions and there is no net change in emissions from the account site, we remain concerned that reductions from a third qualified facility may not be sufficient to offset potential air quality impacts from the original change at Qualified Facility ''A.'' In other words, the submitted rules do not prohibit a shift in emissions from Qualified Facility ''A'' to ''B'' and then to ''C,'' or otherwise assure that the ambient air quality remains protected with regards to the original change at Qualified Facility ''A.'' Consequently, the State at a minimum must revise its rules to require that the reductions be permanent.

The reductions must be of the same pollutant as the change. See submitted 116.116(e)(3). We propose to find that the State has gone beyond this fundamental principle and established an interchange requirement at submitted 30 TAC 116.116(e)(3) for determining whether the interchange of different compounds within the same air contaminant category will result in an equivalent decrease in emissions, e.g., one VOC for another VOC. The emission rates for each different compound must be adjusted using a ratio of the effects screening levels of the compounds. See 30 TAC 116.116(e)(3)(B) through (E). TCEQ has established an ''interchange'' methodology to ensure that compounds within for example the VOC air contaminant category, as interchanged, will have an equivalent impact on the air quality.

We also propose to find that the reductions also meet the principle for being quantifiable by the submitted 30 TAC 116.10(1) and (2) that describe how to calculate the reductions but nonetheless, we request comment on whether these regulatory provisions provide clear direction on the appropriate calculation procedures.

As an example of the quantifiability of the reductions, if the reductions come from a Qualified Facility under a Minor NSR permit by rule, its allowable emissions are the most stringent of the emissions rate allowed in the SIP rules for Minor NSR permits by rule, the emissions rate specified in a particular

[12] The Texas Minor NSR SIP requires that the holder of any type of Minor NSR SIP permit must meet its representations in its permit application or registered certification. The registered certification applies to the Minor NSR SIP standard permits and permits by rule. The permit application refers to the Minor NSR SIP case-by-case permit or amendment. The operating hours, operating procedures, capacity, etc., must be included in the permit application or registered certification. They become conditions from which it is unlawful to vary. *See,* e.g., SIP-codified rules at 30 TAC 116.116(a)–(d) and 30 TAC 106.6.

permit by rule, or the maximum emissions rate represented in the required certified registration. The Texas Minor NSR SIP provides that the holder of a Minor NSR permit by rule may submit a certified registration that includes in it maximum emissions rates (lower than the rates allowed in the SIP rule) and includes a certification that the maximum emissions rates listed on the registration reflect the maximum for operation of the facility. Additionally, the lowest computed emissions rate must be reduced again by the application of *any* applicable (promulgated since the issuance of the permit) state or federal requirement. This means that not only are the reductions quantifiable but the first prong for creditability is met. The reduction's old level of emissions exceeds the new level of emissions.

Notwithstanding our proposed finding that the submitted Program satisfies the basic criteria that emissions reductions be quantifiable, we request comment on one additional aspect of the netting calculation procedures. The submitted rules provide that a Qualified Facility nets its emissions increase on the same basis as its allowable emissions limitation. See 30 TAC 116.116(e)(3)(A). For example, we are concerned that if a Qualified Facility took a decrease in its hourly rate that it could offset that emissions decrease by increasing its hours of operation; if such an increase were not prohibited the decrease is effectively negated. We request comment on whether netting on such a basis is sufficiently quantifiable, and whether any additional provisions are necessary to assure that the entire emissions increase is properly netted against reductions from the other Qualified Facility.

The State also has established a methodology whenever there is a different location of emissions because of the intraplant trading. For example, where the netting has the effect of moving emissions closer to the plant property line than the Qualified Facility to be changed, there is a pre-notification process to analyze whether there could be an increase in off-site impacts. We propose to find that this will ensure the reductions have approximately the same qualitative significance for public health and welfare, the third prong for creditability of the reductions. *See* submitted 116.117(b)(5).

Nonetheless, EPA has some concern on the protection of the ambient air quality and proposes to find that the netting provisions are inadequate to assure protection of the ambient air quality. Specifically, the State must add language to its Program's rule at 30 TAC 116.116(e) that explicitly requires the netting process assures protection of the NAAQS by providing that the netting must result in the same air quality benefit. We are requiring this because although the State's intent is clear the netting process must have this result, there is no corresponding explicit requirement in the Program's rules. The State could also consider whether in nonattainment and near-nonattainment areas, the rules should require that the netting must not result in an adverse air quality impact. Secondly, even though the State's intent is clear, to ensure that the NAAQS are protected, the State must add language to its Program's rule at 30 TAC 116.117, requiring the owner or operator to maintain the information and analysis showing how it concluded that there will be no adverse impact on ambient air quality before undertaking the change.

3. Minor NSR SIP Enforceability Requirements

Section 110(a)(2)(A) of the Act requires that a SIP revision include enforceable emission limitations and other means, as may be necessary or appropriate to meet the Act's requirements. This includes the requirement that minor modifications have enforceable emissions limits. The Program is not clear that each Qualified Facility involved in the netting transaction must submit a permit application and obtain a permit revision reflecting all of the changes made to reduce emissions (relied upon in the netting analysis) as well as reflecting the change itself that increased emissions.

The Texas NSR SIP rule at 30 TAC 116.111(a)(1) is clear that in order to be granted a case-by-case Minor or Major NSR SIP permit or permit amendment, an application must be submitted that includes a complete Form PI–1. For coverage under a Minor NSR permit by rule or standard permit, there is an applicable permit with an emissions limitation.

The Program's rules at 30 TAC 116.116(e)(4) and 116.117(b)(1)–(3) are not clear that it is a *permit application or registration* that must be submitted and that a revised permit must be issued by the TCEQ to reflect the changes made by all of the participating Qualified Facilities. It is not clear that the referenced notification of change, Form PI–E, is a permit application. There is no discussion of when the TCEQ issues the revised permit. *See* the submittals at 30 TAC 116.117(b).

If the change would affect the Special Conditions in the Permit for any participating Qualified Facility, *notification* must be made prior to the change and approval is required by the TCEQ. This requirement also is not clear, however, that a permit application is required. Nor is it clear when the TCEQ is required to issue the revised permit.

EPA acknowledges that 116.117(b)(1) through (3) reference a PI–E Form and this name is similar to the Form PI–1 referenced in the SIP rules, which is the TCEQ standard permit application form. Nevertheless, the Program's rules refer to the submittal of this Form PI–E as if it were a reporting or notification requirement, not as the submittal of a form to the TCEQ that begins the permit revision process.

There are no provisions in 30 TAC 116.117(b) requiring a permit application be submitted to the TCEQ. There also are no provisions in 30 TAC 116.117(b) clearly indicating TCEQ must issue a revised permit for the changes made by all of the participating Qualified Facilities. At a minimum, the State must revise its rules to make it clear that a permit application must be submitted by each participating Qualified Facility and the changes made by the participating Qualified Facilities are reflected in revised permits issued by the TCEQ.

4. Potential Impact of Time Lag Upon Protection of the NAAQS

EPA also is concerned about the lapse of time before each Qualified Facility's permit is revised. The Qualified Facility making the change without relying upon any reductions outside of it, must submit the request by August 1 of each year, showing the changes made during the preceding annual period of July 1–June 30. We believe that this is too long of a lag time between submitting the permit applications and TCEQ revising them downward to reflect the relied-upon emission reductions or the change being made. This lag time can lead to the State not knowing within an appropriate timeframe that the change violated the NAAQS and/or State control strategies or that the relied-upon reductions for whatever reason did not ensure protection of the NAAQS and the control strategies. The State also may not find out about such problems until after the source(s) has made the changes and incurred significant associated expenses. Therefore, we are proposing that this time should be no longer than six months, rather than a year, but nonetheless we request comment on whether six months is an acceptable lapse of time to ensure noninterference with the NAAQS and control strategies.

In summary, there is no explicit requirement that a permit application must be submitted for the change and

for any relied-upon emissions reductions in the netting analysis thereby making the new Program unenforceable. There is too long a lag time before a revised permit is issued in certain circumstances that can lead to a violation of a NAAQS, RFP, or control strategy without the TCEQ becoming aware of it in a timely manner. There is not sufficient information before EPA to make a determination that the exempted changes from the Minor NSR requirements will have only a de minimis effect and that the requested SIP revision relaxation does not interfere with any applicable requirements concerning attainment and reasonable further progress, or any other applicable requirement of the Act, as required by section 110(l).[13]

C. What Is EPA's Summary of Whether the Submitted Program Meets the Requirements for a Minor NSR SIP Revision?

The Program is not clearly limited to Minor NSR and does not prevent circumvention of the Major NSR SIP requirements. The submitted Program does not require that first one must determine whether a change is subject to Major NSR and actual emissions are used for determining whether a change is subject to Major NSR. The Program lacks requirements necessary for enforcement of the applicable emissions limitations, including a permit application and issuance process. Overall, the Program fails to include sufficient enforceable safeguards to ensure that the NAAQS and control strategies are protected. Furthermore, there is no information to determine whether the Program's exemption from the Texas Minor NSR SIP would not violate the NAAQS or the State's control strategies and whether the SIP relaxation would not interfere with NAAQS attainment, reasonable further progress, or otherwise meet any other requirement of the Act.

Therefore, we are proposing to disapprove the submitted Qualified Facilities State Program as not meeting sections 110(a)(2)(C) and 110(l) of the Act and 40 CFR 51.160.

II. What Is EPA's Evaluation of the Submitted General Definitions?

A. Which Submitted General Definitions Meet the NSR SIP Requirements?

We are proposing to approve the following provisions of the SIP submittals as meeting 40 CFR Part 51 and the CAA.

30 TAC 116.10(8)—''grandfathered facility.''

This submitted definition is approvable because it defines which facilities are exempt from the NSR requirements, *i.e.,* those that were constructed or modified before the date that TCEQ began permitting new and modified facilities, which was August 30, 1971. This submitted definition is independent of and severable from the other submitted definitions. We are proposing to approve this submitted definition as meeting the Federal requirements.

30 TAC 116.10(10)—''maximum allowable emissions rate table (MAERT).''

The submitted definition is approvable because it is the same as the SIP-codified 30 TAC 116.115(b)(2)(G). This submitted definition is independent of and severable from the other submitted definitions. We are proposing to approve this submitted definition as meeting the Federal SIP requirements.

30 TAC 116.10(12)—''new facility.''

This submitted definition is approvable because it establishes the date of August 30, 1971 for when facilities that commence construction or modification must obtain preconstruction authorization. This submitted definition is independent of and severable from the other submitted definitions. We are proposing to approve this submitted definition as meeting the Federal requirements.

B. Which Submitted General Definitions Do Not Meet the NSR SIP Requirements?

30 TAC 116.10(3)—''BACT.''

The submittals include a new regulatory definition for ''BACT,'' defining it as BACT with consideration given to the technical practicability and economical reasonableness of reducing or eliminating emissions. TCEQ revised its January 1972 permitting rules, then Regulation VI at rule 603.16, on July 27, 1972, to add the 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, presently codified in the Texas SIP at 30 TAC 116.111(a)(2)(C).

It is not clear whether EPA approved this State BACT requirement as part of the Texas NSR SIP on July 6, 1977 (42 FR 34517) or August 13, 1982 (47 FR 35193). Approval of the original 1972 Texas SIP on May 31, 1972 (37 FR 10896) included State SIP submittals of January 28, February 25, May 2, and May 3, 1972. Since the State revised its rules to add the BACT requirement after May 3, 1972, EPA could not have approved this Texas BACT requirement as part of the original 1972 SIP.

EPA's approval on July 6, 1977 included action on the State SIP revision submittals of 1973, 1974, 1975, and 1977 revisions to Section X: The Permit System. The 1973 SIP revision submittal that included the 1973 revised Section X discussed the application forms and included copies of them. Revised Section X also describes the permit review process and states that the ''review will answer the following questions.'' The list of seven questions includes the following and tracks the State's July 27, 1972 rules:

A. Will the new facility or the modification comply with all Rules and Regulations and the intent of the TCAA?

B. Will the new facility or the modification prevent the maintenance or attainment of the NAAQS?

C. Will the new facility or the modification cause significant deterioration of existing ambient air quality in an area?

D. Will the new facility or modifications have provisions for measuring the emission of significant air contaminants?

E. Will the new facility or modification be located in accordance with proper land use planning?

F. Will the new facility or modification utilize the best available

[13] The State may be able to provide additional information during the public comment period showing how the exemption meets all the requirements of the Act, including enforceability, protecting all NAAQS, RFP, and control strategies. For example, there may be information enabling a reliable estimate of the exempted changes over the life thus far of the Program, e.g., the average percentage of participating Qualified Facilities that require a preconstruction review because of their permit's conditions. This percentage may be a high percentage of the participating universe, and the State could provide documentation of how many of these pre-notification changes it reviews and authorizes as a revised permit, within the 45 days. This could be broken down into the tpy of exempted changes. EPA also notes that under the submitted Program's rules, the change cannot be a physical change that creates a discrete or identifiable structure, device, item, equipment, or enclosure, that constitutes or contains a stationary source. Texas may be able to provide information that this prohibition reduces the numbers and types of changes that are authorized under the submitted Program. There also could be available information illustrating the changes before netting, are truly de minimis for a minor NSR SIP program, taking into account the nonattainment and near-nonattainment areas within the State of Texas. The State will need to provide a thorough account of future growth potential. Modeling may be required to show the expected impacts on ambient air quality (particularly for sources in complex terrain areas). EPA is willing to work with the State on what is an approvable enforceable permitting limitations process and what is an approvable exemption for this Texas Qualified Facilities State Program.

control technology with consideration to the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility?

G. Will the design criteria for the new facility or modification achieve the performance specified in the application?

The 1982 SIP approval included action on Texas SIP revision submittals of May 9, 1975, October 13, 1978, April 13, 1979, and July 20, 1981. These submittals included revisions to the July 27, 1972 Regulation VI, as revised March 27, 1975, August 15, 1975, February 12, 1978, March 6, 1979, November 25, 1979, August 20, 1980, and April 16, 1981. The 1981 rules as submitted and approved by EPA in this 1982 rulemaking recodified the minor NSR and NNSR SIP requirements from Regulation VI into a new Chapter 116. Regardless of which year, it is clear that the State BACT requirement was approved as part of the Texas NSR SIP, either in 1977 or 1982.

The Federal definition for BACT for PSD 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 SIP approval by EPA. 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 a minor NSR SIP requirement for minor NSR permits.

As discussed earlier in section I.B of this preamble, in another Federal Register notice, EPA is proposing disapproval of the Texas NSR SIP submittals for PSD, NNSR for the 1997 8-hour ozone NAAQS, NSR Reform, and a Standard Permit. One of the bases for proposed disapproval of the PSD SIP revision submittals is that Texas has removed from its state rules the Federal PSD definition of BACT. Those interested in this proposed action are encouraged to review and comment on it.

While we continue to approve the inclusion of Texas' minor NSR BACT requirement in the Texas SIP to establish emissions limitations or operational restrictions requirements for minor NSR permits, Texas must revise the submitted BACT definition at 30 TAC 116.10(3) to clearly apply only in the minor NSR SIP and only for minor sources and minor modifications.

30 TAC 116.10(11)(A) and 30 TAC 116.10(11)(B)—Insignificant increases are not a modification requiring a permit.

The submittals include a new regulatory definition for ''Modification of existing facility'' in which insignificant increases of emissions are not modifications requiring a permit. Pursuant to the TCAA of 1971, Texas was required to establish a NSR program. The TCAA required that any person intending to construct a new facility or modify a facility that may emit air contaminants first apply for an air quality permit, which must be granted before that person could begin construction or make any changes. On the other hand, the TCAA allowed Texas to ''*exempt*'' certain facilities or types of facilities from the permitting requirements if it found that the facilities or types of facilities ''would not make a *significant contribution* of air contaminants to the atmosphere.'' The 1971 TCAA, however, did not authorize Texas to set a threshold in its NSR program below which no preconstruction authorization was required. The TCAA required Texas to regulate all new emissions. To complicate matters further, the statutory definition for what was a modification of an existing facility excluded ''*insignificant increases*'' of emissions.

To reconcile the statutory provision requiring regulation of new emissions, the statutory provision requiring permits for construction and modifications causing new emissions, the statutory definition excluding new (insignificant) emissions from obtaining a permit to construct or modify, and yet implement the exemption from permitting authority, Texas adopted rules that allowed it to make determinations whether construction of, or modification to, a facility or type of facilities, would make a *significant contribution* of emissions. If the Agency determined that the emissions from construction of, or modification to, a facility or type would be *insignificant, i.e., not significant (contribution*), it issued an *exemption* for a facility or a type of facilities. These ''*exempted*'' facilities or types of facilities were ''*insignificant*'' sources of emissions. EPA approved into the Texas SIP on May 31, 1972 (37 FR 10896) the TCAA provisions described above, particularly the TCAA provision that excluded the increase of ''insignificant emissions'' from being a modification, and the regulations in Rules 606 and 607 (EPA later approved their recodification into Chapter 116, and they now are codified in the Texas SIP at 30 TAC Chapter 106), allowing the State to issue so-called ''exemptions'' and to maintain a List of the Exemptions. Consequently, any exemption issued by Texas automatically became part of the Texas SIP. Any new facility or modification was subject to federal enforcement action if it failed to have an exemption before it began to construct or make any changes. It was subject to federal enforcement if it violated the terms and conditions of any applicable exemption(s).

Although not approved as part of the Texas SIP, Texas in 1985 adopted through rulemaking the SIP Exemptions contained in the SIP List of Standard Exemptions, and adopted general requirements for the issuance of Exemptions. As part of this 1985 State rulemaking, the State added emission limitations for the first time defining by Texas regulation the minimum level of emissions above which there would be a ''*significant contribution*'' requiring a NSR permit rather than an Exemption. Moreover, under the State's rules, no proposed new facility or modification under any Exemption could be a major source or major modification subject to NNSR and PSD. Later the State moved these Exemption State rules of general requirements and the State-codified Exemptions from Chapter 116 to a new Chapter 106, entitled Exemptions. In early 2000, the State renamed Chapter 106 to Permits by Rule, because the TCAA was revised in 1999 to allow the State to establish standard permits for similar facilities and to adopt permits by rule or exempt sources by rule if it determines the increased emissions will not make a significant contribution of air contaminants to the atmosphere. EPA approved the general requirements for Permits by Rule in Subchapter A of Chapter 106 on November 14, 2003 (68 FR 64543), as meeting the NSR requirements for a minor NSR SIP program. EPA recognized that each State-codified Permit by Rule in the remaining Subchapters of Chapter 106 was already part of the SIP since each was an Exemption previously issued by the State under the SIP Exemption requirements. *See* page 64545.

The following provisions of the TCAA are not part of the Texas SIP and Texas

has not submitted them for approval by EPA into the SIP. Under section 382.05196 of the TCAA enacted in 1999, the Commission may not adopt a Permit by Rule authorizing any facility defined as a ''major facility'' under any applicable preconstruction permitting requirements of the Federal CAA or regulations adopted under that Act. Under section 382.057 of the TCAA, the Commission may not adopt any Exemption by Rule or Standard Permit for any modification of an existing facility defined as a ''major modification'' under any applicable preconstruction permitting requirements of the Federal CAA or regulations adopted under that Act.

The TCAA seems to be clear that a Permit by Rule, Standard Permit, or an Exemption by Rule cannot be used for a major source or major modification. EPA is aware that in the past the State has reasonably interpreted and applied the SIP term ''insignificant'' for allowing only minor modifications and minor sources. Because of the history of the two agencies' interpretations, ordinarily the State's submittal of its relevant 1999 statutory provisions for approval into the SIP would prove sufficient to support that modifications under the submitted 30 TAC 116.10(11)(A) and (B) would apply only to minor modifications and minor sources. There is information; however, *e.g.,* the State's adoption of a Permit by Rule for Startup, Shutdown, and Maintenance Emissions that belies the EPA being able to rely upon such a submittal of the relevant statutory provisions. This type of Permit by Rule cannot be construed to apply only to minor modifications and construction of minor sources. A submittal by the State of the applicable statutory sections for EPA to approve as part of the Texas SIP no longer seems sufficient in view of the issuance of this particular Permit by Rule.

There is another ground for proposing disapproval of the two portions of the submitted definition ''modification of existing facility.'' The public, the regulated community, and governmental agencies consistently over the years have not had a clear and common understanding of the term, ''insignificant'' and its inter-relationship with the SIP rules for Standard Permits and Permits by Rule, in which ''insignificant increases'' are delineated. Very few people even are aware of the history of the TCAA, the State's interpretation and implementation of the TCAA over more than three decades, EPA's history of the Texas SIP approvals over more than three decades, and EPA's legal interpretations over three decades of the State's implementing regulations. If the public, the regulated community, and governmental agencies do not share, a clear and common understanding of the term, ''insignificant,'' the submittals will not perform according to what we believe is the original intent.

With the State's issuance of the Startup, Shutdown, and Maintenance Permit by Rule that is not clearly limited to minor modifications and the continued expressions by the public, regulated entities, and government entities on the lack of clarity in the submittals' language of (A) and (B), EPA is proposing to disapprove the submittals for 30 TAC 116.10(11)(A) and (B) because they are vague and unenforceable.

30 TAC 116.10(11)(G).

The submittals provide that changes at certain natural gas processing, treating, or compression facilities are not modifications if the change does not result in an annual emissions rate of any air contaminant in excess of the volume emitted at the maximum design capacity for grandfathered facilities. The ''annual emissions rate'' is the same as the ''volume emitted at the maximum design capacity''; therefore, this would provide an exemption for these sources from permit review for any emission increases at these facilities. 40 CFR 51.160(e) allows States to identify facilities which will be subject to review under their minor NSR program and requires the minor NSR SIP to discuss the basis for determining which facilities will be subject to review.

The submittals, however, do not contain an applicability statement or regulatory provision limiting this type of change to minor NSR. There is no explanation of the reason for exempting this type of change from the permitting SIP requirements. Without the submittal by the State of an analysis describing how this exemption does not negate the major NSR SIP requirements and meets the minor NSR SIP requirements in 40 CFR 51.160 and the Act's anti-backsliding requirements in section 110(l), EPA proposes to disapprove this submitted definition.

C. What Is the Administrative Correction Related to the Submitted General Definition of ''Facility?''

This definition was initially submitted March 13, 1996, and revisions submitted July 22, 1998. On September 6, 2006 (71 FR 52698), EPA approved the definition of ''Facility,'' as codified at 30 TAC 116.10(4) in the July 22, 1998, submittal. In a SIP revision submitted September 4, 2002, Texas revised 30 TAC 116.10 to add two new definitions and to renumber several existing definitions to accommodate the new definitions. In that revision, the definition of ''facility'' was renumbered from 30 TAC 116.10(4) to 30 TAC 116.10(6). On August 28, 2007 (72 FR 49198), EPA approved portions of the revisions to 30 TAC 116.10 to add the two new definitions and to approve the renumbering of the previously approved definitions. However, EPA's August 28, 2007, approval included a typographical error that identified 30 TAC 116.10(6) ''facility'' as not being in the SIP. The definition of ''facility'' is severable from the other submitted definitions. Accordingly, in this action, EPA proposes to correct the typographical error in 72 FR 49198 to clarify that the definition of ''facility'' as codified at 30 TAC 116.10(6) was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP.

D. Why Are We Not Taking Any Action on the Severable Submitted Portion of the Definition of Federally Enforceable?

30 TAC 116.10(7)(F)—''federally enforceable.''

The submitted paragraph (F) in the definition of ''federally enforceable'' identifies as federally enforceable requirements, any permit requirements established under Subchapter C [14] of Chapter 116. This paragraph implements the CAA section 112(g) program. This program is implemented separately from the SIP and is outside the scope of the SIP; therefore, we are proposing to take no action. *See* 67 FR 58699–58700 (September 18, 2002) for further information on why we are proposing no action on this provision. Paragraphs (A) through (E) in the definition of ''federally enforceable'' remain part of the Texas SIP, as codified at 30 TAC 116.10(7). EPA approved them on September 18, 2002 (67 FR 58697).

VIII. Why is EPA Proposing To Take No Action on a Severable Submitted Provision?

This submitted added provision to 30 TAC 116.116(f) is not in the SIP and it addresses the use of discrete emission reduction credits. It includes a cross-reference to a State rule that no longer exists. Moreover, both the State and the Texas SIP contain the Emissions Trading and Banking rules in Subchapter H of Chapter 116. To date, Texas has not submitted a SIP revision revising this cross-reference appropriately. EPA proposes to take no action today on the submitted 30 TAC

[14] In a SIP revision submitted February 1, 2006, the provisions on Subchapter C were redesignated to a new Subchapter E. EPA intends to take action on the new Subchapter E later in a separate action.

116.116(f) and intends to take action later in a separate action.

IX. Proposed Action

EPA is proposing disapproval of revisions to the SIP submitted by the State of Texas that relate to the Modification of Qualified Facilities, identified in the Tables in Section III of this preamble. These affected provisions include regulatory provisions and definitions and a severable portion of the definition at (E) ''modification of existing facility,'' under Texas' General Definitions in Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. EPA is proposing to find that these submitted provisions and definitions in the submittals affecting the Texas Qualified Facilities State Program are not severable from each other.

EPA is proposing disapproval of the submitted Texas Qualified Facilities State Program, as a substitute major NSR SIP revision, because it does not meet the Act and EPA's regulations. We also are proposing disapproval of the submitted Qualified Facilities Texas State Program as a minor NSR SIP revision because it does not meet the Act and EPA's regulations.

EPA also proposes to take action on revisions to the SIP submitted by Texas that relate to the General Definitions in Chapter 116. EPA proposes to approve three of these severable submitted definitions, ''grandfathered facility,'' ''maximum allowable emissions rate table (MAERT),'' and ''new facility.'' We propose to disapprove the severable submitted definition, ''best available control technology (BACT)'' and to disapprove two severable portions, subparagraphs (A) and (B), in the submitted definition of ''modification of existing facility,'' and the severable portion subparagraph (G) in the submitted definition of ''modification of existing facility.'' The subparagraphs (A) and (B) are not severable from each other. EPA proposes to make an administrative correction to the severable submittal for the SIP-approved definition of ''facility.'' EPA proposes to take no action on the severable submitted subparagraph (F) for the SIP-approved severable definition of ''federally enforceable'' because the submitted paragraph relates to a Federal program that is implemented separately from the SIP. In addition, EPA is proposing to take no action on the severable submitted portion of a provision that includes, among other things, a trading provision containing a cross-reference that no longer is in Texas' rules; EPA will act upon it later in a separate notice.

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

EPA will 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, currently under public comment (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 SIP and subject to potential enforcement for violations of the SIP (See EPA's Revised Guidance on Enforcement During Pending SIP Revisions, dated March 1, 1991).

X. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

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

B. Paperwork Reduction Act

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

C. Regulatory Flexibility Act

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

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

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

D. Unfunded Mandates Reform Act

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

E. Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (*64 FR 43255,* August 10,

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

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

F. Executive Order 13175, Coordination With Indian Tribal Governments

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

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

EPA interprets Executive Order 13045 (*62 FR 19885,* April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it 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]

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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,