

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

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

*F. Executive Order 13175, Coordination With Indian Tribal Governments*

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

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

*H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use*

This proposed rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA’s role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely proposes to disapprove certain State requirements for inclusion into the SIP under section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary

authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon Monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: September 8, 2009.

**Lawrence E. Starfield,**

*Acting Regional Administrator, Region 6.*

[FR Doc. E9–22805 Filed 9–22–09; 8:45 am]

**BILLING CODE 6560–50–P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA–R06–OAR–2006–0133; FRL–8958–7]

**Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD), Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing disapproval of submittals from the State of Texas, through the Texas Commission on Environmental Quality (TCEQ), to revise the Texas Major and Minor NSR SIP. We are proposing to disapprove the submittals because they do not meet the 2002 revised Major NSR SIP requirements. We are proposing to disapprove the submittals as not meeting the Major Nonattainment NSR SIP requirements for implementation of the 1997 8-hour ozone national ambient air quality standard (NAAQS) and the 1-hour ozone NAAQS. Additionally, EPA is proposing to disapprove the submittals to revise the Texas Major PSD NSR SIP. Finally, EPA proposes disapproval of the submitted Standard Permit (SP) for Pollution Control Projects (PCP) because it does not meet the requirements for a minor NSR SIP revision.

EPA is taking comments on this proposal and intends to take final action. EPA is proposing these actions under section 110, part C, and part D,

of the Federal Clean Air Act (the Act or CAA).

**DATES:** Any comments must arrive by November 23, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R06-OAR-2006-0133, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *U.S. EPA Region 6 "Contact Us" Web site:* <http://epa.gov/region6/r6comment.htm> Please click on "6PD" (Multimedia) and select "Air" before submitting comments.

- *E-mail:* Mr. Stanley M. Spruiell at [spruiell.stanley@epa.gov](mailto:spruiell.stanley@epa.gov).

- *Fax:* Mr. Stanley M. Spruiell, Air Permits Section (6PD-R), at fax number 214-665-7263.

- *Mail:* Stanley M. Spruiell, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

- *Hand or Courier Delivery:* Stanley M. Spruiell, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733. Such deliveries are accepted only between the hours of 8 am and 4 pm weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA-R06-OAR-2006-0133. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](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 [www.regulations.gov](http://www.regulations.gov) or e-mail. The [www.regulations.gov](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 [www.regulations.gov](http://www.regulations.gov) your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your

comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the [www.regulations.gov](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 [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 am and 4:30 pm weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittals are also available for public inspection at the State Air Agency during official business hours by appointment: Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

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

**SUPPLEMENTARY INFORMATION:**

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

- "We," "us," and "our" refer to EPA.
- "Act" and "CAA" means Clean Air Act.
- "40 CFR" means Title 40 of the Code of Federal Regulations—Protection of the Environment.
- "SIP" means State Implementation Plan as established under section 110 of the Act.
- "NSR" means new source review, a phrase intended to encompass the

statutory and regulatory programs that regulate the construction and modification of stationary sources as provided under CAA section 110(a)(2)(C), CAA Title I, parts C and D, and 40 CFR 51.160 through 51.166.

- "Minor NSR" means NSR established under section 110 of the Act and 40 CFR 51.160.

- "NNSR" means nonattainment NSR established under Title I, section 110 and part D of the Act and 40 CFR 51.165.

- "PSD" means prevention of significant deterioration of air quality established under Title I, section 110 and part C of the Act and 40 CFR 51.166.

- "Major NSR" means any new or modified source that is subject to NNSR and/or PSD.

- "TSD" means the Technical Support Document for this action.

- "NAAQS" means national ambient air quality standards promulgated under section 109 of that Act and 40 CFR part 50.

- "PAL" means "plantwide applicability limitation."

- "PCP" means "pollution control project."

- "TCEQ" means "Texas Commission on Environmental Quality."

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## I. What Action is EPA Proposing?

We are proposing to disapprove the SIP revisions submitted by Texas on June 10, 2005, and February 1, 2006, as not meeting the 1997 8-hour ozone major nonattainment NSR SIP requirements, and as not meeting the Act and Major Nonattainment NSR SIP requirements for the 1-hour ozone NAAQS. We are proposing to disapprove the SIP revision submitted by Texas on February 1, 2006, as not meeting the Major NSR Reform SIP requirements for PAL provisions and the Major NSR Reform SIP requirements without the PAL provisions. We are proposing to disapprove the February 1, 2006, SIP revision submittal as not meeting the Act and the Major NSR PSD SIP requirements. Finally, we are proposing to disapprove the Standard Permit (SP) for PCP submitted February 1, 2006, as not meeting the Minor NSR SIP requirements. It is EPA's position that each of these six identified portions in the SIP revision submittals, 8-hour ozone, 1-hour ozone, PALs, non PALs, PSD, and PCP Standard Permit is severable from each other.

We are taking no action on the portions of the June 10, 2005, submittal concerning 30 TAC 101.1 Definitions, section 112(g) of the Act, and Emergency Orders.

We have evaluated the SIP submissions for whether they meet the Act and 40 CFR Part 51, and are consistent with EPA's interpretation of the relevant provisions. Based upon our evaluation, EPA has concluded that each of the six portions of the SIP revision submittals does not meet the requirements of the Act and 40 CFR part 51. Therefore, each portion of the State submittals is not approvable. As authorized in sections 110(k)(3) and 301(a) of the Act, where portions of the State submittal are severable, EPA may approve the portions of the submittal that meet the requirements of the Act, take no action on certain portions of the submittal,<sup>1</sup> and disapprove the portions of the submittal that do not meet the requirements of the Act. When the deficient provisions are not severable from the all of the submitted provisions, EPA must propose disapproval of the submittals, consistent with section 301(a) and 110(k)(3) of the Act. Each of the six portions of the State submittals is severable from each other. Therefore, EPA is proposing to disapprove each of the following severable provisions of the

<sup>1</sup> In this action, we are taking no action on certain provisions that are either outside the scope of the SIP or which revise an earlier submittal of a base regulation that is currently undergoing review for appropriate action.

submittals: (1) The submitted 1997 8-hour ozone NAAQS Major Nonattainment NSR SIP revision, (2) the submitted 1-hour ozone NAAQS Major NSR SIP revision, (3) the submitted Major NSR reform SIP revision with PAL provisions, (4) the submitted Major NSR reform SIP revision with no PAL provisions, (5) the submitted Major NSR PSD SIP revision, and (6) the submitted Minor NSR Standard Permit for PCP SIP revision.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a mandatory requirement of the Act starts a sanctions clock and a Federal Implementation Plan (FIP) clock. The provisions in these submittals were not submitted to meet a mandatory requirement of the Act. Therefore, if EPA takes final action to disapprove any provision of the submittals, no sanctions and FIP clocks will be triggered.

## II. What are the Other Relevant Proposed Actions on the Texas Permitting SIP Revision Submittals?

This proposed action should be read in conjunction with two other proposed actions appearing elsewhere in today's **Federal Register**, (1) proposed action on the Texas NSR SIP, the Flexible Permits Program, and (2) proposed action on the Texas NSR SIP, the Qualified Facilities Program and the General Definitions.<sup>2</sup> Also, on November 26, 2008, EPA proposed limited approval/limited disapproval of the Texas submittals relating to public participation for air permits of new and modified facilities (73 FR 72001). EPA believes these actions should be read in conjunction with each other because the permits issued under these State programs are the vehicles for regulating a significant universe of the air emissions from sources in Texas and thus directly impact the ability of the State to achieve and maintain attainment of the NAAQS and protect the health of the communities where these sources are located. The basis for proposing these actions is outlined in each notice and accompanying technical support document (TSD). Those interested in

<sup>2</sup> In that proposed action, the submitted definition of BACT is not severable from the proposed action on the PSD SIP revision submittals. EPA may choose to take final action on the definition of BACT in the NSR SIP final action rather than in the Qualified Facilities and the General Definitions final actions. EPA is obligated to take final action on the submitted definitions in the General Definitions for those identified as part of the Texas Qualified Facilities State Program, the Texas Flexible Permits State Program, Public Participation, Permit Renewals (there will be a proposed action published at a later date), and this BACT definition as part of the NSR SIP.

any one of these actions are encouraged to review and comment on the other proposed actions as well.

EPA intends to take final action on the State's Public Participation SIP revision submittals in November 2009. EPA intends to take final action on the submitted Texas Qualified Facilities State Program by March 31, 2010, the submitted Texas Flexible Permits State Program by June 30, 2010, and the NSR SIP on August 31, 2010. These dates are expected to be mandated under a Consent Decree (*see*, Notice of Proposed Consent Decree and Proposed Settlement Agreement, 74 FR 38015, July 30, 2009).

## III. What has the State Submitted?

This notice provides a summary of our evaluation of Texas' June 10, 2005, and February 1, 2006, SIP revision submittals. We provide our reasoning in general terms in this preamble, but provide a more detailed analysis in the TSD that has been prepared for this proposed rulemaking. Because we are proposing to disapprove the submittals based on the inconsistencies discussed herein, we have not attempted to review and discuss all of the issues that would need to be addressed for approval of these submittals as Major NSR SIP revisions.

On June 10, 2005, Texas submitted revisions to Title 30 of the Texas Administrative Code (30 TAC) Chapter 116—Control of Air Pollution by Permits for New Construction or Modification, revising 30 TAC 116.12—Nonattainment Definitions<sup>3</sup>—and 30 TAC 116.150—New Major Source or Major Modification in Ozone Nonattainment Areas, to meet the Major Nonattainment NSR requirements for Phase I of the 1997 8-hour NAAQS for ozone as promulgated April 30, 2004 (69 FR 23951). The June 10, 2005, submittal also includes revisions to the definitions in 30 TAC 101.1—Definitions.

On February 1, 2006, Texas submitted revisions to 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction or Modification, to implement the Major NSR Reform SIP requirements with the PAL provisions and without the PAL provisions. The submittal also included revisions for the Texas PSD SIP and a new Minor NSR Standard Permit for Pollution Control Projects. This submittal includes the following changes:

<sup>3</sup> In the Texas SIP and in the June 10, 2005, SIP submittal, the title of 30 TAC 116.12 is "Nonattainment Review Definitions." In the February 1, 2006, SIP submittal, 30 TAC 116.12 was renamed "Nonattainment and Prevention of Significant Deterioration Review Definitions."

- *Revisions to the following sections:* 30 TAC 116.12—Nonattainment and Prevention of Significant Deterioration Review Definitions, 30 TAC 116.150—New Major Source or Major Modification in Ozone Nonattainment Areas, 30 TAC 116.151—New Major Source or Major Modification in Nonattainment Areas Other Than Ozone, 30 TAC 116.160—Prevention of Significant Deterioration Requirements, and 30 TAC 116.610(a), (b), and (d)—Applicability;
- *Addition of the following new sections:* 30 TAC 116.121—Actual to Projected Actual Test for Emissions

Increases, 30 TAC 116.180—Applicability, 30 TAC 116.182—Plant-Wide Applicability Limit Application, 30 TAC 116.184—Application Review Schedule, 30 TAC 116.186—General and Special Conditions, 30 TAC 116.188—Plantwide Applicability Limit, 30 TAC 116.190—Federal Nonattainment and Prevention of Significant Deterioration Review, 30 TAC 116.192—Permit Amendments and Alterations, 30 TAC 116.194—Public Notice and Comment, 30 TAC 116.196—Renewal of Plant-Wide Applicability Limit Permit, and 30 TAC 116.198—Expiration or Avoidance.

- *Removal of 30 TAC 116.617—*Standard Permit for Pollution Control Projects and replacement with new 30 TAC 116.617—State Pollution Control Project Standard Permit.

The table below summarizes the changes that are in the two SIP revisions submitted June 10, 2005, and February 1, 2006. A summary of EPA’s evaluation of each section and the basis for this proposal is discussed in sections IV, V, VI, and VII of this preamble. The TSD includes a detailed evaluation of the submittals.

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

Section	Title	Submittal dates	Description of change	Proposed action
<b>Chapter 116—Control of Air Pollution by Permits for New Construction or Modification</b>				
<b>Subchapter A—Definitions</b>				
30 TAC 116.12 .....	Nonattainment Review Definitions.	6/10/2005	Changed several definitions to implement Federal phase I rule implementing 8-hour ozone standard.	Disapproval.
	Nonattainment Review and Prevention of Significant Deterioration Definitions.	2/1/2006	Renamed section and added and revised definitions to implement Federal NSR Reform regulations.	Disapproval.
<b>Subchapter B—New Source Review Permits</b>				
<b>Division 1—Permit Application</b>				
30 TAC 116.121 .....	Actual to Projected Actual Test for Emissions Increase.	2/1/2006	New Section .....	Disapproval.
<b>Division 5—Nonattainment Review</b>				
30 TAC 116.150 .....	New Major Source or Major Modification in Ozone Nonattainment Area.	6/10/2005	Revised section to implement Federal phase I rule implementing 8-hour ozone standard.	Disapproval.
		2/1/2006	Revised section to implement Federal NSR Reform regulations.	Disapproval.
30 TAC 116.151 .....	New Major Source or Major Modification in Nonattainment Areas Other Than Ozone.	2/1/2006	Revised section to implement Federal NSR Reform regulations.	Disapproval.
<b>Division 6—Prevention of Significant Deterioration Review</b>				
30 TAC 116.160 .....	Prevention of Significant Deterioration Requirements.	2/1/2006	Revised section to implement Federal NSR Reform regulations.	Disapproval.
<b>Subchapter C—Plant-Wide Applicability Limits</b>				
<b>Division 1—Plant-Wide Applicability Limits</b>				
30 TAC 116.180 .....	Applicability .....	2/1/2006	New Section .....	Disapproval.
30 TAC 116.182 .....	Plant-Wide Applicability Limit Permit Application.	2/1/2006	New Section .....	Disapproval.
30 TAC 116.184 .....	Application Review Schedule	2/1/2006	New Section .....	Disapproval.
30 TAC 116.186 .....	General and Special Conditions.	2/1/2006	New Section .....	Disapproval.
30 TAC 116.188 .....	Plant-Wide Applicability Limit	2/1/2006	New Section .....	Disapproval.
30 TAC 116.190 .....	Federal Nonattainment and Prevention of Significant Deterioration Review.	2/1/2006	New Section .....	Disapproval.
30 TAC 116.192 .....	Amendments and Alterations	2/1/2006	New Section .....	Disapproval.
30 TAC 116.194 .....	Public Notice and Comment ..	2/1/2006	New Section .....	Disapproval.

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

Section	Title	Submittal dates	Description of change	Proposed action
30 TAC 116.196 .....	Renewal of a Plant-Wide Applicability Limit Permit.	2/1/2006	New Section .....	Disapproval.
30 TAC 116.198 .....	Expiration and Voidance .....	2/1/2006	New Section .....	Disapproval.
<b>Subchapter E—Hazardous Air Pollutants: Regulations Governing Constructed and Reconstructed Sources (FCAA, § 112(g), 40 CFR Part 63)<sup>a</sup></b>				
30 TAC 116.400 .....	Applicability .....	2/1/2006	Recodification from section 116.180.	No action.
30 TAC 116.402 .....	Exclusions .....	2/1/2006	Recodification from section 116.181.	No action.
30 TAC 116.404 .....	Application .....	2/1/2006	Recodification from section 116.182.	No action.
30 TAC 116.406 .....	Public Notice Requirements ..	2/1/2006	Recodification from section 116.183.	No action.
<b>Subchapter F—Standard Permits</b>				
30 TAC 116.610 .....	Applicability .....	2/1/2006	Revised paragraphs (a), (a)(1) through (a)(5), (b), and (d). <sup>b</sup>	Disapproval, No action on paragraph (d).
30 TAC 116.617 .....	State Pollution Control Project Standard Permit.	2/1/2006	Replaced former 30 TAC 116.617—Standard Permit for Pollution Control Projects. <sup>c</sup>	Disapproval.
<b>Subchapter K—Emergency Orders<sup>d</sup></b>				
30 TAC 116.1200 .....	Applicability .....	.....	Recodification from 30 TAC 116.410.	No action.

<sup>a</sup>Recodification of former Subchapter C. These provisions are not SIP-approved.

<sup>b</sup>30 TAC 116.610(d) is not SIP-approved.

<sup>c</sup>30 TAC 116.617 is not SIP-approved.

<sup>d</sup>Recodification of former Subchapter E. These provisions are not SIP-approved.

#### IV. Do the Submitted SIP Revisions Meet the Major NSR PSD SIP Requirements?

##### A. What are the Requirements for EPA's Review of a Submitted Major NSR SIP Revision?

Before EPA's 1980 revised major NSR SIP regulations, 45 FR 52676 (August 7, 1980), States were required to adopt and submit a major NSR SIP revision where the State's provisions and definitions were identical to or individually more stringent than the Federal rules. Under EPA's 1980 revised major NSR SIP regulations, States could submit provisions in a major NSR SIP revision different from those in EPA's major NSR rules, as long as the State provision was equivalent to a rule identified by EPA as appropriate for a "different but equivalent" State rule. If a State chose to submit *definitions* that were not verbatim, the State was required to *demonstrate any different definition* has the effect of *being as least as stringent*. (Emphasis added.) See 45 FR 52676, at 52687. The demonstration requirement was *explicitly* expanded to include not just different definitions *but also different programs* in the EPA's revised

major NSR regulations, as promulgated on December 31, 2002 (67 FR 80186) and reconsidered with minor changes on November 7, 2003 (68 FR 63021). Therefore, to be approved as meeting the 2002 revised major NSR SIP requirements, a State submitting a customized major NSR SIP revision *must demonstrate why its program and definitions* are in fact at least as stringent as the major NSR revised base program. (Emphasis added). See 67 FR 80186, at 80241.

Moreover, because there is an existing Texas Major NSR SIP, the submitted Program must meet the anti-backsliding provisions of the Act in section 193 and meet the requirements in section 110(l) which provides that EPA may not approve a SIP revision if it will interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the Act. Furthermore, any submitted SIP revision must meet the applicable SIP regulatory requirements and the requirements for SIP elements in section 110 of the Act, and be consistent with applicable statutory and regulatory requirements. These can include, among other things,

enforceability, compliance assurance, replicability of an element in the program, accountability, test methods, and whether the submitted rules are vague. There are four fundamental principles for the relationship between the SIP and any implementing instruments, *e.g.*, Major NSR permits. These four principles as applied to the review of a major or minor NSR SIP revision include: (1) The baseline emissions from a permitted source be quantifiable; (2) the NSR program be enforceable by specifying clear, unambiguous, and measurable requirements, including a legal means for ensuring the sources are in compliance with the NSR program, and providing means to determine compliance; (3) the NSR program's measures be replicable by including sufficiently specific and objective provisions so that two independent entities applying the permit program's procedures would obtain the same result; and (4) the major NSR permit program be accountable, including means to track emissions at sources resulting from the issuance of permits and permit amendments. See EPA's April 16, 1992, "General Preamble for

the Implementation of Title I of the Clean Air Act Amendments of 1990" (57 FR 13498) (General Preamble). A discussion illustrating the principles and elements of SIPs that apply to sources in implementing a SIP's control strategies begins on page 13567 of the General Preamble.

*B. Do the Submitted SIP Revisions Meet the Act and the PSD SIP requirements?*

Texas submitted a revision to 30 TAC 116.160(a) and a new section 116.160(c)(1) and (2) on February 1, 2006, as a SIP revision to the Texas PSD SIP. This SIP revision submittal removed from the State rules the incorporation by reference of the Federal PSD definition of "best available control technology (BACT)" as defined in 40 CFR 51.166(b)(12)<sup>4</sup>. The currently approved PSD SIP requires that a State include the Federal definition of BACT. See 30 TAC 116.160(a).

The 2006 submittal also removed from the State rules, the PSD SIP requirement at 40 CFR 52.21(r)(4) that the State previously had incorporated by reference. The currently approved PSD SIP mandates this requirement. See 30 TAC 116.160(a). This provision specifies that if a project becomes a major stationary source or major modification solely because of a relaxation of an enforceable limitation on the source or modification's capacity to emit a pollutant, then the source or modification is subject to PSD applies as if construction had not yet commenced. The State's action in eliminating that requirement means the State's rules will not regulate these types of major stationary sources or modifications as stringently as the Federal program.

<sup>4</sup> The January 1972 Texas NSR rules, as revised in July 1972, require a proposed new facility or modification to utilize the best available control technology, with consideration to the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility. The Federal definition for PSD BACT is part of the Texas SIP as codified in the SIP at 30 TAC 116.160(a). (This current SIP rule citation was adopted by the State on October 10, 2001, and EPA approved this recodified SIP rule citation on July 22, 2004 (69 FR 43752).) EPA approved the Texas PSD program SIP revision submittals, including the State's incorporation by reference of the Federal definition of BACT, in 1992. See proposal and final approval of the Texas PSD SIP at 54 FR 52823 (December 22, 1989) and 57 FR 28093 (June 24, 1992). EPA specifically found that the SIP BACT requirement (now codified in the Texas SIP at 30 TAC 116.111(a)(2)(C)) did not meet the Federal PSD BACT definition. To meet the PSD SIP Federal requirements, Texas chose to incorporate by reference, the Federal PSD BACT definition, and submit it for approval by EPA as part of the Texas PSD SIP. Upon EPA's approval of the Texas PSD SIP submittals, both EPA and Texas interpreted the SIP BACT provision now codified in the SIP at 30 TAC 116.111(a)(2)(C) as being a minor NSR SIP requirement for minor NSR permits.

Section 165 of the Act provides that "No major emitting facility \* \* \* may be constructed [or modified] in any area to which this part applies unless— (1) a permit has been issued for such proposed facility in accordance with this part setting forth *emission limitations* for such facility which conform to the requirements of this part" \* \* \* (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter \* \* \*." *Id.* 7475(a). Accordingly, under the plain language of Section 165 a facility may not be constructed unless it will comply with BACT limits, which conform to the requirements of the Act. As BACT is a defined term in the Act, see CAA 169(3), we interpret this to mean that a facility may not be constructed unless the permit it has been issued conforms to the Act's definition of BACT.

The removal of these two provisions is not approvable as a SIP revision. The BACT requirement is a basic tenet of a permitting program. Our conclusion that the BACT and emission limitation requirements are a statutory minimum flows from the Act itself. See CAA section 165. These two provisions are required for a SIP revision to meet the PSD SIP requirements.

Not only is BACT a defined statutory and regulatory term, but it also constitutes a central requirement of the Act. Accordingly, a state's submission of a revision that would remove the requirement that all new major stationary sources or major modifications meet, at a minimum, BACT as defined by the Act creates a situation where the submitted SIP revision would be a relaxation of the requirements of the previous SIP.

Our evaluation considers whether a submitted SIP revision that removes a statutory requirement can still meet the Act. It is EPA's position that the removal of a statutory requirement from a State's program cannot be approved as a SIP revision because the removal does not meet the requirements of the Act. Additionally, as a SIP relaxation, we would look to the requirements of section 110(l). Section 110(l) of the Act prohibits EPA from approving any revision of a SIP if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act. The State did not provide any demonstration showing how the submitted SIP revision would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act.

As the mechanism in Texas for ensuring that permits contain such a requirement, the State PSD SIP must both require BACT and apply the federal definition of BACT (or one that is more stringent) to be approved pursuant to part C and Section 110(l) of the Act.

Since Texas' approach fails to ensure that all of the statutory relevant criteria contained in the statutory BACT definition are contained in the Texas SIP revision submittal, and the State failed to submit a demonstration showing how the relaxation would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other CAA requirement, we are proposing to disapprove this removal pursuant to part C and Section 110(l) of the Act, as well as failing to meet the Major NSR SIP requirements.

**V. Do the Submitted SIP Revisions Meet the Major Non-attainment NSR Requirements for the 1-Hour and the 1997 8-Hour Ozone NAAQS?**

*A. What are the Anti-Backsliding Major Nonattainment NSR SIP Requirements for the 1-hour Ozone NAAQS?*

On July 18, 1997, EPA promulgated a new NAAQS for ozone based upon 8-hour average concentrations. The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38865).<sup>5</sup> On April 30, 2004 (69 FR 23951), we published a final rule that addressed key elements related to implementation of the 1997 8-hour ozone NAAQS including, but not limited to: revocation of the 1-hour NAAQS and how anti-backsliding principles will ensure continued progress toward attainment of the 1997 8-hour ozone NAAQS. We codified the anti-backsliding provisions governing the transition from the revoked 1-hour ozone NAAQS to the 1997 8-hour ozone NAAQS in 40 CFR 51.905(a). The 1-hour ozone major nonattainment NSR SIP requirements indicated that certain 1-hour ozone standard requirements were not part of the list of anti-backsliding requirements provided in 40 CFR 51.905(f).

On December 22, 2006, the DC Circuit vacated the Phase 1 Implementation Rule in its entirety. *South Coast Air*

<sup>5</sup> On March 12, 2008, EPA significantly strengthened the 1997 8-hour ozone standard, to a level of 0.075 ppm. EPA is developing rules needed for implementing the 2008 revised 8-hour ozone standard and has received the States' submittals identifying areas with their boundaries they identify to be designated nonattainment. EPA is reviewing the States' submitted data.

*Quality Management District, et al., v. EPA*, 472 F.3d 882 (DC Cir. 2006), *reh'g denied* 489 F.3d 1245 (2007) (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review). The EPA requested rehearing and clarification of the ruling and on June 8, 2007, the Court clarified that it was vacating the rule only to the extent that it had upheld petitioners' challenges. Thus, the provisions in 40 CFR 51.905(e) that waived obligations under the revoked 1-hour standard for NSR were vacated. The effect of this portion of the court's ruling is to restore major nonattainment NSR applicability thresholds and emission offsets pursuant to classifications previously in effect for areas designated nonattainment for the 1-hour ozone NAAQS.

On June 10, 2005 and February 1, 2006, Texas submitted SIP revisions to 30 TAC 116.12 and 30 TAC 116.150 which relate to the transition from the major nonattainment NSR requirements applicable for the 1-hour ozone NAAQS to implementation of the major nonattainment NSR requirements applicable to the 1997 8-hour ozone NAAQS. Texas' revisions at 30 TAC 116.12(18) (Footnote 6 under Table I under the definition of "major modification") and 30 TAC 116.150(d) introductory paragraph, effective as state law on June 15, 2005, provide that for "the Houston-Galveston-Brazoria, Dallas-Fort Worth, and Beaumont-Port Arthur eight hour ozone nonattainment areas, if the United States Environmental Protection Agency promulgates rules requiring new source review permit applications in these areas to be evaluated for nonattainment new source review according to the area's one-hour standard classification," then "each application will be evaluated according to that area's one-hour standard classification" and "\* \* \* the de minimis threshold test (netting) is required for all modifications to existing major sources of VOC or NO<sub>x</sub> in that area \* \* \*." The footnote 6 and the introductory paragraph add a new requirement for an affirmative regulatory action by the EPA on the reinstatement of the 1-hour ozone NAAQS major nonattainment NSR requirements before the major nonattainment NSR requirements under the 1-hour standard will be implemented in the Texas 1-hour ozone nonattainment areas.

The currently approved Texas major nonattainment NSR SIP does not require such an affirmative regulatory action by the EPA before the 1-hour ozone major nonattainment NSR requirements come into effect in the Texas 1-hour ozone

nonattainment areas. Our evaluation of a SIP revision generally considers whether a revision would be at least as stringent as the provision in the existing applicable implementation plan that it would supersede. If we cannot conclude that a SIP revision is at least as stringent as the corresponding provision in the existing SIP, we may approve the revision only if the revision would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act. The Texas revision would relax the requirements of the approved SIP.

Texas submitted no section 110(l) analysis demonstrating that this relaxation would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act. Therefore, we are proposing to disapprove the revisions as not meeting section 110(l) of the Act for the Major NNSR SIP requirements for the 1-hour ozone NAAQS.

#### *B. What Are the Major Nonattainment NSR SIP Requirements for the 1997 8-hour Ozone NAAQS?*

The Act and EPA's NSR SIP rules require that an applicability determination regarding whether Major NSR applies for a pollutant should be based upon the attainment or nonattainment designation of the area in which the source is located on the *date of issuance* of the Major NSR permit. See the following: sections 172(c)(5) and 173 of the Act; 40 CFR 51.165(a)(2)(i); and "New Source Review (NSR) Program Transitional Guidance," issued March 11, 1991, by John S. Seitz, Director, Office of Air Quality Planning and Standard. An applicability determination for a Major NSR permit based upon the date of administrative completeness, rather than date of issuance, would allow more sources to avoid the Major NSR requirements where there is a nonattainment designation between the date of administrative completeness and the date of issuance, and thus this submitted revision will reduce the number of sources subject to Major NSR requirements.

Revised 30 TAC 116.150(a), as submitted June 10, 2005 and February 1, 2006, now reads as follows under state law:

(a) This section applies to all new source review authorizations for new construction or modification of facilities as follows:

(1) For all applications for facilities that will be located in any area designated as nonattainment for ozone under 42 United

States Code (U.S.C.), §§ 7407 *et seq.* on the effective date of this section, the issuance date of the authorization; and

(2) For all applications for facilities that will be located in counties for which nonattainment designation for ozone under 42 U.S.C. 7407 *et seq.* becomes effective after the effective date of this section, the date the application is administratively complete.<sup>6</sup>

The submitted rule raises two concerns. First, the revised language in 30 TAC 116.150(a) is not clear as to when and where the applicability date will be set by the date the application is administratively complete and when and where the applicability date will be set by the issuance date of the authorization. The rule, adopted and submitted in 2005, applies the date of administrative completeness of a permit application, not the date of permit issuance, where setting the date for determination of NSR applicability after June 15, 2004 (the effective date of ozone nonattainment designations). The submitted 2006 rule adds the date of permit issuance. Unfortunately, the submitted 2006 rule by introducing a bifurcated structure creates vagueness rather than clarity. The effective date of this new bifurcated structure is February 1, 2006. It is unclear whether this means under subsection (1) that the permit issuance date is used in existing nonattainment areas designated nonattainment for ozone before and up through February 1, 2006. Thus, the proposed revision lacks clarity on its face and is therefore not enforceable.

Second, to the extent that the date of application completeness is used in certain instances to establish the applicability date, such use is contrary to the Act and EPA's interpretation thereof, as discussed above.

The State did not provide any information, which demonstrates that this revision is at least as stringent as the requirements of the Act and applicable Federal rules.

Thus, based upon the above and in the absence of any explanation by the State, EPA is proposing to disapprove the SIP revision submittals for not

<sup>6</sup> It is our understanding of State law, that a "facility" can be an "emissions unit," *i.e.*, any part of a stationary source that emits or may have the potential to emit any air contaminant. A "facility" also can be a piece of equipment, which is smaller than an "emissions unit." A "facility" can be a "major stationary source" as defined by Federal law. A "facility" under State law can be more than one "major stationary source." It can include every emissions point on a company site, without limiting these emissions points to only those belonging to the same industrial grouping (SIP code). To comment on our understanding of the State definition of facility, see our proposed action regarding Modification of Existing Qualified Facilities Program and General Definitions, published elsewhere in today's **Federal Register**.



meeting the Major NSR SIP requirements for the 1997 8-hour ozone standard.

#### VI. Do the Submitted SIP Revisions Meet the Major NSR SIP Requirements?

*A. Do the SIP Revision Submittals Meet the Major NSR SIP Requirements With a PALs Provision?*

We are proposing to disapprove the following non-severable revisions that address the revised Major NSR SIP requirements with a PALs provision: 30 TAC Chapter 116 submitted February 1, 2006: 30 TAC 116.12—Definitions; 30 TAC 116.180—Applicability; 30 TAC 116.182—Plant-Wide Applicability Limit Permit Application; 30 TAC 116.184—Application Review Schedule; 30 TAC 116.186—General and Special Conditions; 30 TAC 116.188—Plant-Wide Applicability Limit; 30 TAC 116.190—Federal Nonattainment and Prevention of Significant Deterioration Review; 30 TAC 116.192—Amendments and Alterations; 30 TAC 116.194—Public Notice and Comment; 30 TAC 116.196—Renewal of a Plant-Wide Applicability Limit Permit; 30 TAC 116.198—Expiration or Voidance.

Below is a summary of our evaluation. Please see the TSD for additional information.

The submittal lacks a provision which limits applicability of a PAL only to an existing major stationary source, and which precludes applicability of a PAL to a new major stationary source, as required under 40 CFR 51.165(f)(1)(i) and 40 CFR 51.166(w)(1)(i), which limits applicability of a PAL to an existing major stationary source. In the absence of such limitation, this submission would allow a PAL to be authorized for the construction of a new major stationary source. In EPA's November 2002 TSD for the revised Major NSR Regulations, we respond on pages I-7-27 and 28 that actual PALs are available only for existing major stationary sources, because actual PALs are based on a source's actual emissions. Without at least 2 years of operating history, a source has not established actual emissions upon which to base an actual PAL. However, for individual emissions units with less than two years of operation, allowable emissions would be considered as actual emissions. Therefore, an actual PAL can be obtained only for an existing major stationary source even if not all emissions units have at least 2 years of emissions data. Moreover, the development of an alternative to provide new major stationary sources with the option of obtaining a PAL based on allowable emissions was

foreclosed by the Court in *New York v. EPA*, 413 F.3d 3 at 38-40 (DC Cir. 2005) ("New York I") (holding that the Act since 1977 requires a comparison of existing actual emissions before the change and projected actual (or potential emissions) after the change in question is required).

The absence of the applicability limitation creates a provision less stringent than the Act as interpreted by the Court and the revised Major NSR SIP PAL requirements. Therefore, we are proposing to disapprove this submittal as not meeting the revised Major NSR SIP requirements.

The submittal has no provisions that relate to PAL re-openings, as required by 40 CFR 51.165(f)(8)(ii), (ii)(A) through (C), and 51.166(w)(8)(ii) and (ii)(a). Nor is there a mandate that failure to use a monitoring system that meets the requirements of this section renders the PAL invalid, as required by 40 CFR 51.165(f)(12)(i)(D) and 51.166(w)(12)(i)(d). The absence of these provisions renders the accountability of this Program inadequate and less stringent than the Federal requirements of Major NSR. Therefore, EPA is proposing to disapprove the submittal as not meeting the revised Major NSR SIP requirements.

The Texas submittal at 30 TAC 116.186 provides for an emissions cap that may not account for all of the emissions of a pollutant at the major stationary source. Texas requires the owner or operator to submit a list of *all facilities to be included in the PAL* see 30 TAC 116.182(1), such that not all of the facilities at the entire major stationary source may be specifically required to be included in the PAL. However, the Federal rules require the owner or operator to submit a list of *all emissions units at the source* see 40 CFR 51.166(f)(3)(i) and 40 CFR 51.166(w)(3)(i). The corresponding Federal rules provide that a PAL applies to all of the emission units at the *entire* major stationary source. Inclusion of all the emissions units subject to the enforceable PAL limit is an essential feature of the Plantwide Applicability Limit. The Texas submittal is unclear as to whether the PAL would apply to all of the emission units at the *entire* major stationary source and therefore appears to be less stringent than the Federal rules. In the absence of any demonstration from the State, EPA is proposing to disapprove 30 TAC 116.186 and 30 TAC 116.182(1) as not meeting the revised Major NSR SIP requirements.

Submitted 30 TAC 116.194 requires that an applicant for a PAL permit must provide for public notice on the draft

PAL permit in accordance with 30 TAC Chapter 39—Public Notice—for all initial applications, amendments, and renewals or a PAL Permit.<sup>7</sup> See 73 FR 72001 (November 26, 2008) for more information on Texas' public participation rules and their relationship to PALs. The November 2008 proposal addressed the public participation provisions in 30 TAC Chapter 39, but did not specifically propose action on 30 TAC 116.194. Today, we propose to address 30 TAC 116.194. Because this section relates to the public participation requirements of the PAL program, this section is not severable from the PAL program. Because we are proposing to disapprove the PAL program, we propose to likewise disapprove 30 TAC 116.194.

The Federal definition of the "baseline actual emissions" provides that these emissions must be calculated in terms of "the average rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period." See 40 CFR 51.165(a)(1)(xxxv)(A), (B), (D) and (E) and 51.166(b)(47)(i), (ii), (iv), and (v). Emphasis added. The submitted definition of the term "baseline actual emissions" found at 30 TAC 116.12(3)(A), (B), (D), and (E) differs from the Federal definition by providing that the baseline shall be calculated as "the rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period." The submitted definition omits reference to the "average rate." The definition differs from the Federal SIP definition but the State failed to provide a demonstration showing how the different definition is at least as stringent as the Federal definition. Therefore, EPA proposes to disapprove the different definition of "baseline actual emissions" found at 30 TAC 116.12(3) as not meeting the revised Major NSR SIP requirements. On the same grounds for lacking a demonstration, EPA proposes to

<sup>7</sup> "The submittals do not meet the following public participation provisions for PALs: (1) For PALs for existing major stationary sources, there is no provision that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). (2) For PALs for existing major stationary sources, there is no requirement that the State address all material comments before taking final action on the permit, consistent with 40 CFR 51.165(f)(5) and 51.166(w)(5). (3) The applicability provision in section 39.403 does not include PALs, despite the cross-reference to Chapter 39 in Section 116.194."



disapprove 30 TAC 116.182(2) that refers to calculations of the baseline actual emissions for a PAL, as not meeting the revised Major NSR SIP requirements.

The State also failed to include the following specific monitoring definitions: "Continuous emissions monitoring system (CEMS)" as defined in 40 CFR 51.165(a)(1)(xxxix) and 51.166(b)(43); "Continuous emissions rate monitoring system (CERMS)" as defined in 40 CFR 51.165(a)(1)(xxxiv) and 51.166(b)(46); "Continuous parameter monitoring system (CPMS)" as defined in 40 CFR 51.165(a)(1)(xxxiii) and 51.166(b)(45); and "Predictive emissions monitoring system (PEMS)" as defined in 40 CFR 51.165(a)(1)(xxxii) and 51.166(b)(44). All of these definitions concerning the monitoring systems in the revised Major NSR SIP requirements are essential for the enforceability of and providing the means for determining compliance with a PALs program. Therefore, we are proposing to disapprove the State's lack of these four monitoring definitions as not meeting the revised Major NSR SIP requirements.

Additionally, where, as here, a State has made a SIP revision that does not contain definitions that are required in the revised Major NSR SIP program, EPA may approve such a revision only if the State specifically demonstrates that, despite the absence of the required definitions, the submitted revision is more stringent, or at least as stringent, in all respects as the Federal program. See 40 CFR 51.165(a)(1) (non-attainment SIP approval criteria); 51.166 (b) (PSD SIP definition approval criteria). Texas did not provide such a demonstration. Therefore, EPA proposes to disapprove the lack of these definitions as not meeting the revised Major NSR SIP requirements.

None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for PALs is severable from each other. Therefore, we are proposing to disapprove the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations.

*B. Do the Submitted SIP Revisions Meet the Non-PAL Aspects of the Major NSR SIP Requirements?*

The submitted NNSR non-PAL rules do not explicitly limit the definition of

"facility"<sup>8</sup> to an "emissions unit" as do the submitted PSD non-PAL rules. It is our understanding of State law that a "facility" can be an "emissions unit," *i.e.*, any part of a stationary source that emits or may have the potential to emit any air contaminant, as the State explicitly provides in the revised PSD rule at 30 TAC 116.160(c)(3). A "facility" also can be a piece of equipment, which is smaller than an "emissions unit." A "facility" can include more than one "major stationary source." It can include every emissions point on a company site, without limiting these emissions points to only those belonging to the same industrial grouping (SIP code). In our proposed action on the Texas Qualified Facilities State Program, EPA specifically solicits comment on the definition for "facility" under State law. We encourage anyone interested in this issue to review and comment on the other proposed action on the submitted Qualified Facilities State Program, as well.

Regardless, the State clearly thought the prudent legal course was to limit "facility" explicitly to "emissions unit" in its PSD SIP non-PALs revision. TCEQ did not submit a demonstration showing how the lack of this explicit limitation in the NNSR SIP non-PALs revision is at least as stringent as the revised Major NSR SIP requirements. Therefore, EPA is proposing to disapprove the submitted definition and its use as not meeting the revised Major NNSR non-PALs SIP requirements.

Under the Major NSR SIP requirements, for any physical or operational change at a major stationary source, a source must include emissions resulting from startups, shutdowns, and malfunctions in its determination of the baseline actual emissions (see 40 CFR 51.165(a)(1)(xxxv)(A)(1) and (B)(1) and 40 CFR 51.166(b)(47)(i)(a) and (ii)(a)) and the projected actual emissions (see 40 CFR 51.165(a)(1)(xxviii)(B) and 40 CFR 51.166(b)(40)(ii)(b)). The definition of the term "baseline actual emissions," as submitted in 30 TAC 116.12(3)(E), does not require the inclusion of emissions resulting from startups, shutdowns, and malfunctions.<sup>9</sup> Our

<sup>8</sup>"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."

<sup>9</sup>The submitted definition of "baseline actual emissions," is as follows: Until March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under Chapter 101 of this title \* \* \* may be included to the extent they have been authorized, or are being authorized, in a permit action under Chapter 116. 30 TAC 116.12(3)(E) (emphasis added).

understanding of State law is that the use of the term "may" "creates discretionary authority or grants permission or a power. See Section 311.016 of the Texas Code Construction Act. Similarly, the submitted definition of "projected actual emissions" at 30 TAC 116.12(29) does not require that emissions resulting from startups, shutdowns, and malfunctions be included. The submitted definitions differ from the Federal SIP definitions and the State has not provided information demonstrating that these definitions are at least as stringent as the Federal SIP definitions. Therefore, based upon the lack of a demonstration from the State, EPA proposes to disapprove the definitions of "baseline actual emissions" at 30 TAC 116.12(3) and "projected actual emissions" at 30 TAC 116.12(29) as not meeting the revised Major NSR SIP requirements.

The Federal definition of the "baseline actual emissions" provides that these emissions must be calculated in terms of "the average rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period." The submitted definition of the term "baseline actual emissions" found at 30 TAC 116.12(3)(A), (B), (D), and (E) differs from the Federal definition by providing that the baseline shall be calculated as "the rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period."

Texas has not provided any demonstration showing how this different definition is at least as stringent as the Federal SIP definition. Therefore, EPA proposes to disapprove the submitted definition of "baseline actual emissions" found at 30 TAC 116.12(3) as not meeting the revised major NSR SIP requirements.

None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for non-PALs is severable from each other. Therefore, we are proposing to disapprove the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR non-PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations.

**VII. Does the Submitted PCP Standard Permit Meet the Minor NSR SIP Requirements?**

EPA approved Texas' general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116 on November 14, 2003 (68 FR 64548) as meeting the minor NSR SIP requirements. The November 14, 2003

action describes how these rules meet EPA's requirements for new minor sources and minor modifications. A Standard Permit provides a streamlined mechanism with all permitting requirements for construction and operation of certain sources in categories that contain numerous similar sources. It is not a case-by-case minor NSR SIP permit. Therefore, each minor NSR SIP Standard Permit must contain all terms and conditions on the face of it (combined with the SIP general requirements) and it cannot be used to address site-specific determinations. This particular type of minor NSR permit is required to be applicable to narrowly defined categories of emission sources<sup>10</sup> rather than a category of *emission types*. A Standard Permit is a minor NSR permit limited to a particular narrowly defined source category for which the permit is designed to cover and cannot be used to make site-specific determinations that are outside the scope of this type of permit.<sup>11</sup>

EPA did not approve the Standard Permit for PCPs (30 TAC 116.617) in the November 14, 2003 action as part of the Texas minor NSR SIP. See 68 FR 64547. On February 1, 2006, Texas submitted a

<sup>10</sup> Examples of narrowly defined categories of emission sources include oil and gas facilities, asphalt concrete plants, and concrete batch plants.

<sup>11</sup> See *Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and Section 112 rules and General permits*, Memorandum from Kathie A Stein, Office of Enforcement and Compliance Assurance, January 25, 1995, *Options for Limiting the Potential to Emit (PTE) of a Stationary Source under Section 112 and Title V of the Clean Air Act*, Memorandum from John S. Seitz, Office of Air Quality Planning and Standards (OAQPS), January 25, 1995, *Approaches to Creating Federally-Enforceable Emissions Limits*, Memorandum from John S. Seitz, OAQPS, November 3, 1993, *Potential to Emit (PTE) Guidance for Specific Source Categories*, Memorandum from John S. Seitz, OAQPS and Eric Schaeffer, OECA, April 14, 1998, *EPA Region 7 Permit by Rule Guidance for Minor Source Preconstruction Permits*. See also, rulemakings related to general permits: 61 FR 53633, final approval of Tennessee SIP Revision, October 15, 1996; 62 FR 2587, final approval of Florida SIP revision, January 17, 1997; 71 FR 5979, final approval of Wisconsin SIP revision, February 6, 2006; 71 FR 14439, proposed conditional approval of Missouri SIP revision, March 22, 2006. EPA guidance documents set out specific guidelines: (1) General permits apply to a specific and narrow category of sources, (2) For sources electing coverage under general permits where coverage is not mandatory, provide notice or reporting to the permitting authority, reporting or notice to permitting authority, (3) General permits provide specific and technically accurate (verifiable) limits that restrict potential to emit, (4) General permits contain specific compliance requirements, (5) Limits in general permits are established based on practically enforceable averaging times, and (6) Violations of the permit are considered violations of state and federal requirements and may result in the source being subject to major source requirements.

repeal of the previously submitted PCP Standard Permit and submitted the adoption of a new PCP Standard Permit at 30 TAC 116.617—State Pollution Control Project Standard Permit.<sup>12</sup> One of the main reasons Texas adopted a new PCP Standard Permit was to meet the new Federal requirements to explicitly limit this PCP Standard Permit only to Minor NSR. In *State of New York, et al. v. EPA*, 413 F.3d 3 (DC Cir. June 24, 2005), the Court vacated the federal pollution control project provisions for NNSR and PSD. The new PCP Standard Permit explicitly prohibits the use of the PCP Standard Permit for new major sources and major modifications. Still the new PCP Standard Permit is a generic permit that applies to numerous types of pollution control projects, which can be used at any source that wants to use a PCP. The definition in this Standard Permit for what is a PCP is overly broad. For example, it does not delineate what type of pollution control equipment is authorized.

The PCP Standard Permit, as adopted and submitted by Texas to EPA for approval into the Texas Minor NSR SIP, is not limited in its applicability to a single category of industrial sources, but to a broad class of pollution control techniques at all source categories. An individual Standard Permit must be limited to a single source category, which consists of numerous similar sources that can meet standardized permit conditions. In addition to EPA's concerns that this submitted PCP Standard Permit is not limited in its applicability, another major concern is that this Standard Permit is designed for case-by-case additional authorization, source-specific review, and source-specific technical determinations. For case-by-case additional authorization, source-specific review, and source specific technical determinations, under the minor NSR SIP rules, if these types of determinations are necessary, the State must use its minor NSR SIP case-by-case permit process under 30 TAC 116.110(a)(1).

There are no replicable conditions in the PCP Standard Permit that specify how the Director's discretion is to be implemented for the individual determinations. Of particular concern is the provision that allows for the exercise of the Executive Director's discretion in making case-specific

<sup>12</sup> The 2006 submittal also included a revision to 30 TAC 116.610(d), that is a rule in Subchapter F, Standard Permits, to change an internal cross reference from Subchapter C to Subchapter E, consistent with the re-designation of this Subchapter by TCEQ. See section IX for further information on this portion of the 2006 submittal.

determinations in individual cases in lieu of generic enforceable requirements. Because EPA approval will not be required in each individual case, specific replicable criteria must be set forth in the Standard Permit establishing equivalent emissions rates and ambient impact. Similarly, the PCP Standard Permit is not the appropriate vehicle in the case-by-case establishing of recordkeeping, monitoring, and recordkeeping requirements because it requires the Executive Director to make case-by-case determinations and to establish case specific terms and conditions for the construction or modification of each individual PCP that are outside the terms and conditions in the PCP Standard Permit.

Because the PCP Standard Permit, in 30 TAC 116.617, does not meet the SIP requirements for Minor NSR, EPA proposes to disapprove the PCP Standard Permit, as submitted February 1, 2006.

#### VIII. What Is Our Evaluation of Other SIP Revision Submittals?

We are proposing to take no action upon the June 10, 2005 SIP revision submittal addressing definitions at 30 TAC Chapter 101, Subchapter A, section 101.1, because previous revisions to that section are still pending review by EPA. We will take appropriate action on the submittals concerning 30 TAC 101.1 in a separate action. As noted previously, these definitions are severable from the other portions of the two SIP revision submittals.

Second, Texas originally submitted a new Subchapter C—Hazardous Air Pollutants: Regulations Governing Constructed and Reconstructed Sources (FCAA, § 112(g), 40 CFR Part 63) on July 22, 1998. EPA has not taken action upon the 1998 submittal. In the February 1, 2006, SIP revision submittal, this Subchapter C is recodified to Subchapter E and sections are renumbered. This 2006 submittal also includes an amendment to 30 TAC 116.610(d) to change the cross-reference from Subchapter C to Subchapter E. These SIP revision submittals apply to the review and permitting of constructed and reconstructed major sources of hazardous air pollutants (HAP) under section 112 of the Act and 40 CFR part 63, subpart B. The process for these provisions is carried out separately from the SIP activities. SIPs cover criteria pollutants and their precursors, as regulated by NAAQS. Section 112(g) of the Act regulates HAPs, this program is not under the auspices of a section 110 SIP, and this program should not be approved into the SIP. These portions of the 1998 and

2006 submittals are severable. For these reasons we propose to take no action on this portion relating to section 112(g) of the Act.

Third, the February 1, 2006, SIP revision submittal includes a new 30 TAC Chapter 116, Subchapter K (as recodified from Subchapter E), that relates to the issuance of Emergency Orders, and is severable from all the other portions of the 2006 submittal. EPA is currently reviewing the SIP revision submittals that relate to Emergency Orders, including this submittal and will take appropriate action on the Emergency Order requirements in a separate action, according to the Consent Decree schedule.

### IX. Proposed Action

Under section 110(k)(3) of the Act and for the reasons stated above, EPA is proposing disapproval of revisions to the Texas Major NSR SIP that relate to implementation of Major NSR in areas designated nonattainment for the 1997 8-hour ozone NAAQS, implementation of Major NSR in areas designated nonattainment for the 1-hour ozone NAAQS, and implementation of Major NSR SIP requirements in all of Texas. We are proposing to disapprove the SIP revision submittals for the Texas Major NSR SIP. Finally, we are proposing to disapprove the submittals for a Minor Standard Permit for PCP. EPA is also proposing to take no action on certain severable revisions submitted June 10, 2005, and February 1, 2006.

*Specifically, we are proposing:*

- Disapproval of revisions to 30 TAC 30 TAC 116.12 and 116.150 as submitted June 10, 2005;
- Disapproval of revisions 30 TAC 116.12, 116.150, 116.151, 116.160; and disapproval of new sections at 30 TAC 116.121, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, and 116.617, as submitted February 1, 2006.

We are also proposing to take no action on the provisions identified below:

- The revisions to 30 TAC 101.1—Definitions, submitted June 10, 2005;
- The recodification of the existing Subchapter C under 30 TAC Chapter 116 to a new Subchapter E under 30 TAC Chapter 116; and
- The recodification of the existing Subchapter E under 30 TAC Chapter 116 to a new Subchapter K under 30 TAC Chapter 116.

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

EPA intends to take final action on the State's Public Participation SIP revision submittal in November 2009. EPA intends to take final action on the submitted Texas Qualified Facilities State Program by March 31, 2010, the submitted Texas Flexible Permits State Program by June 30, 2010, and the NSR SIP by August 31, 2010. These dates are expected to be mandated under a Consent Decree (*see* Notice of Proposed Consent Decree and Proposed Settlement Agreement, 74 FR 38015, July 30, 2009). Sources are reminded that they remain subject to the requirements of the federally approved Texas Major NSR SIP and subject to potential enforcement for violations of the SIP (*See* EPA's Revised Guidance on Enforcement During Pending SIP Revisions, dated March 1, 1991).

### X. Statutory and Executive Order Reviews

#### A. Executive Order 12866, Regulatory Planning and Review

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

#### B. Paperwork Reduction Act

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

#### C. Regulatory Flexibility Act

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

than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

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

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

#### D. Unfunded Mandates Reform Act

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

#### E. Executive Order 13132, Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have

federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

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

*F. Executive Order 13175, Coordination With Indian Tribal Governments*

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

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

*H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use*

This proposed rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a

significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA’s role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely proposes to disapprove certain State requirements for inclusion into the SIP under section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon Monoxide, Hydrocarbons, Intergovernmental relations, Lead, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: September 8, 2009.

**Lawrence E. Starfield,**

*Acting Regional Administrator, Region 6.*

[FR Doc. E9–22806 Filed 9–22–09; 8:45 am]

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA–R04–OAR–2007–0359; FRL–8960–8]

**Approval and Promulgation of Implementation Plans, Alabama: Clean Air Interstate Rule**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a portion of the State Implementation Plan (SIP) revision submitted by the State of Alabama, through the Alabama Department of Environmental Management (ADEM), on March 7, 2007. This action proposes to approve the portion of the March 7, 2007, submittal that addresses State reporting requirements under the Nitrogen Oxide (NO<sub>x</sub>) SIP Call and the Clean Air Interstate Rule (CAIR) found in 40 CFR 51.122 and 51.125 as amended by the CAIR rulemakings. Specifically, in this action EPA is proposing to approve revisions to Chapter 335–3–1 “General Provisions.” In previous rulemakings, EPA took action on the other portions of the March 7, 2007, SIP submittal, which included revisions to Chapters 335–3–5, and 335–3–8 (October 1, 2007, 72 FR 55659) and Chapter 335–3–17 (March 26, 2009, 74 FR 13118). Although the DC Circuit Court found CAIR to be flawed, the rule was remanded without vacatur and thus remains in place. Thus, EPA is continuing to approve CAIR provisions into SIPs as appropriate. CAIR, as promulgated, requires States to reduce emissions of sulfur dioxide (SO<sub>2</sub>) and NO<sub>x</sub> that significantly contribute to, or interfere with maintenance of, the national ambient air quality standards (NAAQS) for fine particulates and/or ozone in any downwind state. CAIR establishes budgets for SO<sub>2</sub> and NO<sub>x</sub> for States that contribute significantly to