ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2006–0133 and EPA–R06–OAR–2005–TX–0025; FRL—9199–6]

Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Nonattainment NSR (NNSR) for the 1-Hour and the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: EPA is taking final action to disapprove submittals from the State of Texas, through the Texas Commission on Environmental Quality (TCEQ), to revise the Texas Major and Minor NSR SIP. We are disapproving the submittals because they do not meet the 2002 revised Major NSR SIP requirements. We are also disapproving the submittals as not meeting the Major Nonattainment NSR SIP requirements for implementation of the 1997 8-hour ozone national ambient air quality standard (NAAQS) and the 1-hour ozone NAAQS. EPA is disapproving the submitted Standard Permit (SP) for Pollution Control Projects (PCP) because it does not meet the requirements of the CAA for a minor NSR Standard Permit program. Finally, EPA is also disapproving a submitted severable definition of best available control technology (BACT) that is used by TCEQ in its Minor NSR SIP permitting program.

EPA is not addressing the submitted revisions concerning the Texas Major PSD NSR SIP, which will be addressed in a separate action. EPA is taking no action on severable provisions that implement section 112(g) of the Act and is restoring a clarification to an earlier action that removed an explanation that a particular provision is not in the SIP because it implements section 112(g) of the Act. EPA is not addressing severable revisions to definitions submitted June 10, 2005, submittal, which will be addressed in a separate action. We are taking no action on a severable provision relating to Emergency and Temporary Orders, which we will address in a separate action.

EPA is taking these actions under section 110, part C, and part D, of the Federal Clean Air Act (the Act or CAA).

DATES: This rule is effective on October 15, 2010.

ADDRESSES: EPA has established a docket for this action on New Source Review (NSR) Nonattainment NSR (NNSR) Program for the 1-Hour Ozone Standard and the 1997 8-Hour Ozone Standard, NSR Reform, and a specific Standard Permit under Docket ID No. EPA–R06–OAR–2006–0133. The docket for the action on the definition of BACT is in Docket ID No. EPA–R06–OAR–2005–TX–0025. All documents in these dockets are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal, which is part of the EPA record, is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

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

SUPPLEMENTARY INFORMATION:

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

- "We," "us," and "our" refer to EPA.
- "Act" and "CAA" means Clean Air Act.
- "40 CFR" means Title 40 of the Code of Federal Regulations–Protection of the Environment.
- "SIP" means State Implementation Plan as established under section 110 of the Act.
- "NSR" means new source review, a phrase intended to encompass the statutory and regulatory programs that regulate the construction and modification of stationary sources as provided under CAA section 110(a)(2)(C), CAA Title I, parts C and D, and 40 CFR 51.160 through 51.166.
- "Minor NSR" means NSR established under section 110 of the Act and 40 CFR 51.160.
- "NNSR" means nonattainment NSR established under Title I, section 110 and part D of the Act and 40 CFR 51.165.
- "PSD" means prevention of significant deterioration of air quality established under Title I, section 110 and part C of the Act and 40 CFR 51.166.
- "Major NSR" means any new or modified source that is subject to NNSR and/or PSD.
- "TSD" means the Technical Support Document for this action.
- "NAAQS" means national ambient air quality standards promulgated under section 109 of that Act and 40 CFR part 50.
- "PAL" means "plantwide applicability limitation."
- "PCP" means "pollution control project."
- "TCEQ" means "Texas Commission on Environmental Quality."

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I. What action is EPA taking?

A. What regulations is EPA disapproving?

We are disapproving the SIP revisions submitted by Texas on June 10, 2005, and February 1, 2006, as not meeting the Act and the 1997 8-hour ozone Major Nonattainment NSR SIP requirements, and as not meeting the Act and Major Nonattainment NSR SIP requirements for the 1-hour ozone NAAQS. We are disapproving the SIP revision submitted by Texas on February 1, 2006, as not meeting the Major NSR Reform SIP requirements for PAL provisions and the Major NSR Reform SIP requirements without the PAL provisions. We are disapproving the Standard Permit for PCP submitted February 1, 2006, as not meeting the Act and Minor NSR SIP requirements. We proposed to disapprove the above SIP revision submittals on September 23, 2009 (74 FR 48467). We are disapproving the State's regulatory definition for its Texas Clean Air Act's statutory definition for "BACT" that was submitted in 30 TAC 116.10(3) on March 13, 1996, and July 22, 1998, because it is not clearly limited to minor sources and minor modifications. We proposed to disapprove this severable definition of BACT under our action on Qualified Facilities. *See* 74 FR 48450, at 48463 (September 23, 2009). It is EPA's position that each of these six identified portions in the SIP revision submittals, 8-hour ozone, 1-hour ozone, PALs, non-PALs, PCP Standard Permit, and Minor NSR definition of BACT, is severable from each other and from the remaining portions of the SIP revision submittals.

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

- The submitted 1997 8-hour ozone NAAQS Major Nonattainment NSR SIP revision,
- The submitted 1-hour ozone NAAQS Major NNSR SIP revision,
- The submitted Major NSR reform SIP revision with PAL provisions,
- The submitted Major NSR reform SIP revision with no PAL provisions,
- The submitted Minor NSR Standard Permit for PCP SIP revision, and
- The submitted definition of "BACT" under 30 TAC 116.10(3) for Minor NSR.

The provisions in these submittals for each of the six portions of the SIP revision submittals were not submitted to meet a mandatory requirement of the Act. Therefore, this final action to disapprove the submitted six portions of the State submittals does not trigger a sanctions or Federal Implementation Plan clock. *See* CAA section 179(a).

B. What other actions is EPA taking?

EPA is taking action in a separate rulemaking action published in today's **Federal Register** on the severable revisions that relate to Prevention of Significant Deterioration. The affected provision that is being acted upon separately in today's **Federal Register** is 30 TAC 116.160.

We are taking no action on 30 TAC 116.400, 116.402, 116.404, and 116.406, submitted February 1, 2006. These provisions implement section 112(g) of the Act, which is outside the scope of the SIP. We are also making an administrative correction relating to 30 TAC 116.115(c)(2)(B)(ii)(I). In our 2002 approval of 30 TAC 116.115 we included an explanation in 40 CFR 52.2270(c) that 30 TAC 116.115(c)(2)(B)(ii)(I) is not in the SIP because it implements section 112(g) of the Act, which is outside the scope of the SIP. In a separate action published April 2, 2010 (75 FR 16671), we inadvertently removed the explanation that states that this provision is not part of the SIP.

We are taking no action on severable portions of the June 10, 2005, submittal concerning 30 TAC 101.1 Definitions. We will take action on these portions of the submittal in a later rulemaking.

Finally, we are taking no action on severable portions of the February 1, 2006, submittal which relate to

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

Emergency and Temporary Orders. We will take action on these portions of the submittal in a later rulemaking.

II. What is the background?

A. Summary of Our Proposed Action

On September 23, 2009, under Docket No. EPA–R06–OAR–0133, EPA proposed to disapprove revisions to the SIP submitted by the State of Texas that relate to revisions to the New Source Review (NSR) State Implementation Plan (SIP); (1) Prevention of Significant Deterioration (PSD), (2) Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, (3) NNSR for the 1-Hour Ozone Standard, (4) Major NSR Reform for PAL provisions, (5) The Major NSR Reform SIP requirements without the PAL provisions and (6) The Standard Permit for PCP. *See* 74 FR 48467. These affected provisions that we proposed to disapprove were 30 TAC 116.12, 116.121, 116.150, 116.151, 116.160, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, 116.610(a), and 116.617 under Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. EPA also proposed on September 23, 2009, under Docket No. EPA–R06–OAR–2005–TX–0025 (*see* 74 FR 48450, at 48463–48464), to disapprove a revision to the SIP submitted by the State that relates to the State's Minor NSR definition of BACT. The affected definition that we proposed to disapprove was 30 TAC 116.10(3). *See* 74 FR 48450, at 48463–48464. EPA finds that each of these six submitted provisions is severable from each other. EPA also finds that the submitted definition is severable from the other submittals.

EPA is taking action in a separate rulemaking action published in today's **Federal Register** on the severable revisions that relate to Prevention of Significant Deterioration. The affected provision that is being acted upon separately in today's **Federal Register** is 30 TAC 116.160.

EPA proposed on September 23, 2009, under Docket No. EPA–R06–OAR–0133, no action on the following regulations:

- 30 TAC 116.400, 116.402, 116.404, 116.406, 116.610(d). These regulations implement section 112(g) of the CAA and are outside the scope of the SIP;
- 30 TAC 116.1200. This regulation relates to Emergency and Temporary Orders and will be addressed in a separate action under the Settlement Agreement in BCCA Appeal Group v. EPA, Case No. 3:08–cv–01491–N (N.D. Tex).

B. Summary of the Submittals Addressed in This Final Action

Tables 1 and 2 below summarize the changes that are in the SIP revision submittals. A summary of EPA's evaluation of each section and the basis for this final action is discussed in sections III through V of this preamble. The TSD (which is in the docket) includes a detailed evaluation of the submittals.

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

Title of SIP submittal	Date submitted to EPA	Date of state adoption	Regulations affected in this action
Qualified Facilities and Modification to Existing Facilities	3/13/1996	2/14/1996	30 TAC 116.10—definition of "BACT".
NSR Rule Revisions; section 112(g) Rule Review for Chapter 116.	7/22/1998	6/17/1998	30 TAC 116.10(3)—definition of "BACT".
New Source Review for Eight-Hour Ozone Standard	6/10/2005	5/25/2005	30 TAC 116.12 and 115.150.
Federal New Source Review Permit Rules Reform	2/1/2006	1/11/2006	30 TAC 116.12, 116.121, 116.150, 116.151, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, 116.400, 116.402, 116.404, 116.406, 116.610, 116.617, and 116.1200.

TABLE 2—SUMMARY OF EACH REGULATION THAT IS AFFECTED BY THIS ACTION

Section	Title	Submittal dates	Description of change	Final action
Chapter 116—Control of Air Pollution by Permits for New Construction or Modification				
Subchapter A—Definitions				
30 TAC 116.10(3)	Definition of "BACT"	3/13/1996	Added new definition	Disapproval.
		7/22/1998	Repealed and a new definition submitted as paragraph (3).	
30 TAC 116.12	Nonattainment Review Definitions	6/10/2005	Changed several definitions to implement Federal phase I rule implementing 8-hour ozone standard.	Disapproval.
	Nonattainment Review and Prevention of Significant Deterioration Definitions.	2/1/2006	Renamed section and added and revised definitions to implement Federal NSR Reform regulations.	Disapproval.
Subchapter B—New Source Review Permits				
Division 1—Permit Application				
30 TAC 116.121	Actual to Projected Actual Test for Emissions Increase.	2/1/2006	New Section	Disapproval.

TABLE 2—SUMMARY OF EACH REGULATION THAT IS AFFECTED BY THIS ACTION—Continued

Section	Title	Submittal dates	Description of change	Final action
Division 5—Nonattainment Review				
30 TAC 116.150	New Major Source or Major Modification in Ozone Nonattainment Area.	6/10/2005	Revised section to implement Federal phase I rule implementing 8-hour ozone standard.	Disapproval.
		2/1/2006	Revised section to implement Federal NSR Reform regulations.	Disapproval.
30 TAC 116.151	New Major Source or Major Modification in Nonattainment Areas Other Than Ozone.	2/1/2006	Revised section to implement Federal NSR Reform regulations.	Disapproval.
Subchapter C—Plant-Wide Applicability Limits				
Division 1—Plant-Wide Applicability Limits				
30 TAC 116.180	Applicability	2/1/2006	New Section	Disapproval.
30 TAC 116.182	Plant-Wide Applicability Limit Permit Application.	2/1/2006	New Section	Disapproval.
30 TAC 116.184	Application Review Schedule	2/1/2006	New Section	Disapproval.
30 TAC 116.186	General and Special Conditions	2/1/2006	New Section	Disapproval.
30 TAC 116.188	Plant-Wide Applicability Limit	2/1/2006	New Section	Disapproval.
30 TAC 116.190	Federal Nonattainment and Prevention of Significant Deterioration Review.	2/1/2006	New Section	Disapproval.
30 TAC 116.192	Amendments and Alterations	2/1/2006	New Section	Disapproval.
30 TAC 116.194	Public Notice and Comment	2/1/2006	New Section	Disapproval.
30 TAC 116.196	Renewal of a Plant-Wide Applicability Limit Permit.	2/1/2006	New Section	Disapproval.
30 TAC 116.198	Expiration and Voidance	2/1/2006	New Section	Disapproval.
Subchapter E—Hazardous Air Pollutants: Regulations Governing Constructed and Reconstructed Sources (FCAA, § 112(g), 40 CFR Part 63) [a]				
30 TAC 116.400	Applicability	2/1/2006	Recodification from section 116.180.	No action.
30 TAC 116.402	Exclusions	2/1/2006	Recodification from section 116.181.	No action.
30 TAC 116.404	Application	2/1/2006	Recodification from section 116.182.	No action.
30 TAC 116.406	Public Notice Requirements	2/1/2006	Recodification from section 116.183.	No action.
Subchapter F—Standard Permits				
30 TAC 116.610	Applicability	2/1/2006	Revised paragraphs (a), (a)(1) through (a)(5), (b), and (d) [b].	- Disapproval of paragraph (a) - No action on paragraph (d)
30 TAC 116.617	State Pollution Control Project Standard Permit.	2/1/2006	Replaced former 30 TAC 116.617—Standard Permit for Pollution Control Projects [c].	Disapproval.
Subchapter K—Emergency Orders [d]				
30 TAC 116.1200	Applicability	2/1/2006	Recodification from 30 TAC 116.410.	No action.

[a] Recodification of former Subchapter C. These provisions are not SIP-approved.
[b] 30 TAC 116.610(d) is not SIP-approved.
[c] 30 TAC 116.617 is not SIP-approved.
[d] Recodification of former Subchapter E. These provisions are not SIP-approved.

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

Final action on the submitted Major NSR SIP elements and the Standard Permit is required by August 31, 2010, as provided in the Consent Decree entered on January 21, 2010 in *BCCA Appeal Group* v. *EPA,* Case No. 3:08–cv–01491–N (N.D. Tex). As required by the Consent Decree, EPA published its final actions for the following SIP revisions: (1) Texas Qualified Facilities

Program and its associated General Definitions on April 14, 2010 (*See* 75 FR 19467); and (2) Texas Flexible Permits Program on July 15, 2010 (*See* 75 FR 41311).

TCEQ submitted on July 16, 2010, a proposed SIP revision addressing the PSD SIP requirements. We are acting upon the previous PSD SIP revision submittal of February 1, 2006, and the newly submitted PSD SIP revision in a separate rulemaking. Additionally, EPA acknowledges that TCEQ is developing a proposed rulemaking package to address EPA's concerns with revisions to the New Source Review (NSR) State Implementation Plan (SIP); Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard and the 1-Hour Ozone Standard, NSR Reform, and the PCP Standard Permit. We will, of course, consider any rule changes if and when they are submitted to EPA for review. However, the rules before us today are those of Texas's current 1997 8-Hour Ozone Standard NNSR Program, 1-Hour Ozone Standard NNSR Program, NSR Reform Program, PCP Standard Permit, and we have concluded that these current Programs are not approvable for the reasons set out in this notice.

III. Did we receive public comments on the proposed rulemaking?

In response to our September 23, 2009, proposal, we received comments from the following: Association of Electric Companies of Texas (AECT); Austin Physicians for Social Responsibility (PSR); Baker Botts, L.L.P., on behalf of BCCA Appeal Group (BCCA); Baker Botts, L.L.P., on behalf of Texas Industrial Project (TIP); Bracewell & Guiliani, L.L.P., on behalf of the Electric Reliability Coordinating Council (ERCC); Citizens of Grayson County; Gulf Coast Lignite Coalition (GCLC); Office of the Mayor—City of Houston, Texas (City of Houston); Harris County Public Health and Environmental Services (HCPHES); Sierra Club—Houston Regional Group (Sierra Club); Sierra Club Membership Services (including 2,062 individual comment letters) (SCMS); Texas Chemical Council (TCC); Texas Commission on Environmental Quality (TCEQ); Texas Association Business; Members of the Texas House of Representatives; Texas Association of Business (TAB); Texas Oil and Gas Association (TxOGA); and University of Texas at Austin School of Law—Environmental Clinic (the Clinic) on behalf of Environmental Integrity Project, Environmental Defense Fund, Galveston-Houston Association for Smog Prevention, Public Citizen, Citizens for Environmental Justice, Sierra Club Lone Star Chapter, Community-In-Power and Development Association, KIDS for Clean Air, Clean Air Institute of Texas, Sustainable Energy and Economic Development Coalition, Robertson County: Our Land, Our Lives, Texas Protecting Our Land, Water and Environment, Citizens for a Clean Environment, Multi-County Coalition, and Citizens Opposing Power Plants for Clean Air.

We respond to these comments in our evaluation and review under this final action in section IV below.

IV. What are the grounds for these actions?

This section includes EPA's evaluation of each part of the submitted rules. The evaluation is organized as follows: (1) A discussion of the background of the submitted rules; (2) a summary and response to each comment received on the submitted rule; and (3) the grounds for final action on each rule.

A. The Submitted Minor NSR State BACT Definition SIP Revision

EPA proposed to disapprove this severable definition of BACT in 30 TAC 116.10(3), submitted March 13, 1996, and July 22, 1998, when EPA proposed to disapprove the Texas Qualified Facilities Program (under Docket No. EPA–R06–OAR–2005–TX–0025). *See* 74 FR 48450, at 48463–48464. The submittals on March 13, 1996, and July 22, 1998, include a new regulatory definition for the Texas Clean Air Act's definition of "BACT," defining it as BACT with consideration given to the technical practicability and economical reasonableness of reducing or eliminating emissions.

1. What is the background for the submitted definition of BACT under 30 TAC 116.10(3) as proposed under Docket No. EPA–R06–OAR–2005–TX–0025?

On July 27, 1972, the State of Texas revised its January 1972 permitting rules, then Regulation VI at rule 603.16, to add the Texas Clean Air Act statutory requirement that a proposed new facility and proposed modification utilize BACT, with consideration to the technical practicability and economical reasonableness of reducing or eliminating the emissions from the facility. EPA approved the revised 603.16 into the Texas SIP [2] and that provision is presently codified in the Texas SIP at 30 TAC 116.111(a)(2)(C).

The Texas NSR SIP includes not only the PSD BACT definition [3] but also a requirement for a source to perform a BACT analysis. *See* 30 TAC 116.111(a)(2)(C). EPA relied upon this SIP provision in its 1992 original approval of the Texas PSD SIP as meeting the PSD requirement of 40 CFR 52.21(j). *See* 54 FR 52823, at 52824–52825, and 57 FR 28093, at 28096–28096. Both Texas and EPA interpreted this SIP provision to require either a Minor NSR BACT determination or a Major PSD BACT determination. Since EPA's approval of the Texas PSD SIP in 1992, there has been some confusion about the distinction between a State Minor NSR BACT definition and a PSD Major NSR BACT definition and the requirement that a source must perform the relevant BACT analysis.

TCEQ in 1996 submitted a regulatory definition of the TCAA BACT statutory provision but failed to distinguish the submitted regulatory BACT definition as the Minor NSR BACT definition. *See* the proposed disapproval of the BACT definition in 30 TAC 116.10(3) at 74 FR 48450, at 40453 (footnote 2), 48463–48464, TCEQ's proposed revisions to its Qualified Facilities Program rulemaking, and EPA's June 7, 2010, comment letter on TCEQ's Qualified Facilities Program, for further information.

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[2] The January 1972 Texas NSR rules, as revised in July 1972, require a proposed new facility or modification to utilize "best available control technology, with consideration to the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility." This definition of BACT is from the Texas Clean Air Act. EPA approved this into the Texas NSR SIP possibly in the 1970's and definitely on August 13, 1982 (47 FR 35193). When EPA approved the Texas PSD program SIP revision submittals, including the State's incorporation by reference of the Federal definition of PSD BACT, in 1992, both EPA and Texas interpreted the use of the TCAA BACT definition to be for Minor NSR SIP permitting purposes only. EPA specifically found that the State's TCAA BACT definition did not meet the Federal PSD BACT definition. We required the use of the Federal PSD BACT definition for PSD SIP permitting purposes. *See* the proposal and final approval of the Texas PSD SIP at 54 FR 52823 (December 22, 1989) and 57 FR 28093 (June 24, 1992).

[3] Texas's current PSD SIP incorporates by reference the Federal PSD definition of BACT in 40 CFR 52.21(b)(12). *See* current SIP at 30 TAC 116.160(a). On February 1, 2006, TCEQ submitted a revision that reorganized 30 TAC 116.160 and removed the reference to the BACT definition. On September 23, 2009, EPA proposed to disapprove the 2006 revision to section 116, because of the removal of the reference to the Federal PSD BACT definition. On July 16, 2010, Texas submitted a revision to section 116.160 that reinstated the reference to the PSD BACT definition in 40 CFR 52.21(b)(12). *See* 30 TAC 116.160(c)(1)(A), submitted July 16, 2010. EPA is addressing the 2006 and 2010 revisions to 30 TAC 116.160 in a separate action published in today's **Federal Register.**

2. What is EPA's response to comments on the submitted Minor NSR definition of BACT SIP revision?

Comment 1: TCEQ commented (under Docket No. EPA–R06–OAR–2005–TX–0025) on the proposed disapproval of BACT in the Qualified Facilities proposal that it will consider EPA's comments in connection with its disapproval of the definition of BACT and plans to revise its definition of BACT to correct the deficiencies identified in the proposal.

Response: EPA acknowledges TCEQ's consideration of our comments regarding our disapproval of the definition of BACT as well as TCEQ's plans to revise its definition of BACT to correct the deficiencies identified in our proposal. TCEQ proposed to revise this definition on March 30, 2010. On June 7, 2010, we forwarded comments to TCEQ on this proposed rule. In our comments, we stated that the definition of the TCAA BACT must be revised to indicate more clearly that the definition is for any air contaminant or facility that is not subject to the Federal permitting requirements for PSD. The proposed substantive revisions to the regulatory definition are acceptable. Nonetheless, as we explained in our comment letter, we believe that the TCAA BACT regulatory definition should be given a distinguishable name, *e.g.,* State, Texas, Minor NSR Best Available Control Technology. We recognize that the State must continue to use the term BACT since it is in the TCAA; we believe that TCEQ could add before "BACT" however, Texas, State, or Minor NSR, to clearly distinguish this BACT definition from the Federal PSD BACT definition.

Comment 2: The Clinic commented (under Docket No. EPA–R06–OAR–2005–TX–0025) on the proposed disapproval and agrees that this definition cannot be substituted for the Federal definition of BACT for purposes of PSD. The Clinic further comments that rather than limiting the applicability of the definition of "Texas BACT" to minor sources and modifications, Texas should use a different acronym for its minor NSR technology requirement. The use of dual definitions of BACT within the same program is too confusing, as evidenced by the ongoing application of Texas BACT in the Texas PSD permitting proceedings.

Response: EPA agrees with the Clinic that the TCAA BACT regulatory definition cannot be substituted for the Federal definition of PSD BACT. EPA takes note of the Clinic's comment regarding the dual use of the definition of "Texas BACT" within the same program and ensuing confusion. *See* Response to Comment 1 above for further information.

3. What are the grounds for disapproval of the submitted Minor NSR definition of BACT SIP revision?

EPA is disapproving the submitted definition of BACT under 30 TAC 116.10(3) as proposed under Docket No. EPA–R06–OAR–2005–TX–0025. EPA proposed to disapprove this severable definition of BACT in 30 TAC 116.10(3), submitted March 13, 1996, and July 22, 1998, when EPA proposed to disapprove the submitted Texas SIP revisions for Modification of Existing Qualified Facilities Program and General Definitions (under Docket No. EPA–R06–OAR–2005–TX–0025). *See* 74 FR 48450, at 48463–48464.

EPA received comments from TCEQ and the Clinic regarding the proposed disapproval of this submitted definition as a revision to the Texas NSR SIP. *See* our response to these comments in section IV.A.2 above. The submitted regulatory BACT definition of the TCAA provision at 30 TAC 116.10(3) fails to apply clearly only for minor sources and minor modifications at major stationary sources. *See* the proposed disapproval of the BACT definition in 30 TAC 116.10(3) at 74 FR 48450, at 40453 (footnote 2), 48463–48464, TCEQ Qualified Facilities proposal, and EPA's Qualified Facilities comment letter, for further information. Moreover, we strongly recommend, as suggested in comments from the Clinic, that Texas adopt a prefatory term before its TCAA BACT definition, *e.g.,* State, Texas, or Minor NSR, to avoid any confusion with the term BACT as used by the CAA and the major source PSD program.

B. The Submitted Anti-Backsliding Major NSR SIP Requirements for the 1-Hour Ozone NAAQS

1. What is the background for the submitted anti-backsliding Major NSR SIP requirements for the 1-hour ozone NAAQS?

On July 18, 1997, EPA promulgated a new NAAQS for ozone based upon 8-hour average concentrations. The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38865).[4] On April 30, 2004 (69 FR 23951), we published a final rule that addressed key elements related to implementation of the 1997 8-hour ozone NAAQS including, but not limited to: revocation of the 1-hour NAAQS and how anti-backsliding principles will ensure continued progress toward attainment of the 1997 8-hour ozone NAAQS. We codified the anti-backsliding provisions governing the transition from the revoked 1-hour ozone NAAQS to the 1997 8-hour ozone NAAQS in 40 CFR 51.905(a). The 1-hour ozone major nonattainment NSR SIP requirements indicated that certain 1-hour ozone standard requirements were not part of the list of anti-backsliding requirements provided in 40 CFR 51.905(f).

On December 22, 2006, the DC Circuit vacated the Phase 1 Implementation Rule in its entirety. *South Coast Air Quality Management District, et al.,* v. *EPA,* 472 F.3d 882 (DC Cir. 2006), reh'g denied 489 F.3d 1245 (2007) (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review). EPA requested rehearing and clarification of the ruling and on June 8, 2007, the Court clarified that it was vacating the rule only to the extent that it had upheld petitioners' challenges. Thus, the Court vacated the provisions in 40 CFR 51.905(e) that waived obligations under the revoked 1-hour standard for NSR. The court's ruling, therefore, maintains major nonattainment NSR applicability thresholds and emission offsets pursuant to classifications previously in effect for areas designated nonattainment for the 1-hour ozone NAAQS.

On June 10, 2005 and February 1, 2006, Texas submitted SIP revisions to 30 TAC 116.12 and 30 TAC 116.150 which relate to the transition from the major nonattainment NSR requirements applicable for the 1-hour ozone NAAQS to implementation of the major nonattainment NSR requirements applicable to the 1997 8-hour ozone NAAQS. Texas's revisions at 30 TAC 116.12(18) (Footnote 6 under Table I under the definition of "major modification") and 30 TAC 116.150(d) introductory paragraph, effective as State law on June 15, 2005, provide that for "the Houston-Galveston-Brazoria, Dallas-Fort Worth, and Beaumont-Port Arthur eight hour ozone nonattainment areas, if the United States Environmental Protection Agency promulgates rules requiring new source review permit applications in these areas to be evaluated for nonattainment new source review according to the area's one-hour standard classification," then "each application will be evaluated

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

according to that area's one-hour standard classification" and "* * * the de minimis threshold test (netting) is required for all modifications to existing major sources of VOC or NO_X in that area * * *." The footnote 6 and the introductory paragraph add a new requirement for an affirmative regulatory action by EPA on the reinstatement of the 1-hour ozone NAAQS major nonattainment NSR requirements before the legally applicable major nonattainment NSR requirements under the 1-hour ozone standard will be implemented in the Texas 1-hour ozone nonattainment areas.

The currently approved Texas major nonattainment NSR SIP does not require such an affirmative regulatory action by EPA before the 1-hour ozone major nonattainment NSR requirements come into effect in the Texas 1-hour ozone nonattainment areas. The current SIP states at 30 TAC 116.12(18) (Footnote 1 under Table I) that "Texas nonattainment area designations are specified in 40 Code of Federal Regulations § 81.344." That section includes designations for the one-hour standard as well as the eight-hour standard. Moreover, the submitted revisions to 30 TAC 116.12(18) and 116.150(d) do not comport with the *South Coast* decision as discussed above.

The court opinion maintains the lower applicability thresholds and more stringent offset ratios for a 1-hour ozone nonattainment area whose classification under that standard was higher than its nonattainment classification under the 8-hour standard. In the submitted rule revision, the lower applicability thresholds and more stringent offset ratios for a classified 1-hour ozone nonattainment area would not be required in a Texas 1-hour ozone nonattainment area unless and until EPA promulgated a rulemaking implementing the South Coast decision. Although EPA proposed that the Texas revision relaxes the requirements of the approved SIP and we stated that EPA lacks sufficient information to determine whether this relaxation would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act (*see* 74 FR 48467, at 48473) we have now determined that it is unnecessary to reach this issue because the revision nonetheless fails to comply with the CAA, whereas, the existing approved SIP meets CAA requirements.

2. What is EPA's response to comments on the submitted anti-backsliding Major NSR SIP requirements for the 1-Hour Ozone NAAQS?

Comment 1: TCEQ commented that the anti-backsliding issue associated with the status of the requirements for compliance with the 1-hour ozone NAAQS with the implementation of the 8-hour ozone NAAQS was delayed by litigation that took several years to become final. TCEQ adopted changes to 30 TAC 116.12(18) in June, 2005, prior to the resolution of the litigation. After the *South Coast* decision, EPA subsequently stated it would conduct rulemaking to address the 1-hour ozone NAAQS requirements.[5] TCEQ commits to work with EPA to ensure that the rule is revised to comply with current law.

Response: EPA acknowledges TCEQ's commitment to revise its State rules to implement the Major NSR anti-backsliding requirement. However, the 2007 Meyers Memorandum cited in the comment did not indicate that States should await EPA rulemaking before taking any necessary steps to comply with the *South Coast* decision. Rather, the memorandum encouraged the Regions to "have States comply with the court decision as quickly as possible." The memorandum's reference to "rulemaking to conform our NSR regulations to the court's decision" was not intended to suggest that States could simply ignore the court's decision until EPA had updated its regulations to reflect the vacatur.

Comment 2: The Clinic commented that Texas rules limit enforcement of the 1-hour ozone NAAQS in violation of *South Coast Air Quality Management District* v. *EPA.* As a result of this decision, States must immediately comply with the formerly revoked 1-hour ozone requirements, including NNSR applicability thresholds and emission offset requirements. Texas rules include two provisions that require EPA to conduct rulemaking before TCEQ can begin enforcing the one-hour standard classification requirements for NAAQS. *See* 30 TAC 116.12(18), Table I, and 116.150(d).

Response: See response to Comment 1.

[5] *See* New Source Review (NSR) Aspects of the Decision of the U.S. Court of Appeals for the District of Columbia Circuit on the Phase I Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standards (NAAQS), from Robert J. Meyers, Principal Deputy Assistant Administrator, to EPA Regional Administrators, dated October 3, 2007. This memorandum is in the docket for this action numbered EPA–R06–OAR–2006–0133–0007 and is available at: *http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064801987ff.*

Comment 3: BCCA, TIP, TCC, commented that the Texas rules regarding the 1-hour/8-hour transition are neither inconsistent with the CAA, nor the court's decision in *South Coast.* With its remand to EPA following vacatur of parts of the Phase 1 transition rule, the *South Coast* court did not offer specific direction concerning implementation of the backsliding requirements as they apply to NSR. However, the court in its Opinion on Petitions for Rehearing "urged" EPA "to act promptly in promulgating a revised rule that effectuates the statutory mandate by implementing the eight-hour standard * * *." *South Coast Air Quality Mgmt. Dist.* v. *EPA,* 489 F.3d 1245, 1248–49 (DC Cir. 2007).

The commenters note that consistent with the court's direction in *South Coast,* the language of CAA § 172(e) suggests that EPA must take definite action to implement anti-backsliding requirements:

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

42 U.S.C. 7502(e) (emphasis added). Commenters claim that an October 2007 memorandum from EPA Deputy Administrator Robert Meyers stated that EPA intends to undertake rulemaking to conform the Agency's NSR regulations to the *South Coast* decision and yet EPA has not yet proposed such a rule. The footnote 6 and introductory paragraph cited in EPA's proposed disapproval are consistent with CAA § 172(e) and not a basis for disapproval of the proposed SIP revision. TCC stated that it is reasonable for TCEQ to understand that some EPA action is necessary before it proceeds with appropriate rule changes to reinstate the major NNSR applicability thresholds and emission offset requirements, and this is not a rational basis to justify disapproving the State's rules.

Response: EPA disagrees with the claim that States are under no obligation to take steps to comply with the *South Coast* decision until EPA updates its regulations. Neither the court's vacatur of the provision that waived States' obligation to include in their SIPs NSR provisions meeting the requirements for the 1-hour standard nor section 172(e) mandate that EPA promulgate a rule before such a requirement applies.

As EPA provided in the preamble to the Phase 1 Implementation Rule and as

recognized by the Court in *South Coast,* CAA § 172(e) does not apply because the 1997 8-hour NAAQS was a strengthening, rather than a relaxation, of the 1-hour NAAQS. *See* 69 FR 23951, at 23972 (April 30, 2004); 489 F.3d at 1248. However, in the preamble to the Phase I Implementation Rule, we cited to section 172(e) of the CAA and stated that "if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent." *See* 69 FR 23951, at 23972 (April 30, 2004). Thus, even if, as suggested upon revocation of a standard in the absence of an EPA rule retaining them pursuant to section 172(e), that would hold true only where section 172(e) directly applied, *i.e.,* where EPA had promulgated a less stringent NAAQS. Regardless, EPA disagrees with that interpretation of section 172(e). Rather, EPA interprets the CAA as retaining requirements applicable to any area, but allowing EPA through rulemaking to develop alternatives approaches or processes that would apply, so long as such alternatives ensure that the requirements are no less stringent than what applies under the Act. Thus, in the case, once the Court vacated EPA determination under the principles of section 172(e) that NSR as it applied for the 1-hour NAAQS should no longer apply, that requirement, as established under the CAA, once again applied. We do not believe that the interpretation suggested by the commenters is a reasonable interpretation as it would allow areas to discontinue implementing measures mandated by Congress with respect to a revoked standard in the absence of EPA rulemaking specifically retaining such obligations. Such a result would be counter to the health-protective goals of the CAA and inconsistent with the *South Coast* decision, which upheld EPA's authority to revoke standards but only where adequate anti-backsliding requirements were in place.

Nor do we believe that the language cited by the commenter from the *South Coast* decision supports their claim that rulemaking is necessary before the statutory 1-hour NSR requirement applies. The quoted language from the court's opinion immediately follows a sentence that pertains to the classification issue that was decided by the Court. Specifically, the Court notes that some parties objected to a partial vacatur of the rule because it would "inequitably exempt Subpart 1 areas from regulation while the remand is pending." *See* 489 F.3d at 1248. In other words, certain States with areas subject to subpart 2 claimed it would be inequitable for such areas to remain subject to planning obligations while subpart 1 areas would be "exempt." The Court responded by saying that a complete vacatur "would only serve to stall progress where it is most needed" and then urges EPA "to act promptly in promulgating a revised rule." *See* 489 F.3d at 1248. Thus, this portion of the opinion expressly addressed the need for EPA to promulgate a rule quickly so that areas that had been classified as subpart 1 would no longer be "exempt" from planning requirements for the 1997 ozone NAAQS, which requirements are linked to whether an area is subject only to subpart 1 or also subpart 2 and to an area's classification under subpart 2.

For these reasons, the effect of the portion of the court's ruling that vacated the waiver of the 1-hour NSR obligation is to restore the statutory obligation for areas that were nonattainment for the 1-hour standard at the time of designation for the 1997 8-hour standard to include in their SIPs major nonattainment NSR applicability thresholds and emission offsets pursuant to the area's classifications for the 1-hour ozone NAAQS at the time of designation for the 1997 ozone NAAQS.

In addition, the Court specifically concluded that withdrawing 1-hour NSR from a SIP "would constitute impermissible backsliding." *See* 472 F.3d at 900. Thus, it would be inconsistent with the *South Coast* decision for Texas to withdraw the 1-hour NSR applicability thresholds and emission offsets from its SIP. Texas's proposed addition of SIP language conditioning implementation of the 1-hour NSR thresholds and offsets on an affirmative regulatory action by EPA would be equivalent, in terms of human health impact, to a temporary withdrawal of those requirements from the SIP, and therefore would be inconsistent with the Court's decision.

Finally, we note that the 2007 Meyers Memorandum cited in the comment did not indicate that States should await EPA rulemaking before taking any necessary steps to comply with the *South Coast* decision. Rather, the memorandum encouraged the Regions to "have States comply with the court decision as quickly as possible." The memorandum's reference to "rulemaking to conform our NSR regulations to the court's decision" was not intended to suggest that States could simply ignore the court's decision until EPA had updated its regulations to reflect the vacatur. EPA proposed to remove the vacated provisions from its regulations on January 16, 2009 (74 FR 2936).

3. What are the grounds for disapproval of the submitted anti-backsliding Major NSR SIP requirements for the 1–hour ozone NAAQS?

EPA is disapproving the submitted Anti-Backsliding Major NSR SIP revisions for the 1-hour ozone NAAQS. This includes the SIP revisions submitted June 10, 2005, and February 1, 2006, with changes to 30 TAC 116.12 and 30 TAC 116.150 which relate to the transition from the major nonattainment NSR requirements applicable for the 1-hour ozone NAAQS to implementation of the major nonattainment NSR requirements applicable to the 1997 8-hour ozone NAAQS. *See* section B.1, first three paragraphs, for the information regarding EPA's promulgation of the new 1997 8-hour ozone NAAQS, EPA's Phase 1 Implementation Rule, the court history, and the description of the submitted SIP revisions.

The currently approved Texas major nonattainment NSR SIP does not require such an affirmative regulatory action by EPA before the 1-hour ozone major nonattainment NSR requirements can be implemented in the Texas 1-hour ozone nonattainment areas. However, the submitted revisions to 30 TAC 116.12(18) and 116.150(d) do not comply with the CAA as interpreted by the Court in the *South Coast* decision because the opinion does not require further action by EPA with respect to NSR, as discussed above.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.B.2 above. We are disapproving the revisions as not meeting part D of the Act as interpreted by the Court in *South Coast* for the Major NNSR SIP requirements for the 1-hour ozone NAAQS. *See* the proposal at 74 FR 48467, at 48472–48473, our background for these submitted SIP revisions in section IV.B.1 above, and our response to comments on these submitted SIP revisions in section IV.B.2 above for additional information.

C. The Submitted Major Nonattainment NSR SIP Requirements for the 1997 8–Hour Ozone NAAQS

1. What is the background for the submitted Major Nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS?

EPA interprets its Major NSR SIP rules to require that an applicability

determination regarding whether Major NSR applies for a pollutant should be based upon the designation of the area in which the source is located on the *date of issuance* of the Major NSR permit. EPA also interprets the Act and its rules that if an area is designated nonattainment on the date of issuance of a Major NSR permit, then the Major NSR permit must be a NNSR permit, not a PSD permit. If the area is designated attainment/unclassifiable, then under EPA's interpretation of the Act and its rules, the Major NSR permit must be a PSD permit on the date of issuance. *See* the following: sections 160, 165, 172(c)(5) and 173 of the Act; 40 CFR 51.165(a)(2)(i) and 51.166(a)(7)(i). EPA's interpretation of these statutory and regulatory requirements is guided by the memorandum issued March 11, 1991, and titled "New Source Review (NSR) Program Transitional Guidance," issued March 11, 1991, by John S. Seitz, Director, Office of Air Quality Planning and Standard.[6]

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

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

(1) For all applications for facilities that will be located in any area designated as nonattainment for ozone under 42 United States Code (U.S.C.), 7407 *et seq.* on the effective date of this section, the issuance date of the authorization; and

(2) For all applications for facilities that will be located in counties for which nonattainment designation for ozone under 42 U.S.C. 7407 *et seq.* becomes effective after the effective date of this section, the date the application is administratively complete.[7]

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

Second, to the extent that the date of application completeness is used in certain instances to establish the applicability date for Nonattainment NSR requirements, such use is contrary to EPA's interpretation of the governing EPA regulations, as discussed above.

Thus, based upon the above and in the absence of any explanation by the State, EPA proposed to disapprove the SIP revision submittals for not meeting the Major NNSR SIP requirements for the 1997 8-hour ozone standard. *See* the proposal at 74 FR 48467, at 48473–48474, for additional information.

2. What is EPA's response to comments on the submitted Major Nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS?

Comment 1: TCEQ commented that in 2006 it had revised the rule to clarify and implement EPA interpretation that the applicability date is the date of permit issuance, as well as provide for the possibility of new nonattainment areas. The 2006 submittal also added a new bifurcated structure to the rule for when applicability is based upon date of submittal of a complete application and when applicability is based upon the date of permit issuance. TCEQ further agrees that this new bifurcated structure is unclear. TCEQ commits to work with EPA to comply with current rule and practice.

Response: EPA acknowledges TCEQ's commitment to revise the rule to clarify and implement EPA's interpretation of the Act that the applicability date is the date of permit issuance for all nonattainment areas, including applicability in newly designated nonattainment areas.

Comment 2: TCEQ, the Clinic, BCC, TIP, and TCC commented on the definition of "facility" as used in its submitted Major Nonattainment NSR SIP Requirements for the 1997 8-hour ozone NAAQS. They also commented on this definition under the evaluation of the Submitted Non-PAL Aspects of the Major NSR SIP Requirements in section IV.

Response: See section IV.E.2, Comments 1 through 3, for the comments and EPA's response on the definition of facility.

Comment 3: The Clinic commented that TCEQ's rules fail to require all NSR applicability determinations to be based on the applicable attainment status of an area on the date of permit issuance, as required under the CAA. Texas rule authorize certain sources to construct or modify in a nonattainment area to comply with PSD requirements rather than NNSR requirements if the facility's permit application is administratively complete prior to the area's designation to nonattainment. *See* 30 TAC 116.150(a). While the rules are vague as to what constitutes the "effective date of this section," 30 TAC 116.150(a)(2) clearly is not approvable because it authorizes facilities to base applicability determination on the area's attainment status as of the date their applications are administratively complete.

Response: EPA agrees with this comment.

Comment 4: BCCA, TIP, TCC, commented that the applicability cutoff established in TCEQ rules is not inconsistent with the CAA or EPA rules. While it may be inconsistent with EPA's interpretation of that rule language, the use of application completeness as an applicability date is not inconsistent with Part 51 itself. As a result, the applicability cutoff dates, established in 30 TAC 116.150(a), are not appropriate grounds for disapproval of the proposed SIP revision. EPA concerns regarding applicability dates are properly addressed through comments on individual permits, and not through a disapproval of the SIP revision. TCC further commented that TCEQ rules state that for facilities located in areas that are designated nonattainment areas after the effective date of TCEQ rules, the NNSR requirements apply the day the application is administratively complete. The day the application is determined to be administratively complete occurs prior to the issuance date of the permit; therefore, the State's rules are more stringent than the Federal rules in this regard.

Response: EPA disagrees with this comment. The applicability cutoff established in the submitted revision is inconsistent with the CAA and EPA rules. EPA interprets EPA's NSR SIP

[6] You can access this document at: *http://www.epa.gov/ttn/nsr/gen/nstrans.pdf.*

[7] It is our understanding of State law, that a "facility" can be an "emissions unit," *i.e.,* any part of a stationary source that emits or may have the potential to emit any air contaminant. A "facility" also can be a piece of equipment, which is smaller than an "emissions unit." A "facility" can be a "major stationary source" as defined by Federal law. A "facility" under State law can be more than one "major stationary source." It can include every emissions point on a company site, without limiting these emissions points to only those belonging to the same industrial grouping (SIC code).

rules to require that an applicability determination regarding whether Major NSR applies for a pollutant should be based upon the attainment or nonattainment designation of the area in which the source is located on the *date of issuance* of the Major NSR permit. EPA also interprets its rules that if an area is designated nonattainment on the date of issuance of a Major NSR permit, then the Major NSR permit must be a NNSR permit, not a PSD permit. If the area is designated attainment/unclassifiable, then under EPA's interpretation of the Act and its rules, the Major NSR permit must be a PSD permit on the date of issuance. *See* the following: sections 160, 165, 172(c)(5) and 173 of the Act; 40 CFR 51.165(a)(2)(i) and 51.166(a)(7)(i). EPA's interpretation of these statutory and regulatory requirements is guided by the memorandum issued March 11, 1991, and titled "New Source Review (NSR) Program Transitional Guidance," issued March 11, 1991, by John S. Seitz, Director, Office of Air Quality Planning and Standard. *See* section IV.C.1 above for further information. The submitted revision provides the regulatory framework for administering individual permits, thus it is necessary to ensure it is consistent with the equivalent Federal requirements. The submitted revision applies the date of administrative completeness of a permit application, not the date of permit issuance, where setting the date for determination of NSR applicability after June 15, 2004 (the effective date of ozone nonattainment designations). The submitted revision also appears to apply the date of permit issuance in existing nonattainment areas designated nonattainment for ozone before and up through February 1, 2006. This regulatory structure creates ambiguity and lacks clarity. Thus, the proposed revision lacks clarity on its face and is therefore not enforceable.

3. What are the grounds for disapproval of the submitted Major Nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS?

EPA is disapproving the submitted Major Nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS. An applicability determination for a Major Nonattainment NSR (NNSR) permit based upon the date of administrative completeness, rather than date of issuance, would allow more sources to avoid the Major NSR requirements where there is a nonattainment designation between the date of administrative completeness and the date of issuance, and thus this submitted revision will reduce the number of sources subject to Major NNSR requirements. The submitted revised rule does not apply the date of permit issuance in all cases and therefore violates the Act, as discussed previously.

The submitted revised 2006 rule by introducing a bifurcated structure creates vagueness rather than clarity. The effective date of this new bifurcated structure is February 1, 2006. Thus, the proposed revision lacks clarity on its face and is therefore not enforceable.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.C.2 above. *See* the proposal at 74 FR 48467, at 48473–48474, our background for these submitted SIP revisions in section IV.C.1 above, and our response to comments on these submitted SIP revisions in section IV.C.2 above for additional information.

D. The Submitted Major NSR Reform SIP Revision for Major NSR With PAL Provisions

1. What is the background for the submitted Major NSR reform SIP revision for Major NSR with PAL provisions?

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

We proposed disapproval of the PAL Provisions because of the following:

- The submittal lacks a provision which limits applicability of a PAL only to an *existing* major stationary source, and which precludes applicability of a PAL to a new major stationary source, as required under 40 CFR 51.165(f)(1)(i) and 40 CFR 51.166(w)(1)(i), which limits applicability of a PAL to an existing major stationary source. In the absence of such limitation, this submission would allow a PAL to be authorized for the construction of a new major stationary source. In EPA's November 2002 TSD for the revised Major NSR Regulations, we respond on pages I–7–27 and 28 that actuals PALs are available only for existing major stationary sources, because actuals PALs are based on a source's actual emissions.[8] Without at least 2 years of operating history, a source has not established actual emissions upon which to base an actuals PAL. However, for individual emissions units with less than two years of operation, allowable emissions would be considered as actual emissions. Therefore, an actuals PAL can be obtained only for an existing major stationary source even if not all emissions units have at least 2 years of emissions data. Moreover, the development of an alternative to provide new major stationary sources with the option of obtaining a PAL based on allowable emissions was foreclosed by the Court in *New York* v. *EPA,* 413 F.3d 3 at 38–40 (DC Cir. 2005) ("New York I") (holding that the Act since 1977 requires a comparison of existing actual emissions before the change and projected actual (or potential emissions) after the change in question is required).
- The submittal has no provisions that relate to PAL re-openings, as required by 40 CFR 51.165(f)(8)(ii), (ii)(A) through (C), and 51.166(w)(8)(ii) and (ii)(a).
- There is no mandate that failure to use a monitoring system that meets the requirements of this section renders the PAL invalid, as required by 40 CFR 51.165(f)(12)(i)(D) and 51.166(w)(12)(i)(d).
- The Texas submittal at 30 TAC 116.186 provides for an emissions cap that may not account for all of the emissions of a pollutant at the major stationary source. Texas requires the owner or operator to submit a list of all facilities to be included in the PAL, such that not all of the facilities at the entire major stationary source may be specifically required to be included in the PAL. *See* 30 TAC 116.182(1). However, the Federal rules require the owner or operator to submit a list of all emissions units at the source. *See* 40 CFR 51.166(f)(3)(i) and 40 CFR 51.166(w)(3)(i). The Texas submittal is unclear as to whether the PAL would apply to all of the emission units at the *entire* major stationary source and

[8] The TSD for the 2002 NSR rule making is in the docket for this action as document no. EPA–R06–OAR–2006–0133–0010. You can access this document at: *http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a2b968.*

therefore appears to be less stringent than the Federal rules. In the absence of any demonstration from the State, EPA proposed to disapprove 30 TAC 116.186 and 30 TAC 116.182(1) as not meeting the revised Major NSR SIP requirements.

• Submitted 30 TAC 116.194 requires that an applicant for a PAL permit must provide for public notice on the draft PAL permit in accordance with 30 TAC Chapter 39—Public Notice—for all initial applications, amendments, and renewals or a PAL Permit.[9] Although this submitted rule relates to the public participation requirements of the PAL program, it is is not severable from the PAL program. Because we proposed to disapprove the PAL program, we likewise proposed to disapprove 30 TAC 116.194.

• The Federal definition of the "baseline actual emissions" provides that these emissions must be calculated in terms of "the *average* rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period." *See* 40 CFR 51.165(a)(1)(xxxv)(A), (B), (D) and (E) and 51.166(b)(47)(i), (ii), (iv), and (v). Emphasis added. Texas's submitted definition of the term "baseline actual emissions" found at 30 TAC 116.12(3)(A), (B), (D), and (E) differs from the Federal definition by providing that the baseline shall be calculated as "the rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period." The submitted definition omits reference to the "average rate." The definition differs from the Federal SIP definition but the State failed to provide a demonstration showing how the different definition is at least as stringent as the Federal definition. Therefore, EPA proposed to disapprove the different definition of "baseline actual emissions" found at 30 TAC 116.12(3) as not meeting the revised Major NSR SIP requirements. On the same grounds for lacking a demonstration, EPA proposed to disapprove 30 TAC 116.182(2) that refers to calculations of the baseline actual emissions for a PAL, as not meeting the revised Major NSR SIP requirements.

• The State also failed to include the following specific monitoring definitions: "Continuous emissions monitoring system (CEMS)" as defined in 40 CFR 51.165(a)(1)(xxxi) and 51.166(b)(43); "Continuous emissions rate monitoring system (CERMS)" as defined in 40 CFR 51.165(a)(1)(xxxiv) and 51.166(b)(46); "Continuous parameter monitoring system (CPMS)" as defined in 40 CFR 51.165(a)(1)(xxxiii) and 51.166(b)(45); and "Predictive emissions monitoring system (PEMS)" as defined in 40 CFR 51.165(a)(1)(xxxii) and 51.166(b)(44). All of these definitions concerning the monitoring systems in the revised Major NSR SIP requirements are essential for the enforceability of and providing the means for determining compliance with a PALs program. Therefore, we proposed to disapprove the State's lack of these four monitoring definitions as not meeting the revised Major NSR SIP requirements. Additionally, where, as here, a State has made a SIP revision that does not contain definitions that are required in the revised Major NSR SIP program, EPA may approve such a revision only if the State specifically demonstrates that, despite the absence of the required definitions, the submitted revision is more stringent, or at least as stringent, in all respects as the Federal program. *See* 40 CFR 51.165(a)(1) (non-attainment SIP approval criteria); 51.166(b) (PSD SIP definition approval criteria). Texas did not provide such a demonstration. Therefore, EPA proposed to disapprove the lack of these definitions as not meeting the revised Major NSR SIP requirements.

None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for PALs is severable from each other. Therefore, we proposed to disapprove the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations. *See* the proposal at 74 FR 48467, at 48474–48475, for additional information.

2. What is EPA's response to comments on the submitted Major NSR Reform SIP Revision for Major NSR With PAL provisions?

Comment 1: TCEQ commented that it does not use a rate that differs from the Federal NSR requirement relating to baseline actual emissions. TCEQ definition of "actual emissions" includes the modifier "average," and "actual emissions" are included in the definition of "baseline actual emissions" rate. In practice, TCEQ contends that a reading of the entire definition, including parts (a)–(d), results in an average emission rate being used to establish a baseline actual emission rate. This is because to determine an actual emission rate in tons per year from a consecutive 24-month period requires averaging the emissions over 24 months to obtain an annual emission rate (an average annual emission rate).

TCEQ is willing to work with EPA to address any changes necessary to clarify the definition, and specifically reference that a baseline actual emission rate is an average emission rate, in tons per year, of a Federally regulated new source review pollutant.

Response: We appreciate the State's willingness to work with EPA to address any changes necessary to clarify the definition, and specifically reference that a baseline actual emission rate is an average emission rate, in tons per year, of a NSR regulated pollutant, but disagree with TCEQ's comment. We acknowledge that the SIP-approved definition of "actual emissions" at 30 TAC 116.12(1) is based upon average emissions but the lack of a specific provision in the definition of "baseline actual emissions" to require such emissions to be calculated as average emissions can be interpreted to be less stringent than the Federal minimum requirements because readers can interpret "the" emissions rate to be the highest rate instead of an average rate. It does not necessarily follow that the reading of the entire definition and the requirement to determine an actual emission rate in tons per year from a consecutive 24-month period to obtain an annual emission rate would result in an average emission rate.

Comment 2: BCCA and TIP commented that the substance of EPA's concern appears to be that the Texas rules are missing the word "average." The missing term is not grounds for disapproval of the Texas definition of "baseline actual emissions." The omission of the term "average" from this phrase in the 30 TAC 116.12(3) definition does not render the definition invalid or inconsistent with the

[9] "The submittals do not meet the following public participation provisions for PALs: 1) For PALs for existing major stationary sources, there is no provision that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). 2) For PALs for existing major stationary sources, there is no requirement that the State address all material comments before taking final action on the permit, consistent with 40 CFR 51.165(f)(5) and 51.166(w)(5). 3) The applicability provision in section 39.403 does not include PALs, despite the cross-reference to Chapter 39 in Section 116.194." *See* 73 FR 72001 (November 26, 2008) for more information on Texas's public participation rules and their relationship to PALs. The November 2008 proposal addressed the public participation provisions in 30 TAC Chapter 39, but did not specifically propose action on 30 TAC 116.194.

equivalent provision in 40 CFR Part 51. EPA cites a distinction without a substantive difference, as application of the two definitions will reach the same conclusion with regard to the tons per year ("tpy") emission rate over the 24-month baseline period. The Texas definition of "baseline actual emissions" in the proposed SIP revision is equivalent to the Federal definition in this regard and should be approved.

Response: EPA disagrees with this comment. *See* the response to comment 1 above.

Comment 3: TCEQ commented on EPA's statements that TCEQ's rules do not include the following PAL requirements:

- Provisions for PAL re-openings;
- Requirements concerning the use of monitoring systems (and associated definitions);
- A provision which limits applicability of a PAL only to an existing major stationary source;
- A provision that requires all facilities at a major source, emitting a PAL pollutant be included in the PAL;
- A provision that a PAL include every emissions point at a site, without limiting these emissions points to only those belonging to the same industrial grouping (SIC) code; and
- Notwithstanding the "lack of explicit limitation," *i.e.,* defining facility to equal emissions unit; that is how TCEQ applies the rule.

TCEQ will address these items in a future rulemaking.

Response: We appreciate the State's willingness to work with EPA to address any changes necessary to clarify these concerns relating to PAL re-openings; requirements concerning the use of monitoring systems (and associated definitions); a provision which limits applicability of a PAL only to an existing major stationary source; the lack of regulatory provisions relating to emissions to be included in a proposed PAL, the lack of provisions to require that all facilities at a major source, emitting a pollutant for which a PAL is being requested, be included in the PAL; and the concern that PAL can include every emissions point at a site, without limiting these emissions points to only those belonging to the same industrial grouping (SIC) code. However, our evaluation is based on the submitted rule currently before us.

Comment 4: The Clinic comments that Texas illegally allows PALs for new sources based upon allowable emissions. Federal regulations allow an agency to approve a PAL for "any existing major stationary source." *See* 40 CFR 51.166(f)(1)(i). PALs are intended to serve as thresholds for determining when emission increases trigger NNSR and PSD permitting review. As the DC Circuit found in *New York* v. *EPA,* "Congress clearly intended to apply NSR to changes that increase actual emissions. *New York* v. *EPA,* 413 F.3d 3, 38–40 (DC Cir. 2005.) Because new sources do not have past actual emissions, they cannot be subject to a PAL. 67 FR 80186, 80285 (December 31, 2002). The submitted Texas PAL rules do not limit their applicability to existing major sources.

Response: EPA agrees with this comment. The Federal PAL regulations provide that "[t]he reviewing authority may approve the use of an actuals PAL *for any existing major stationary source* * * *." *See* 40 CFR 51.165(f)(1) and 51.166(w)(1). Emphasis added. *See* the discussion in the proposal at 74 FR 48467, at 48474, and section IV.D.1 above, for further information.

Comment 5: Regarding limiting issuance of PAL permits only to existing major stationary sources, BCCA, TIP, and TCC comment that the absence of a reference to "existing" facilities is not grounds for disapproval of the Texas PAL rules. Even absent a reference to existing facilities, the Texas PAL rules are substantively similar to and closely track the Federal PAL regulations, as TCEQ explained in adopting the Texas PAL program.[10] The Texas PAL rules' applicability provisions are consistent with the Federal PAL program in 40 CFR Part 51, and should be approved as part of the Texas SIP on that basis. Moreover, the Federal scheme contemplates that "new" units may be included when calculating the baseline actual emissions for a PAL.[11] The preamble goes on to provide, "For any emission unit * * * that is constructed after the 24-month period, emissions equal to its PTE must be added to the PAL level."[12] Additionally, EPA issued PALs before NSR reform and these PALs showed a degree of flexibility tailored to the specific sites. For example, in its flexible permit pilot study, EPA examined a hybrid PAL issued to the Saturn plant in Spring Hill, Tennessee. This permit consisted of PSD permit for a major expansion with permitted emissions based on projected future actual emissions in combination with a PSD permit for existing emissions units with allowable emissions based on current actual emissions at the existing emissions units. According to EPA, that plant's hybrid PAL permit enabled Saturn to add and modify new lines "in a timely manner, while ensuring that best available pollution control technologies are installed and that air emissions remain under approved limits." Texas's PAL provisions are consistent with the Federal PAL provisions, and so should be approved. EPA concerns regarding TCEQ's implementation of the Texas rules are properly addressed through comments on individual permits, and not through a disapproval of the SIP revision.

Response: EPA disagrees that Texas's rules are consistent with the Federal PAL provisions, and we find the absence to a reference to "existing" major stationary sources to be grounds for disapproval. The Federal regulations generally adhere to the basic tenet that the PAL level is based on actual, historical operations. Such information is absent for new major stationary sources, and thus, EPA chose not to allow PALs for new major stationary sources. The commenters' reference to a hybrid PAL issued to the Saturn plant in Spring Hill, Tennessee, is not relevant to the approvability of the Texas's rules. This facility was permitted under a flexible permit pilot study, not under the provisions under 40 CFR 51.165(f) and 51.166(w), which specify the minimum requirements for an approvable State PAL SIP Program. Moreover, TCEQ provided no demonstration that its submitted program is at least as stringent as the Federal minimum PAL SIP Program requirements despite its broader applicability. EPA's concerns with the submitted PAL Program revisions are a result of its evaluation of these revisions. EPA disapproval is due to programmatic deficiencies, not problems associated with individual permits. Moreover, implementation by the State of its State PAL program is outside the scope of this rulemaking action.

Comment 6: The Clinic comments that Texas's rules fail to include adequate reopening provisions. Federal rules allow a permitting authority to re-open a PAL permit to correct errors in calculating a PAL or to reduce the PAL based on new Federal or State requirements or changing NAAQS levels or a change in attainment status. *See* 40 CFR 51.165(f)(8). The Texas rules do not provide for such reopening and are less stringent than Federal regulations.

Response: EPA agrees with this comment. The Federal rules require PAL re-openings as provided under 40 CFR 51.165(f)(8)(ii)) and 51.166(w)(8)(ii). The State did not provide any demonstration, as required for a customized Major NSR SIP revision submittal, showing how its submitted program is at least as

[10] *See* 31 Tex. Reg. 516, 527 & 528 (Jan. 27, 2006).

[11] 67 FR 80,186, at 80,208 (Dec. 31, 2002).

[12] *Id.*

stringent as the Federal PAL SIP Program requirements.

Comment 7: Regarding PAL re-openings, BCCA, TIP, TCC, and TxOGA comment that the current provisions of 30 TAC 116.192 regarding amendments and alterations of PALs provide adequate safeguards to ensure that appropriate procedural requirements are followed, both to increase a PAL through an amendment and to decrease a PAL through a permit alteration. *See, e.g.,* 30 TAC 116.190(b), requiring the decrease of a PAL for any emissions reductions used as offsets. The absence of rule language using the specific term "reopening" does not prevent TCEQ from implementing and enforcing the program in a manner consistent with Part 51 and is not an appropriate basis for disapproval of the SIP revision. The Texas PAL rules should be approved as a revision to the Texas SIP.

Response: EPA disagrees with this comment. The provisions in 30 TAC 116.192 relate to amendments and alterations. The Federal rules provide for PAL re-openings for other causes which include the following: correction of typographical/calculation errors in setting the PAL; reduction of the PAL to create creditable emission reductions for use as offsets; reductions to reflect newly applicable Federal requirements (for example, NSPS) with compliance dates after the PAL; PAL reduction consistent with any other requirement, that is enforceable as a practical matter, and that the State may impose on the major stationary source under the SIP; and PAL reduction if the reviewing authority determines that a reduction is necessary to avoid causing or contributing to a NAAQS or PSD increment violation, or an adverse impact on an air quality related value that has been identified for a Federal Class I area by a Federal Land Manager for which information is available to the general public. *See* 40 CFR 51.165(f)(4)(i)(A) and (f)(6)(i), and 51.166(w)(4)(i)(*a*) and (w)(6)(i). Texas has submitted no demonstration, as required for a customized Major NSR SIP revision submittal, that the lack of provisions for PAL re-openings is at least as stringent as the Federal PAL Program SIP requirements.

Comment 8: The Clinic comments that Texas illegally allows for "partial PALs." Federal rules require that all units at a source be subject to the PAL cap. *See* 40 CFR 52.21(aa)(6)(i)–(ii). Texas rules do not require PALs to include all units at the source that emit the PAL pollutant. *See* 30 TAC 116.182(1). EPA stated in its proposal that inclusion of all units at the source that emit the PAL pollutant is an "essential feature of the Federal PAL." Texas failure to require such provision justifies disapproval of the Texas PAL rules.

Response: The 2002 final rules require States to include PALs as a minimum program element in the SIP-approved major NSR program. The minimum Federal requirement for an approvable PAL regulations must include all emissions units at a major stationary source that emit the PAL pollutant as provided under 40 CFR 51.165(f)(6)(i) and 51.166(w)(6)(i). We reviewed the approvability of the Texas submitted program against these criteria, and determined, *inter alia,* that the submitted program does not meet these minimum program elements.

EPA has not taken a position on whether a State could include a "partial PAL" program, separate and apart from a PAL program that meets the Federal minimum program requirements, as an element in its major or minor NSR program. Nonetheless, the State did not submit its PAL Program with a request to have it reviewed by EPA on a case-by-case basis for approvability as a program, separate and apart from the Federal source-wide PAL program. Nor did it submit it for approval as a Minor NSR SIP revision. TCEQ did not provide any demonstration, as required for a customized Major NSR SIP revision submittal, showing how the allowing of an emission cap that does not include all emissions units at the major stationary source that emit the PAL pollutant is at least as stringent as the Federal PAL Program SIP requirements, nor does the record show whether Texas's submission will interfere with any applicable requirement concerning attainment and reasonable further progress or any other CAA requirement.

Comment 9: Concerning the lack of provision that a PAL include all emissions units at the major stationary source that emit the PAL pollutant, BCCA, TIP, TCC, and TxOGA commented that EPA's interpretation of the Texas PAL rules, which are consistent with the Federal PAL, is not grounds for disapproval of the SIP revision. The Texas PAL rules are substantively similar to and closely track the Federal PAL regulations, as TCEQ explained in adopting the Texas PAL program. EPA concerns regarding TCEQ's implementation of the Texas rules are properly addressed through comments on individual permits and not through a disapproval of the SIP revision. The Texas rules require that applicants for a PAL specify the facilities and pollutants to be covered by the PAL. Specifically, an applicant must detail "[A] list of all facilities, including their registration or permit number to be included in the PAL * * *." *See* 30 TAC 116.182. This requirement closely tracks the Federal provisions. Moreover, logic dictates, and the Federal rules recognize, that not every facility emits every regulated pollutant. Under the Federal rules "[e]ach PAL shall regulate emissions of only one pollutant." *See* 40 CFR 52.21(aa)(4)(e). Additionally, EPA has recognized that States may implement PAL programs in a more limited manner. In its 1996 proposal for the PAL concept, EPA noted "States may choose * * * to adopt the PAL approach on a limited basis. For example, States may choose to adopt the PAL approach only in attainment/unclassifiable areas, or only in nonattainment areas, for *specified source categories,* or only for certain pollutants in these areas." *See* 61 FR 38250, at 38265 (July 23, 1996) (emphasis added). The Texas PAL provisions track the Federal regulations, and so should be approved.

Response: EPA disagrees with this comment. The Federal rules at 40 CFR 51.165(f)(4)(i)(A) and (f)(6)(i), and 51.166(w)(4)(i)(a) and (w)(6)(i) require a PAL to include each emissions unit at a major stationary source that emits the PAL pollutant. The Federal rules do not require a PAL to include an emissions unit that does not emit, or has the potential to emit, the relevant PAL pollutant. In 1996, EPA proposed to allow States to pick and choose from the menu of reform options. In 2002, we rejected this proposed approach in favor of making all the reform options minimum program elements. *See* 67 FR 80185, at 80241, December 31, 2002. Accordingly, our final rule requires States to adopt the Federal PAL provisions as a minimum program element, or to demonstrate that an alternative program is equivalent or more stringent in effect. Texas has submitted no demonstration, as required for a customized Major NSR SIP revision submittal, that the difference in its program is at least as stringent as the Federal PAL Program SIP requirements.

Comment 10: The Clinic comments that Texas fails to prohibit the use of PALs in ozone extreme areas. Federal rules prohibit the use of PALs in extreme ozone nonattainment areas. *See* 40 CFR 51.165(f)(1)(ii). The Texas rules contain no such prohibition, and are less stringent than the Federal rules and not protective of air quality.

Response: EPA agrees that 40 CFR 51.165(f)(1)(ii) requires the prohibition and the submittal lacks such a prohibition. Texas currently has no extreme ozone nonattainment areas so it is not clear how that requirement

applies. We do not need to reach the issue, however, because the scope of our disapproval, *i.e.,* the entire Texas PALs Program, is not changed even if we added this as a basis for disapproval.

Comment 11: TCEQ commented that it will address EPA's concerns regarding public participation for PALs in a separate rulemaking regarding public participation for the NSR permitting program.

Response: TCEQ adopted revised rules for public participation on June 2, 2010; these rules became effective on June 24, 2010. TCEQ submitted these revised rules to EPA on July 2, 2010. EPA is reviewing these submitted regulations and will address the submittal in a separate action. Because this 30 TAC 116.740 relates to the public participation requirements of the PAL program, this section is not severable from the PAL program. Because we are disapproving the PAL program, we are also disapproving the submitted 30 TAC 116.194.

Comment 12: The Clinic commented that the PAL rules lack adequate public participation. Texas's rules do not require PALs to be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161. In particular, the PAL rules are missing the requirements that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least 30 day period for submittal of public comment on the draft permit as required under 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). Further the rules lack provisions for public participation for PAL renewals or emission increases. There is no requirement that TCEQ address all material comments before taking final action on the permit. Accordingly, these rules are less stringent than the Federal rules.

Response: EPA agrees with these comments. The submitted rule does not meet the public participation requirements for PAL as required in 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). These rules require that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161; and which require the program to include provisions for public participation for PAL renewals or emission increases. The Federal rules further require that TCEQ address all material comments before taking final action on the permit. Because the submitted rule lacks these requirements it is not consistent with the Federal rules.

Comment 13: Concerning the lack of provisions in the Texas PAL that meet the public participation requirements in 40 CFR 51.160 and 51.161, BCCA and TIP commented that EPA appears to be concerned that there is not an explicit reference to PALs in the public participation provisions. The Texas rules make clear that PALs are subject to public notice and participation. The absence of a reference to PALs in the applicability section of 30 TAC 39.403 is not significant. Section 116.194 of the PAL rules provides the clear cross-references to the applicable provisions of Chapter 39. A reference back from Chapter 39 to the PAL rules is redundant and unnecessary, and not grounds for disapproval of the Texas PAL rules.

Response: EPA disagrees with this comment. Submitted 30 TAC 116.194 requires that an applicant for a PAL permit must provide for public notice on the draft PAL permit in accordance with 30 TAC Chapter 39—Public Notice—for all initial applications, amendments, and renewals of a PAL Permit.[13] *See* 73 FR 72001 (November 26, 2008) for more information on Texas's public participation rules and their relationship to PALs. The November 2008 proposal addressed the public participation provisions in 30 TAC Chapter 39, but did not specifically propose action on 30 TAC 116.194. In the September 23, 2009, proposal, we proposed to address 30 TAC 116.194. Because this section relates to the public participation requirements of the PAL program, this section is not severable from the PAL program. Because we are disapproving the PAL program, we are also disapproving the submitted 30 TAC 116.194.

Comment 14: The Clinic commented that Texas fails to include required monitoring definitions for PALs. While the Federal regulations define "continuous emission monitoring system (CEMS)," "continuous emission rate monitoring system (CERMS)," "continuous parameter monitoring system (CPMS)," and "predictive emissions monitoring system (PEMS)" (*see* 40 CFR 51.165(a)(1)(xxxi), (xxxiv), (xxxiii), and (xxxii)), the Texas rules omit definitions. Because these definitions are crucial to enforcing and monitoring PALs, the lack of these definitions in Texas's PAL rules make the PAL rules less stringent that the Federal rules.

Response: EPA agrees with this comment. *See* 74 FR 48467, at 48475, and section IV.D.I of this action.

Comment 15: BCCA and TIP commented that EPA appears to be concerned that the monitoring provisions are not separately and discretely defined. They comment that Texas PAL rules in 30 TAC 116.192(c) contain monitoring requirements that are equivalent to the Federal PAL rules. They also comment that the absence of definitions of CEMS, CERMS, CPMS and PEMS does not render the rules unenforceable. They maintain that the rules themselves identify and define each type of monitoring system, and identify Federal-equivalent requirements that each monitoring system must satisfy. They cite, as an example, 30 TAC 116.192(c)(2)(B) as providing that an owner or operator using a CEMS to monitor PAL pollutant emissions shall comply with applicable performance specifications found in 40 CFR Part 60, Appendix B and sample, analyze, and record data at least every 15 minutes while the emissions unit is operating. Similar requirements are included for mass balance calculations, CPMS, PEMS and emissions factors used to monitor PAL pollutant emissions. They claim that the absence of separate definitions does not impact the enforceability of Texas PALs. The Texas provisions adequately address monitoring requirements for PALs, and should therefore be approved.

Response: EPA disagrees with this comment. In the proposal we stated that "[a]ll definitions concerning the monitoring systems in the revised Major SIP requirements are essential for the enforceability of and providing the means for determining compliance with a PALs program." We acknowledge that 40 CFR 51.165(f)(12)(i)(C) and 51.166(w)(12)(i)(*c*) allow a State program to include alternative monitoring, but the alternative monitoring must be approved by EPA as meeting the requirements of 40 CFR 51.165(f)(12)(A) and 51.166(w)(12)(a). The State did not provide any request for approval for alternative monitoring. Furthermore, the State did not provide any demonstration, as required for a customized Major NSR SIP revision

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

submittal, showing how the absence of these PAL monitoring definitions, is at least as stringent as the Federal PAL Program SIP requirements.

Comment 16: BCCA, TIP, TCC, and TxOGA commented that the Texas PAL rules make clear that monitoring is mandatory for a PAL. They comment that the rules establish monitoring requirements in 30 TAC 116.186(c) that are consistent with the Federal PAL monitoring requirements. They also comment the monitoring requirements are, most importantly, cast in terms of requirements that "*shall*" *or* "*must*" be met. Examples include:

- 30 TAC 116.186(c)(1): "The PAL monitoring system *must* accurately determine all emissions of the PAL pollutant in terms of mass per unit of time."
- 30 TAC 116.186(c)(2) further specifies requirements that *shall* be met for any permit holder using mass balance equations, continuous emissions monitoring system ("CEMS"), continuous parameter monitoring system ("CPMS") predictive emissions monitoring system ("PEMS"), or emission factors.

The commenters claim that these provisions adequately address the monitoring requirements required under the Federal PAL provisions. They assert that any additional statement that the PAL is rendered invalid unless the permit holder complies with these requirements is unnecessary in light of the clearly mandatory monitoring requirements that are equivalent to Federal requirements.

Response: EPA disagrees with this comment. The rules referred to by the commenters only provide that the required monitoring be met, but has no provision that the PAL becomes invalid whenever a major stationary source with a PAL Permit or any emissions unit under such PAL is operated without complying with the required monitoring, as required under 40 CFR 51.165(f)(12)(i)(D) and 51.166(w)(i)(*d*). TCEQ did not provide any demonstration, as required for a customized Major NSR SIP revision submittal, showing how the lack of a requirement invalidating the PAL if there is no compliance with the required monitoring, is at least as stringent as the Federal PAL Program SIP requirements.

3. What are the grounds for disapproval of the submitted Major NSR Reform SIP revision for Major NSR with PAL provisions?

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

We are disapproving the submitted PAL revisions for the following reasons: (1) The submittal lacks a provision which limits applicability of a PAL only to an *existing* major stationary source; (2) the submittal has no provisions that relate to PAL re-openings; (3) there is no mandate that failure to use a monitoring system that meets the requirements of this section renders the PAL invalid; (4) the Texas submittal at 30 TAC 116.186 provides for an emissions cap that may not account for all of the emissions of a pollutant at the major stationary source; (5) the submitted 30 TAC 116.194 does not require that: (a) PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment; (b) that the State address all material comments before taking final action on the permit; and (c) include a cross-reference to 30 TAC Chapter 39—Public Notice; (6) the Federal definition of the "baseline actual emissions" provides that these emissions must be calculated in terms of the average rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period; [14] and (7) the State also failed to include the following specific monitoring definitions for CEMS, CERMS, CPMS, PEMS.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.D.2 above. None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for PALs is severable from each other. Therefore, we are disapproving the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations. *See* the proposal at 74 FR 48467, at 48474–48475, our background for these submitted SIP revisions in section IV.D.1 above, and our response to comments on these submitted SIP revisions in section IV.D.2 above for additional information.

E. The Submitted Non-PAL Aspects of the Major NSR SIP Requirements

1. What is the background for the submitted non-PAL aspects of the Major NSR SIP requirements?

The submitted NNSR non-PAL rules do not explicitly limit the definition of "facility" [15] to an "emissions unit" as do the submitted PSD non-PAL rules. It is our understanding of State law that a "facility" can be an "emissions unit," *i.e.,* any part of a stationary source that emits or may have the potential to emit any air contaminant, as the State explicitly provides in the revised PSD rule at 30 TAC 116.160(c)(3). A "facility" also can be a piece of equipment, which is smaller than an "emissions unit." A "facility" can include more than one "major stationary source." It can include every emissions point on a company site, without limiting these emissions points to only those belonging to the same industrial grouping (SIP code). In our proposed action on the Texas Qualified Facilities State Program, EPA specifically solicited comment on the definition for "facility" under State law. Regardless, the State clearly thought the prudent legal course was to limit "facility" explicitly to "emissions unit" in its PSD SIP non-PALs revision. TCEQ did not submit a demonstration showing how the lack of this explicit limitation in the NNSR SIP non-PALs revision is at least as stringent as the revised Major NSR SIP requirements. Therefore, EPA is disapproving the submitted definition and its use as not meeting the revised Major NNSR non-PALs SIP requirements.

Under the Major NSR SIP requirements, for any physical or

[14] *See* section IV.E.3 of this preamble for further information on the basis for disapproval of the submitted definitions "baseline actual emission" for not determining baseline emissions as average emissions.

[15] "Facility" is defined in the SIP approved 30 TAC 116.10(6) as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment."

operational change at a major stationary source, a source must include emissions resulting from startups, shutdowns, and malfunctions in its determination of the baseline actual emissions (*see* 40 CFR 51.165(a)(1)(xxxv)(A)(1) and (B)(1) and 40 CFR 51.166(b)(47)(i)(*a*) and (ii)(a)) and the projected actual emissions (*see* 40 CFR 51.165(a)(1)(xxviii)(B) and 40 CFR 51.166(b)(40)(ii)(*b*)). The definition of the term "baseline actual emissions," as submitted in 30 TAC 116.12(3)(E), does not require the inclusion of emissions resulting from startups, shutdowns, and malfunctions.[16] Our understanding of State law is that the use of the term "may" "creates discretionary authority or grants permission or a power. *See* Section 311.016 of the Texas Code Construction Act. Similarly, the submitted definition of "projected actual emissions" at 30 TAC 116.12(29) does not require that emissions resulting from startups, shutdowns, and malfunctions be included. The submitted definitions differ from the Federal SIP definitions and the State has not provided information demonstrating that these definitions are at least as stringent as the Federal SIP definitions. Therefore, based upon the lack of a demonstration from the State, EPA is disapproving the definitions of "baseline actual emissions" at 30 TAC 116.12(3) and "projected actual emissions" at 30 TAC 116.12(29) as not meeting the revised Major NSR SIP requirements.

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

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

See the proposal at 74 FR 48467, at 48475, for additional information.

2. What is EPA's response to comments on the submitted non-PAL aspects of the Major NSR SIP requirements?

Comment 1: TCEQ responded to EPA's request concerning its interpretation of Texas law and the Texas SIP with respect to the term "facility." The definition of "facility" is the cornerstone of the Texas Permitting Program under the Texas Clean Air Act. In addition, to provide clarity and consistency, TCEQ also provides similar comments in regard to Docket ID No. EPA–R06–OAR–2005–TX–0025 and EPA–R06–OAR–2005–TX–0032. EPA believes that the State uses a "dual definition" for the term facility. Under the TCAA and TCEQ rule, "facility" is defined as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. Tex. Health & Safety Code 382.003(6); 30 TAC 116.10(6). A mine, quarry, well test, or road is not considered to be a facility." A facility may contain a stationary source—point of origin of a contaminant. Tex. Health & Safety Code 382.003(12). As a discrete point, TCEQ contends that, under Federal law, a facility can constitute but cannot contain a major stationary source as defined by Federal law. A facility is subject to Major and Minor NSR requirements, depending on the facts of the specific application. Under Major NSR, EPA uses the term "emissions unit" (generally) when referring to a part of a "stationary source," TCEQ translates "emissions unit" to mean "facility,"[17] which TCEQ contends is at least as stringent as Federal rule. TCEQ and its predecessor agencies have consistently interpreted facility to preclude inclusion of more than one stationary source, in contrast to EPA's stated understanding. Likewise, TCEQ does not interpret facility to include "every emissions point on a company site, even if limiting these emission points to only those belonging to the same industrial grouping (SIC Code)." The Federal definition of "major stationary source" is not equivalent to the state definition of "source." 40 CFR 51.166(b)(1)(a). A "major stationary source"[18] can include more than one "facility" as defined under Texas law—which is consistent with EPA's interpretation of a "major stationary source" including more than one emissions unit. The above interpretation of "facility" has been consistently applied by TCEQ and its predecessor agencies for more than 30 years. TCEQ's interpretation of Texas statutes enacted by the Texas Legislature is addressed by the Texas Code Construction Act. More specifically, words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. Tex. Gov't Code 311.011(b). While Texas law does not directly refer to the two steps allowing deference enunciated in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* Texas law and judicial interpretation recognize *Chevron*[19] and follow similar analysis as discussed below. The Texas Legislature intends an agency created to centralize expertise in a certain regulatory area "be given a large degree of latitude in the methods it uses to accomplish its regulatory function." *Phillips Petroleum Co.* v. *Comm'n on Envtl. Quality,* 121 S.W.3d 502, 508 (Tex.App.—Austin 2003, no pet.), which cites Chevron to support the following: "Our task is to determine whether an agency's decision is based upon a permissible interpretation of its statutory scheme." Further, Texas courts construe the test of an administrative rule under the same principles as if it were a statute. *Texas Gen. Indem. Co.* v. *Finance Comm'n,* 36 S.W.3d 635,641 (Tex.App.—Austin 2000, no pet.). Texas Administrative agencies have the power to interpret their own rules, and their interpretation is entitled to great weight and deference. *Id.* The agency's construction of its rule is controlling unless it is plainly erroneous or inconsistent. *Id.* "When the construction

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

[17] The term "facility" shall replace the words "emissions unit" in the referenced sections of the CFR. 30 TAC 116.160(c)(3).

[18] Tex. Health & Safety Code § 382.003(12).

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

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

Response: EPA welcomes the clarification concerning TCEQ's interpretation of Texas law and the Texas SIP with respect to the term "facility." However, we have determined that Texas's use of the term "facility," as it applies to the NNSR non-PALs rules, is overly vague, and therefore, unenforceable. TCEQ comments that it translates "emissions unit" to mean "facility." Although Texas's PSD non-PAL rules explicitly limit the definition of "facility" to "emissions unit," the NNSR non-PALs rules fail to make such a limitation. *See* 74 FR 48467, at 48473, footnote 6, and 48475; *compare* 30 TAC 116.10(6) *to* 30 TAC 116.160(c)(3). The State clearly thought the prudent legal course was to limit "facility" explicitly to "emissions unit" in its PSD SIP non-PALs revision. Furthermore, TCEQ did not submit information sufficient to demonstrate that the lack of this explicit limitation in the submitted NNSR non-PALs is at least as stringent as the revised definition in the PSD non-PALs definition.

We recognize that TCEQ should be accorded a level of deference to interpret the State's statutes and regulations; however, such interpretations must meet the applicable requirements of the Act and implementing regulations under 40 CFR part 51 to be approvable into the SIP as Federally enforceable requirements. The State has failed to provide any case law or SIP citation that confirms TCEQ's interpretation for "facility" under the NNSR non-PALs that would ensure Federal program scope.

Comment 2: The Clinic comments that Texas's use of the term "facility" makes its rules unacceptably vague. Texas's use of this term is problematic because of its dual definitions and broad meanings. The commenter compares Texas's definition of "facility" in 30 TAC 116.10 with the definition of "stationary source" in 30 TAC 116.12 and the definition of "building, structure, facility, or installation" in 30 TAC 116.12 and concludes that these definitions are quite similar. The commenter acknowledges that this argument assumes that one can rely on the Nonattainment NSR rules to interpret the general definitions. If one cannot use the Nonattainment NSR definitions to interpret the general definition of "facility," then one must resort to the definition of "source" in 30 TAC 116.10(17), which is defined as "a point of origin of air contaminants, whether privately or publicly owned or operated." Pursuant to this reading, a facility is more like a Federal "emissions unit." 40 CFR 51.165(a)(1)(vii). " 'Emissions unit' means any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant * * *" At least in the Qualified Facility rules, it appears that TCEQ use of the definition of "facility" is more like a Federal "emissions unit." The circular nature of these definitions, and the existence of two different definitions of "facility" without clear description of their applicability, makes Texas's rules, including the Qualified Facility rules, vague. The commenter urges EPA to require Texas to clarify its definition of "facility" and to ensure that its use of the term throughout the rules is consistent with that definition.

Response: EPA agrees with this comment. *See* our response to comment 1 above for further information.

Comment 3: Concerning the definition of "facility," BCCA, TIP, and TCC commented that the term "facility" is defined in Chapter 116 and in the Texas Clean Air Act, and is used in a consistent manner throughout. The term has identical meaning in the NNSR non-PAL rules and the PSD non-PAL rules. Any failure to "explicitly limit the definition" in one part of Chapter 116 is not grounds for disapproval, given the well-established definition of "facility" in the context of Texas air permitting and that it is comparable to the Federal definition of "emissions unit." TCEQ regulations in 30 TAC 116.10(6) defines a facility as: "A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not a facility." *See* 30 TAC 116.10(6). Section 116.10 states that the definitions contained in the section apply to *all* uses throughout Chapter 116. 30 TAC 116.10 ("[T]he following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.") This definition is similar to the definition of "emission unit" in Texas's Title V rules. There, "emissions unit" is defined as: "A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. *See* 30 TAC 122.10(8). Under the express terms of 30 TAC 116.10, the definition of "facility" is clear, and is equivalent to the Federal definition of "emission unit" in the nonattainment NSR non-PAL rules, as it is throughout Chapter 116.

Response: EPA disagrees with these comments. *See* our response to comment 1 above for further information.

Comment 4: TCEQ comments that TCEQ rules includes maintenance, startup and shutdown emissions in the development of "baseline actual emissions" to the extent that the permit reviewer can verify that these emissions occurred, were properly quantified and reported as part of the baseline, and were creditable. Otherwise, startup and shutdown, as well as maintenance emissions, are treated as unauthorized and, as such, have a baseline actual emission rate of zero. Further, TCEQ rules do not authorize malfunction emissions. TCEQ has concerns about crediting a major source with an emission associated with malfunctioning of equipment when the source determines baseline actual emissions. TCEQ is concerned that including malfunction emissions would inflate the baseline and narrow the gap between baseline actual emissions and the planned emission rate. Therefore, the number of "major" sources or modifications would be reduced. It is unclear how emissions that are not authorized would be considered creditable within the concept of NSR applicability.

EPA has approved the exclusion of malfunction emissions from the baseline calculation in other States' rules. TCEQ considers the exclusion of malfunction emissions from baseline actual emissions to be at least as stringent as the Federal rule. TCEQ is willing to work with EPA to clarify the inclusion of startup and shutdown emissions when determining baseline actual emissions.

Response: EPA disagrees with this comment. We note two fundamental concerns with the Texas definitions, as discussed in this response. First, the Texas definition of "baseline actual emissions" provides discretion to include emissions from malfunctions, startups, and shutdowns, but does not contain specific, objective, and replicable criteria for determining whether TCEQ's choice of emissions events to be included in the baseline actual emissions will be effective in terms of enforceability, compliance assurance, and ambient impacts. Second, the Texas definition of "projected actual emissions" does not include emissions from startups, shutdowns and malfunctions in contrast to the Federal definition which includes such emissions.

The Federal definition of "baseline actual emissions" requires such emissions to include emissions associated with startups, shutdowns, and malfunctions. *See* 40 CFR 51.165(a)(1)(xxxv)(A)(*1*) and (B)(*1*) and 51.166(b)(47)(i)(*a*) and (ii)(*a*). In contrast, Texas's submitted definition of "baseline actual emissions" at 30 TAC 116.12(3)(E) differs from the Federal definition by providing that "[u]ntil March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under [30 TAC] Chapter 101 of this title * * * *may* be included the extent they have been authorized, or are being authorized, in a permit action under Chapter 116." Emphasis added. EPA's understanding of State law is that the use of the term "may" creates discretionary authority or grants permission or power. *See* section 311.016 of the Texas Code Construction Act.

TCEQ considers emission events as unauthorized emissions associated with the startup, shutdown, and malfunction related activities. *See* 30 TAC 101.1(28). Texas has adopted an affirmative defense approach to handle such emissions. *See* 30 TAC 101.222. For emissions associated with the planned maintenance, startup or shutdown activities, the State rule has adopted a phased-in approach to allow a source to file an application to permit its planned maintenance, startup or shutdown related emissions in a source's NSR permit. This approach is based on the source's SIC code. *See* 101.222(h) and (i). For EPA's proposed rulemaking action on the State's Emission Events rule, *see* May 13, 2010 (75 FR 26892). The State's submitted definition provides director discretion whether to include these types of emissions. Such director discretion provisions are not acceptable for inclusion in SIPs, unless each director decision is required under the plan to be submitted to EPA for approval as a single-source SIP revision. This Program does not contain specific, objective, and replicable criteria for determining whether the Executive Director's choice of emissions events to be included in the baseline actual emissions will be effective in terms of enforceability, compliance assurance, and ambient impacts. This would include a replicable procedure for use of any discretionary decision to determine which maintenance, startup, and shutdown emissions are properly quantified and reported as part of the baseline, and are creditable; and for determining that maintenance, startup, and shutdown emissions then do not meet such criteria and can be excluded because they are unauthorized.

The State did not provide any demonstration, as required for a customized Major NSR SIP revision submittal, that the submitted provision that may exclude any emissions from maintenance, startup, and shutdown from the definition of baseline actual emissions, is at least as stringent as the definition in the Federal non-PAL Program SIP requirements. Texas also includes authorized maintenance emissions in its baseline actual emissions. Because maintenance emissions are not specifically required in the Federal definition, the State must provide a demonstration, as required for a customized Major NSR SIP revision submittal, that including these emissions in the baseline actual emissions is at least as stringent as the definition in the Federal non-PAL Program SIP requirements.

With respect to "projected actual emission," the Federal definition of "projected actual emissions" requires the projected emissions to include emissions associated with startups, shutdowns, and malfunctions. *See* 40 CFR 51.165(a)(1)(xxviii)(B)(*2*) and 51.166(b)(40)(ii)(*b*). Texas's submitted definition of "projected actual emissions" at 30 TAC 116.12(29) differs from the Federal definitions by not including emissions associated with startups, shutdowns, and malfunctions. The exclusion of these emissions in the projected actual emissions while providing for the possible inclusion of these emissions from baseline actual emissions does not provide a comparable estimation of emissions increases associated with the project and could narrow the gap between baseline actual emissions and the projected actual emissions in a way that allows facilities to avoid NSR requirements. The State did not provide a demonstration, as required for a customized Major NSR SIP revision, that excluding these emissions from projected actual emissions, is at least as stringent as the Federal non-PALs SIP requirements. (EPA also wishes to note that the submitted definition of baseline actual emissions is unclear how TCEQ will include authorized emissions events as baseline actual emissions and projected actual emissions on and after March 1, 2016.)

With respect to one aspect specifically related to emissions associated with malfunctions, EPA appreciates Texas's concern that including malfunction emissions in the baseline and projected actual emissions would inflate the baseline and narrow the gap between baseline and planned emissions. EPA acknowledges that it has approved the exclusion of malfunction emissions from the baseline calculation in other States' rules. This includes the approval of such exclusions in Florida (proposed April 4, 2008 at 73 FR 18466 and final approval on June 27, 2008 at 73 FR 36435) and South Carolina (proposed September 12, 2007 at 72 FR 52031 and final approval on June 2, 2008 at 73 FR 31368) and the proposed exclusion in Georgia (proposed September 4, 2008 at 73 FR 51606). EPA's review of these actions indicates that in each State, malfunctions were excluded from *both* baseline actual emissions and projected actual emissions. This exclusion was based upon the difficulty of quantifying past malfunction emissions and estimating future malfunction emissions as part of the projected actual emissions. Georgia's rules specify that if malfunction emissions are omitted from projected actual emissions, they must also be omitted from baseline emissions, and vice versa, so as to provide a comparable estimation of emissions increases associated with the project. Florida is also concerned about the possibility that including malfunction emissions may result in the unintended rewarding of the source's poor operation and maintenance, by allowing malfunction to be included in the baseline emissions that will be used to calculate emissions changes and emissions credits.

After reviewing Texas's comments on exclusion of malfunctions from its baseline actual emissions and projected actual emissions, we note that TCEQ voices concerns similar to Florida, Georgia, and South Carolina. Accordingly, we agree with TCEQ's concern that including malfunction emissions would inflate the baseline and narrow the gap between baseline actual emissions and the planned emission rate. Therefore, the number of "major" sources or modifications would

be reduced. It is unclear how emissions that are not authorized would be considered creditable within the concept of NSR applicability. Nevertheless, we must review the submitted definitions pending before EPA for action. Both definitions do not exclude malfunctions emissions. Furthermore, the baseline actual emissions definition allows the discretionary inclusion of malfunction emissions. To be approvable, both definitions must mandate the exclusion of malfunction emissions.

Comment 5: BCCA, TIP, TCC, and TxOGA commented that the Texas rules' treatment of startups, shutdowns, and malfunctions is not a proper basis for disapproval of the proposed SIP revision. The Federal and Texas definitions both require that non-compliant emissions be excluded from the determination of baseline actual emissions.[20] Based on the Texas rules' integration of pending Chapter 101 revisions on startup, shutdown, and malfunction emissions (as requested by EPA), the proposed SIP revision's treatment of these types of emissions is a reasonable approach.

EPA has approved rules for baseline calculations that exclude some of the elements they assert should be included in Texas's definition. For example, Georgia's PSD regulations give applicants the option of excluding malfunction emissions from the calculation of baseline emissions.[21] In approving this approach, EPA noted "The intent behind this optional calculation methodology is that it may result in a more accurate estimate of emission increases. The Federal rules allow for some flexibility, and EPA supports EPD's analysis that the Georgia rule is at least as stringent as the Federal rule." [22] Similarly, Texas's approach to the baseline calculation attempts for a more accurate estimate of emissions.

Moreover, TCEQ is underway in permitting maintenance, startup and shutdown emissions through Chapter 116 preconstruction permits, and a SIP revision reflecting the maintenance, startup, and shutdown permitting initiative has been submitted to EPA for approval. TCEQ is distinguishing between planned and unplanned maintenance, startup, and shutdown emissions, and working to authorize those planned maintenance, startup, and shutdown emissions in Texas air permits. It is reasonable and appropriate that the maintenance, startup, and shutdown permitting initiative be properly integrated with the definition of "baseline actual emissions." The proposed SIP revision recognizes that such emissions may be added to the baseline in the future, based on TCEQ's ongoing process of authorizing maintenance, startup, and shutdown emissions. The proposed SIP revision and TCEQ's current approach is sound and reasonable based on historical treatment of maintenance, startup, and shutdown emissions in Texas air permits, and is not grounds for disapproval of the proposed SIP revision.

Response: EPA disagrees with this comment. *See* the response to Comment 4 above for more information.

Comment 6: The Clinic comments that Texas's definition of "baseline actual emissions" is less stringent than the Federal definition. The Federal regulations define "baseline actual emissions" as "the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period." *See* 40 CFR 51.165(a)(1)(xxxv)(A) and (B). This definition further provided that the average rate "shall include emissions associated with startups, shutdowns, and malfunctions." *See* 40 CFR 51.165(a)(1)(xxxv)(A)(1).

Texas rules define "baseline actual emissions" as "the rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period." *See* 30 TAC 116.12(3)(A). The Texas rules do not require baseline actual emissions to include emissions associated with maintenance, startups, and shutdowns. Instead, the rules state that maintenance, startup, and shutdown events "may be included to the extent they have been authorized, or are being authorized." *See* 30 TAC 116.12(3)(E). Texas's failure to incorporate the Federal definition and the express failure to require incorporation of maintenance, startup, and shutdown emissions in the average rate renders the definition as inconsistent with Federal regulations.

The commenter further notes that Texas's failure to include maintenance, startup, and shutdown emissions is related to a larger problem with Texas's program. Texas is allowing sources to authorize their maintenance, startup, and shutdown emissions separately from their routine emissions. For example, Texas allows sources that have individual major NSR or PSD permits to authorize their maintenance, startup, and shutdown emissions through a stand-alone permit-by-rule. *See* 30 TAC 106.263. This allows sources to avoid considering their maintenance, startup, and shutdown emissions in determining potential to emit, as well as in determining the magnitude of any emission increases. EPA has repeatedly informed Texas that its approach for permitting maintenance, startup, and shutdown emissions violates the Act.[23] EPA should take action to ensure that Texas follows the Act when permitting maintenance, startup, and shutdown emissions.

Response: EPA agrees with the comment relating to not calculating baseline actual emissions as average emission rates. *See* section IV.D.2, responses to comments 1 and 2 for further information.

EPA agrees with this comment related to the inclusion of emissions associated with authorized maintenance, startup, and shutdown in the baseline actual emissions. *See* the response to comment 4 above. The comments relating to authorizing maintenance, startup, and shutdown emissions separately from routine emissions are outside the scope of this action.

Comment 7: The Clinic comments that Texas's definition of "projected actual emissions" is less stringent than the Federal definition. The Federal regulations define "projected actual emissions" to include maintenance, startup, and shutdown emissions. *See* 40 CFR 51.165(a)(1)(xxviii)(b) and 51.166(b)(40)(ii)(b). Texas's definition of "projected actual emissions" fails to include maintenance, startup, and shutdown emissions. *See* 30 TAC 116.12(29). Even where such emissions are included in a source's baseline actual emissions, there is no provision to require such emission in the projected actual emissions. The commenter states that facilities in Texas often have extremely large maintenance, startup, and shutdown emissions. *See* Attachment 8 of the comments (Facility emission event information). Under Texas's definitions, a source which would trigger a major modification under Federal rules could avoid a major modification by failing to include maintenance, startup, and shutdown in their projected actual emissions. The commenter states that any company that includes maintenance, startup, and shutdown in its baseline actual emissions should be required to include a realistic estimate of maintenance,

[20] 30 TAC 116.12(3)(D) ("The actual rate shall be adjusted downward to exclude any non-compliant emissions that occurred during the consecutive 24-month period.")

[21] GA. COMP. R. & REGS. 391–3– 1–.02(7)(a)2.(ii)(II)II (2009).

[22] 73 FR 51,606, at 51,609 (Sept. 4, 2008).

[23] *See* "Letter to Richard Hyde, TCEQ, Director, Air Permits Division" from Jeff Robinson, EPA, Region 6, Chief, Air Permits Section (May 21, 2008) (Attachment 7 in the Clinic's comments).

startup, and shutdown emissions in its projected actual emissions.

Response: EPA agrees with this comment. *See* our response to Comment 4 above for further information.

3. What are the grounds for disapproval of the submitted non-PAL aspects of the major NSR SIP requirements?

EPA is disapproving the submitted NNSR non-PAL rules because they do not explicitly limit the definition of "facility" to an "emissions unit." It is our understanding of State law that a "facility" can be an "emissions unit," *i.e.,* any part of a stationary source that emits or may have the potential to emit any air contaminant, as the State explicitly provides in the revised PSD rule at 30 TAC 116.160(c)(3). A "facility" also can be a piece of equipment, which is smaller than an "emissions unit." A "facility" can include more than one "major stationary source." It can include every emissions point on a company site, without limiting these emissions points to only those belonging to the same industrial grouping (SIP code). Regardless, the State clearly thought the prudent legal course was to limit "facility" explicitly to "emissions unit" in its PSD SIP non-PALs revision. TCEQ did not submit a demonstration showing how the lack of this explicit limitation in the NNSR SIP non-PALs revision is at least as stringent as the revised Major NSR SIP requirements. Therefore, EPA is disapproving the use of the submitted definition as not meeting the revised Major NNSR non-PALs SIP requirements.

Under the Major NSR SIP requirements, for any physical or operational change at a major stationary source, a source must include emissions resulting from startups, shutdowns, and malfunctions in its determination of the baseline actual emissions. The definition of the term "baseline actual emissions," as submitted in 30 TAC 116.12(3)(E), does not require the inclusion of emissions resulting from startups, shutdowns, and malfunctions as required under Federal regulations. The submitted definition of baseline actual emissions provides that until March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under [30 TAC] Chapter 101 of this title may be included the extent they have been authorized, or are being authorized, in a permit action under Chapter 116. The submitted definition of "projected actual emissions" at 30 TAC 116.12(29) differs from the Federal definitions by not including emissions associated with startups, shutdowns, and malfunctions. The authorized emission events under the submitted definition include emissions associated with maintenance, startups, and shutdowns. Our understanding of State law is that the use of the term "may" creates discretionary authority or grants permission or a power. *See* Section 311.016 of the Texas Code Construction Act. Similarly, the submitted definition of "projected actual emissions" at 30 TAC 116.12(29) does not require that emissions resulting from startups, shutdowns, and malfunctions be included. The submitted definitions differ from the Federal SIP definitions and the State has not provided information demonstrating that these definitions meet the Federal SIP definitions. Specifically, the State has not provided: (1) A replicable procedure for determining the basis for which emissions associated with maintenance, startup, and shutdown will and will not be included in the baseline actual emissions, (2) the basis for including emissions associated with maintenance in baseline actual emissions, (3) the basis for not including maintenance, startup, and shutdown emissions in the projected actual emissions, and (4) provisions for how it will handle maintenance, startup, and shutdown emissions after March 1, 2016. Therefore, based upon the lack of a demonstration from the State, as is required for a customized Major NSR SIP revision submittal, EPA is disapproving the definitions of "baseline actual emissions" at 30 TAC 116.12(3) and "projected actual emissions" at 30 TAC 116.12(29) as not meeting the revised Major NSR SIP requirements.

Texas stated that it has excluded emissions associated with malfunctions from the calculation of baseline actual emissions and projected actual emissions because including such emissions would inflate the baseline and narrow the gap between baseline and project emissions. EPA agrees with the reasons Texas uses to exclude malfunction emissions from baseline actual emissions and projected actual emissions are comparable to the reasons EPA used for excluding malfunction emissions from other States in which EPA approved such exclusion. Notwithstanding Texas's exclusion of malfunctions from these definitions, Texas must address the other grounds for disapproval as discussed above. This includes mandating the exclusion of malfunction emissions in both definitions.

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

Texas has not provided any demonstration, as is required for a customized Major NSR SIP revision submittal, showing how this different definition is at least as stringent as the Federal SIP definition. Therefore, EPA is disapproving the submitted definition of "baseline actual emissions" found at 30 TAC 116.12(3) as not meeting the revised major NSR SIP requirements.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.E.2 above. None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for non-PALs is severable from each other. Therefore, we are disapproving the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR non-PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations. *See* the proposal at 74 FR 48467, at 48475, our background for these submitted SIP revisions in section IV.E.1 above, and our response to comments on these submitted SIP revisions in section IV.E.2 above for additional information.

F. The Submitted Minor NSR Standard Permit for Pollution Control Project SIP Revision

1. What is the background for the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision?

EPA approved Texas's general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116 on November 14, 2003 (68 FR 64548) as meeting the minor NSR SIP requirements. The Texas Clean Air Act provides that the TCEQ may issue a standard permit for "new or existing similar facilities" if it is enforceable and compliance can be adequately monitored. *See* section 382.05195 of the TCAA. EPA approved the State's Standard Permit program as part of the Texas Minor NSR SIP program on November 14, 2003 (68 FR 64548). In the final FRN, EPA noted that the submitted provisions provide for a

streamlined mechanism for approving the construction or modification of certain sources in categories that contain numerous similar sources. EPA approved the provisions for issuing and modifying standard permits because, among other things, the submitted rules required the following: (1) No major stationary source or major modification subject to part C or part D of the Act could be issued a standard permit; (2) sources qualifying for a standard permit are required to meet all applicable requirements under section 111 of the Act (NSPS), section 112 of the Act (NESHAPS and MACT), and the TCEQ rules (this includes the Texas SIP control strategies); (3) sources have to register their emissions with the TCEQ and this registration imposes an enforceable emissions limitation; (4) maintenance of records sufficient to demonstrate compliance with all the permit's conditions; and (5) periodic reporting of the nature and amounts of emissions necessary to determine whether a source is in compliance. TCEQ must conduct an air quality impacts analysis of the anticipated emissions from the similar facilities before issuing and modifying any standard permit. All new or revised standard permits are required to undergo public notice and a 30-day comment period, and TCEQ must address all comments received from the public before finalizing its action to issue or revise a standard permit. Based upon the above and as further described in the TSD for the approval action, EPA found that the submitted Texas Minor NSR Standard Permits Program was adequate to protect the NAAQS and reasonable further progress (RFP) and was enforceable.

One of the primary reasons why EPA found that the Standard Permits Program was enforceable is that these types of Minor NSR permits were to be issued for similar sources. The issuance of a Minor NSR permit for similar sources eliminates the need for a case-by-case review and evaluation to ensure that the NAAQS and RFP are protected and the permit is enforceable. The provisions of the Texas Standard Permits Program also ensured that the terms and conditions of an individual standard permit would be replicable. This is a key component for the EPA authorization of a generic preconstruction permit. Replicable methodologies eliminate any director discretion issues. Otherwise, if there are any director discretion issues, EPA requires that they be addressed in a case-by-case Minor NSR SIP permit.

When EPA approved the Texas Standard Permits Program as part of the Texas Minor NSR SIP, it explicitly did not approve the Pollution Control Project (PCP) Standard Permit (30 TAC 116.617). *See* 68 FR 64543, at 64547. On February 1, 2006, Texas submitted a repeal of the previously submitted PCP Standard Permit and submitted the adoption of a new PCP Standard Permit at 30 TAC 116.617—State Pollution Control Project Standard Permit.[24] One of the main reasons Texas adopted a new PCP Standard Permit was to meet the new Federal requirements to explicitly limit this PCP Standard Permit only to Minor NSR. In *State of New York, et al* v. *EPA,* 413 F.3d 3 (DC Cir. June 24, 2005), the Court vacated the Federal pollution control project provisions for NNSR and PSD. Although the new PCP Standard Permit explicitly prohibits the use of it for Major NSR purposes, TCEQ has failed to demonstrate how this particular Standard Permit meets the Texas Standard Permits NSR SIP since it applies to numerous types of pollution control projects, which can be used at *any* source that wants to use a PCP, and is not an authorization for similar sources.

Under the Texas Standard Permits Minor NSR SIP, an individual Standard Permit must be limited to new or existing similar sources, such that the affected sources can meet the Standard Permit's *standardized* permit conditions. This particular PCP Standard Permit does not lend itself to standardized, enforceable, replicable permit conditions. Because of the broad types of source categories covered by the PCP Standard Permit, this Standard Permit lacks replicable standardized permit conditions specifying how the Director's discretion is to be implemented for the individual determinations, *e.g.,* the air quality determination, the controls, and even the monitoring, recordkeeping, and reporting. Rather, the types of sources covered by a Pollution Control Project are better designed for case-by-case additional authorization, source-specific review, and source-specific technical determinations. For case-by-case additional authorization, source-specific review, and source specific technical determinations, under the minor NSR SIP rules, if these types of determinations are necessary, under the Texas Minor NSR SIP, the State is required to use its minor NSR SIP case-by-case permit process under 30 TAC 116.110(a)(1).

Because of the lack of replicable standardized permit conditions and the lack of enforceability, the PCP Standard Permit is not the appropriate vehicle for authorizing PCPs. EPA proposed to disapprove the PCP Standard Permit, as submitted February 1, 2006. *See* the proposal at 74 FR 48467, at 48475–48476, for additional information.

2. What is EPA's response to comments on the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision?

Comment 1: TCEQ commented that its PCP Standard Permit has been used to implement control technologies required by regulatory changes, statutory changes, and/or EPA consent decree provisions. As such, control devices may be applied to numerous different facility types and industry types, ranging from storage tanks to fired units. TCEQ understands EPA's comments and will work with EPA to develop an approvable authorization(s) that will achieve the same goals and emission reductions.

Response: EPA appreciates TCEQ's understanding of our comments and intention to work with us to develop an approvable rule revision. However, our evaluation is based on the submitted rule currently before us.

Comment 2: The Clinic comments that the Texas PCP Standard Permit does not meet Federal NNSR and PSD requirements. *See New York* v. *EPA,* 413 F.3d 4 (DC Cir. 2005). The PCP Standard Permit also fails to meet the minimum standards for minor authorizations as provided by the Act at 42 U.S.C. 7410(a)(2)(C) and (C) and at 40 CFR 51.160(a) and (b). Texas's PCP Standard Permit is not limited to a particular source-category and can apply to various pollution control projects at any source type. *See* 30 TAC 116.617(a). Further, the permit itself does not have emission limits or monitoring; instead, a facility is permitted to include site-specific limits and monitoring requirements in its application for coverage under a PCP Standard Permit. *See* 30 TAC 116.617(d)(2). The PCP Standard Permit includes a generic statement that the permit must not be used to authorize changes for which the Executive Director at TCEQ determines whether "there are health effects concerns or the potential to exceed a national ambient air quality standard criteria pollutant or contaminant that results from an increase in emissions of any air contaminant until those concerns are addressed by the

[24] The 2006 submittal also included a revision to 30 TAC 116.610(d), that is a rule in Subchapter F, Standard Permits, to change an internal cross reference from Subchapter C to Subchapter E, consistent with the re-designation of this Subchapter by TCEQ. *See* section IV.H, and 74 FR 48467, at 48476, for further information on this portion of the 2006 submittal.

registrant." *See* 30 TAC 116.617(a)(3)(B). This provision itself, without specific emission limits and monitoring requirements in the PCP Standard Permit, in inadequate to protect the NAAQS, and is an acknowledgement that provisions on the face of the PCP Standard Permit are not sufficient to assure protection of the NAAQS and PSD increments. The commenter supports EPA taking action to disapprove and to further require facilities that have emissions authorized under the PCP Standard Permit to seek a Federally valid authorization.

Response: EPA agrees with the comments that the submitted PCP Standard Permit does not meet the requirements of the Texas Minor NSR Standard Permits SIP.

Comment 3: BCCA, TIP, TCC, GCLC, TxOGA, and TAB commented that the PCP standard permit does contain on its face all requirements applicable to its use. *See* 30 TAC 116.617(d). The rule requires that a permittee make a submittal to TCEQ, but does not require the Executive Director to act to approve the submittal. Under the rules, if the Executive Director does not act, the authorization under the permit stands. Review by the Executive Director is not to make case-by-case determination, but rather to review for impacts on air quality and disallow use if air quality would be negatively impacted. *See* 30 TAC 116.617(a)(3)(B). This is an important distinction. The Texas PCP permit is more stringent than a program that lacks a discretionary denial provision.

Moreover, the PCP is a minor NSR authorization. The CAA does not establish requirements for a State's minor NSR programs. The Federal regulations that govern minor NSR programs at 40 CFR 51.160–.164 provide States great flexibility in establishing SIP approvable minor NSR programs. Indeed, EPA's Environmental Appeals Board ("EAB") has recognized the flexibility provided States in establishing a non-PSD, non-nonattainment NSR permitting program, noting that Federal requirements do not mandate a particular minor NSR applicability methodology or test.[25]

In light of this flexibility, the Texas PCP standard permit is an acceptable part of the State's minor NSR SIP. Notably, EPA cites no statutory authority or provision of Part 51 in suggesting a bar on approval of general or standard permits. The manner in which TCEQ implements the PCP standard permit is reasonable and practical, and a decision to reject the PCP standard permit is a decision to reject an important minor NSR tool used by Texas sources to authorize environmentally beneficial projects in an expedited fashion. Site-specific traditional NSR permitting for such projects is impractical, inefficient and detrimental to the environment.

Response: EPA disagrees with this comment. We are not disapproving the Texas PCP Standard Permit because under the Texas Minor NSR SIP, Texas cannot issue general or standard permits. In fact, EPA has approved the Texas Standard Permits Program as part of the Texas Minor NSR SIP. EPA's approval authorizes Texas to issue so-called general permits, *i.e.,* the Texas standard permits. Our approval of the Texas Standard Permit Program as part of the Texas Minor NSR SIP was based on the statutory and regulatory requirements, including section 110 of the Act, in particular section 110(a)(2)(C), and 40 CFR 51.160, which require EPA to determine that the State has adequate procedures in place in the submitted Program to ensure that construction or modification of sources will not interfere with attainment of a National Ambient Air Quality Standard (NAAQS) or Reasonable Further Progress (RFP).

This particular submitted individual Standard Permit does not meet the requirements of the Texas Standard Permits Minor NSR SIP. The submitted revision allows the Executive Director to selectively review for impacts on air quality and disallow use if air quality would be negatively impacted or even revise the emission limit to avoid negative air quality impacts. It grants the Executive Director too much discretion to act selectively and make site-specific determinations outside the scope of the PCP Standard Permit and fails to include replicable procedures for the exercise of such discretion. It fails to include replicable procedures for the exercise of such discretion. Under the Texas Minor NSR Standard Permits SIP, each Standard Permit promulgated by Texas is required to include replicable standardized permit terms and conditions. Each Standard Permit is required to stand on its own. No further action on the part of the Executive Director for holders of a Standard Permit is authorized under the SIP because each individual Standard Permit is required to contain upfront all the replicable standardized terms and conditions. The replicability of a Standard Permit issued pursuant to the SIP rules eliminates any director discretion. EPA approval will not be required in each individual case as the TCEQ evaluates (and perhaps revises) a source's PCP Standard Permit. If the Director retains the authority to exercise discretion in the evaluation of each PCP Standard Permit holder's impact on air quality, this undermines EPA's rationale for approving the Texas Standard Permits Program as part of the Texas Minor NSR SIP. Under the SIP, any case-by-case determination must be made through the vehicle of the case-by-case Minor NSR SIP permit, not using a Minor NSR SIP Standard Permit as the vehicle. While Minor NSR SIP permit programs are given great flexibility, they cannot interfere with attainment and must meet the requirements for minor NSR. The Executive Director's selective application of his discretion on a case-by-case basis, without specific replicable criteria, exceeds the scope of EPA's approval of the Standard Permits Program in 30 TAC Subchapter F of 30 TAC Chapter 116 as approved on November 14, 2003 (68 FR 64548).

The submitted PCP Standard Permit revision has no replicable conditions that specify how the Director's discretion is to be exercised and delineated. We are particularly concerned that the Executive Director may exercise such discretion in case-specific determinations in the absence of generic, replicable enforceable requirements. These replicable methodologies and enforceable requirements should be in the submitted individual Standard Permit itself, not in the Executive Director's after the fact case-specific determinations made in issuing a customized Standard Permit to a source. If an individual Standard Permit requires any customizations for a holder, then this particular Standard Permit no longer meets the requirements for the Texas Standard Permit Program SIP. This customized Standard Permit has morphed into a case-by-case Minor NSR SIP permit and must meet the Texas NSR SIP requirements for this type of permit.

Comment 4: BCCA, TIP, TCC, GCLC, and TAB commented that the manner in which TCEQ has defined pollution control projects is reasonable and practical, and a decision to reject the PCP Standard Permit is a decision to reject an important minor NSR tool used by Texas sources to authorize environmentally beneficial projects in an expedited fashion. TCC further comments that EPA does not, and cannot, question that the Standard Permit for PCPs provides for the regulation of stationary sources as necessary to assure that that NAAQS are achieved. TCC also comments that Parts C (PSD) and D (NNSR) are not implicated because PCP Standard

[25] *In re Tennessee Valley Authority,* 9 EAD 357, 461 (EAB Sept. 15, 2000).

Permits are expressly made unavailable to major sources and major modifications. All commenters indicated that narrowing the scope of projects that can qualify for the expedited standard permit approval (or requiring TCEQ to promulgate source category-specific PCP standard permits for every source category in Texas) is impractical, inefficient, and detrimental to the environment.

Response: EPA agrees that the submitted PCP Standard Permit does not apply to major stationary sources and major modifications subject to PSD or NNSR. While the manner in which TCEQ has defined pollution control projects may be reasonable and practical, using the Texas Standard Permits SIP to issue one individual Standard Permit for all types of PCPs does not meet the SIP's requirements.

The scope of a Standard Permit promulgated by TCEQ is governed by the TCAA and the SIP's general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116. These do not provide for the issuance of a Standard Permit for dissimilar sources. They provide for the issuance of a Standard Permit for similar sources so that its permit terms and conditions are determined upfront in the promulgation of the individual Standard Permit. There is no need for any director discretion or customization of the individual Standard Permit. This is not to say that TCEQ is precluded from issuing various individual Standard Permits for PCPs; TCEQ can issue various individual Standard Permits for PCPs that cover similar sources.

Comment 5: ERCC commented that PCP authorizations are not unique to Texas and EPA's concerns with Texas PCP Standard Permit is too broad, is misplaced, and fails to recognize the regulatory restrictions in place, and the benefits that allow efficient emission reduction projects to proceed in the State. The commenter refers to two States with pollution control exemptions from the definition of modification which allow PCPs to proceed with significantly fewer limitations than the Texas PCP Standard Permit: Ohio and Oregon. Neither of these States limits PCP by a category of pollution control techniques or industrial sources. These SIP-approved provisions fail to provide any guidance for an application, director review, recordkeeping, or monitoring requirements. The Texas PCP program is highlighted for disapproval because it placed too much emphasis on the requirements and limitations of the PCP program. The Texas program has more safeguards than Oregon and Ohio. The Texas PCP program is solely a Minor NSR Program. By proposing disapproval of the Texas PCP program, EPA is holding Texas to a vastly more stringent approach and is designed to judge Texas in a way that EPA has not proposed for any other State.

Response: See response to Comments 3 and 4. EPA also wishes to note that that the cited Oregon and Ohio PCP exemptions from Major NSR were approved by EPA before the court held that EPA lacked the authority to exempt PCPs from the Major NSR SIP requirements. *See State of New York* v. *EPA,* 413 F 3d. 3 (DC Cir. 2005). These exemptions of PCPs from Major NSR are not the same as a Minor NSR Standard Permit for PCPs. Moreover, they have no relationship to the Texas Minor NSR Standard Permits SIP.

Comment 6: TAB commented on the history of the PCP programs at EPA and in Texas and states that Texas has been issuing Standard Permits for PCP Projects since 1994. TAB comments that the standard permit program was administered for several years with no suggestion of programmatic abuses, and more importantly, no examples given by anyone of unintended consequences. TAB also asserts that 13 years after Texas adopted its pollution control project standard permit, EPA finally commented on it in the proposal. TAB asserts that EPA cannot question that TCEQ's Minor NSR program, including the PCP Standard Permit, meets this provision of the Act.

Response: EPA disagrees with the comment. EPA had no need to comment on the administration of the general Standard Permit Program in this action because EPA approved Texas' general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116 on November 14, 2003 (68 FR 64548) as meeting the minor NSR SIP requirements. That approval describes how the Standard Permit rules met EPA's requirements for new minor sources and minor modifications. The scope of EPA's disapproval in this action is limited to Texas's submission of a SIP revision, on February 1, 2006, adopting a Standard Permit for PCPs at 30 TAC 116.617—State Pollution Control Project Standard Permit. CAA section 110 sets out the process for EPA's review of State SIP submittals. Nothing in the Act suggests EPA is foreclosed from disapproving a submittal because it failed to comment on it during the State's rulemaking process. For further response to the remainder of the comment, *see* response to comments 3 and 4.

Comment 7: TAB discussed numerous guidance memoranda that EPA used to support its position that the PCP Standard Permit is unapprovable because it is not limited to a particular narrowly defined source category that the permit is designed to cover and can be used to make site-specific determinations that are outside the scope of this type permit. The commenter states that these memos are not law, and cannot conceivably be used as an independent basis to deny approval of a SIP revision. Any EPA pronouncement that purports to be binding must be adopted through notice and comment rulemaking. *See Appalachian Power Company* v. *EPA,* 208 F.3d 1015, 1023 (DC Cir. 2000). The commenter concludes that if EPA wants to disapprove a submitted SIP revision of a Standard Permit because it is not limited to a particular narrowly defined source category and that allow site specific determinations, then EPA must adopt a rule that says so. TAB comments that even if the memos could legally support EPA's position, that the PCP Standard Permit is unapprovable because it not limited to a particular narrowly defined source category that the permit is designed to cover and can be used to make site-specific determinations that are outside the scope of this type permit, neither of the cited memos actually says so. The commenter reviewed each cited memo and found nothing to suggest any intent to fill gaps or qualify any provision of 40 CFR 51.160. TAB further comments on EPA's cites to a series of **Federal Registers** on actions taken on other States' minor NSR programs. The commenter states that these actions offer no explanation of how these particular actions illuminate EPA's proposal to disapprove Texas' PCP Standard Permit. TAB further comments on EPA's cites to a series of **Federal Registers** on actions taken on other States' minor NSR programs. The commenter states that these actions offer no explanation of how these particular actions illuminate EPA's proposal to disapprove Texas' PCP Standard Permit.

Response: EPA disagrees with this comment. Section 110 of the Act, in particular section 110(a)(2)(C), and 40 CFR 51.160, require the EPA to determine that the State has adequate procedures to ensure that construction or modification of sources will not interfere with attainment of a National Ambient Air Quality Standard (NAAQS). The CAA grants EPA the authority to ensure that the construction or modification of sources will not interfere with attainment of a National

Ambient Air Quality Standard (NAAQS). The memoranda cited in the proposal were cited for the purpose of providing documentary evidence of how EPA has exercised its discretionary authority when reviewing general permit programs similar to the Texas Standard Permits SIP. They also collectively provide an historical perspective on how EPA has exercised its discretion in reviewing regulatory schemes similar to the submitted PCP Standard Permit. The utility of these citations is not in the specific subject matter they address, but in their discussion of the regulatory principles to be applied in reviewing permit schemes that adopt emission limitations created through standardized protocols. For example, the memorandum titled *Approaches to Creating Federally-Enforceable Emissions Limits,* Memorandum from John S. Seitz, OAQPS, November 3, 1993, on page 5 discusses EPA recognition that emissions limitations can be created through standardized protocols. Likewise, the memorandum titled *Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and section 112 rules and General permits,* Memorandum from Kathie A Stein, Office of Enforcement and Compliance Assurance, January 25, 1995, discusses on page 6 the essential characteristics of a general permit that covers a homogenous group of sources.

Again, the **Federal Register** citations provided in the proposal serve to further highlight EPA's practical application of the policies enunciated in the above referenced memoranda. These documents demonstrate that EPA has consistently applied these policies with respect to approval of the minor source permit programs which feature rules which are similar to the Texas Standard Permits SIP. For example the **Federal Register** at 71 FR 5979, final approval of Wisconsin SIP revision, February 6, 2006, states on page 5981 that EPA regards the prohibitory rules and general permits are essentially similar and goes on to discuss requirements for approval of permit schemes of this nature. The cited notices address requirements for approval of general permit programs submitted as SIP revisions and are illustrative of regulatory policy applied by EPA in reviewing Standard Permit programs for SIP approval.

The cumulative effect of these documents is to provide the public with an insight to EPA's policy with regard to its application of discretionary authority in reviewing a variety of proposed general permit schemes. In this instance, EPA interprets the applicable statutes and rules to require that Standard Permits be limited to similar sources and they cannot be used to make site-specific determinations that are outside the scope of this type of permit. This is consistent with EPA's prior policy pronouncements on this subject as evidenced by the memoranda. EPA's interpretation is circumscribed by the statutory requirement that such a permit program not interfere with the attainment of the NAAQS. Consequently, the commenter's failure to find relevant information to illuminate EPA's decision to disapprove the submitted Texas' PCP Standard Permit is not a reflection on the utility of the cited documents.

Comment 8: TAB concludes by observing that there is no evidence of Standard Permit Program failure or adverse comments. The commenter criticizes EPA for not taking action on the PCP Standard Permit Program which the CAA required action long before 2009. EPA is further criticized for failing to review the record to determine the negative impacts of the PCP Standard Permit Program during the intervening time during which TCEQ has been issuing PCP authorizations under this program. EPA offers no example of a PCP Project that failed to protect public health or welfare, or could not be enforced, or that did not accomplish its valuable purpose of quickly, but carefully, authorizing emission reduction projects.

Response: EPA disagrees with this comment. The standard for review in this context is not the existence of adverse comments or failure in the implementation of a Standard Permit Program SIP. EPA reviews a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3). *See also BCCA Appeal Group* v. *EPA,* 355 F 3d. 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (DC Cir. 1995). This includes an analysis of the submitted regulations for their legal interpretation. The existence of adverse comments is not the exclusive criteria for review of submitted revisions. In this particular instance, EPA's review is limited to Texas's submission of a SIP revision for a new PCP Standard Permit at 30 TAC 116.617, not a SIP revision for general Standard Permits Program. EPA has already approved Texas' general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116 on November 14, 2003 (68 FR 64548) as meeting the minor NSR SIP requirements.

3. What are the grounds for disapproving the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision?

EPA is disapproving the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision because the PCP Standard Permit, as adopted and submitted by Texas to EPA for approval into the Texas Minor NSR SIP, does not meet the requirements of the Texas Minor NSR Standard Permits Program. It does not apply to similar sources. Because it does not apply to similar sources, it lacks the requisite replicable standardized permit terms specifying how the Director's discretion is to be implemented for the case-by-case determinations.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.F.2 above. Because the PCP Standard Permit, in 30 TAC 116.617, does not meet the Texas Minor NSR SIP requirements for Standard Permits, EPA is disapproving the PCP Standard Permit, as submitted February 1, 2006. *See* the proposal at 74 FR 48467, at 48475–48476, our background for these submitted SIP revisions in section IV.F.1 above, and our response to comments on these submitted SIP revisions in section IV.F.2 above for additional information.

G. No Action on the Revisions to the Definitions Under 30 TAC 101.1

We proposed to take no action upon the June 10, 2005, SIP revision submittal addressing definitions at 30 TAC Chapter 101, Subchapter A, section 101.1, because previous revisions to that section are still pending review by EPA. *See* 74 FR 48467, at 48476. We received no comments on this proposal. Accordingly, we will take appropriate action on the submittals concerning 30 TAC 101.1 in a separate action. As noted previously, these definitions are severable from the other portions of the two SIP revision submittals.

H. No Action on Provisions That Implement Section 112(g) of the Act and for Restoring an Explanation That a Portion of 30 TAC 116.115 Is Not in the SIP Because It Implements Section 112(g) of the Act

Texas originally submitted a new Subchapter C—Hazardous Air Pollutants: Regulations Governing Constructed and Reconstructed Sources (FCAA, § 112(g), 40 CFR Part 63) on July 22, 1998. EPA has not taken action upon the 1998 submittal. In the February 1,

2006, SIP revision submittal, this Subchapter C is recodified to Subchapter E and sections are renumbered. This 2006 submittal also includes an amendment to 30 TAC 116.610(d) to change the cross-reference from Subchapter C to Subchapter E. These SIP revision submittals apply to the review and permitting of constructed and reconstructed major sources of hazardous air pollutants (HAP) under section 112 of the Act and 40 CFR part 63, subpart B. The process for these provisions is carried out separately from the SIP activities. SIPs cover criteria pollutants and their precursors, as regulated by NAAQS. Section 112(g) of the Act regulates HAPs, this program is not under the auspices of a section 110 SIP, and this program should not be approved into the SIP. These portions of the 1998 and 2006 submittals are severable. For these reasons we proposed to take no action on this portion relating to section 112(g) of the Act. *See* 74 FR 48467, at 48476–48477. We received no comments on this proposal. Accordingly, we are taking no action on the recodification of Subchapter C to Subchapter (d) and 30 TAC 116.610(d).

In a related matter, we are making an administrative correction to an earlier action which inadvertently removed an explanation that 30 TAC 116.115(c)(2)(B)(ii)(I) is not in the SIP. When we approved 30 TAC 116.115 in the SIP on September 18, 2002, we excluded 30 TAC 116.115(c)(2)(B)(ii)(I) because it implemented the requirements of section 112(g) of the Act. *See* 67 FR 58679, at 58699. In a separate action, we approved revisions to 30 TAC 116.115 on April 2, 2010 (75 FR 16671), which are unrelated to the excluded provisions of 30 TAC 116.115(c)(2)(B)(ii)(I). However, that action inadvertently removed the explanation that excluded 116.115(c)(B)(ii)(I) from the SIP. In this action, we are making an administrative correction to restore into the Code or Federal Regulations the explanation that the SIP does not include 30 TAC 116.115(c)(B)(ii)(I).

I. No Action on Provision Relating to Emergency and Temporary Orders

We proposed to take no action upon the February 1, 2006, SIP revision submittal which recodified the severable provisions relating to Emergency Orders from 30 TAC Chapter 116, Subchapter E to a new Subchapter K. *See* 74 FR 48467, at 48477. We received no comments on this proposal. Accordingly, we will take appropriate action on the Emergency Order requirements in a separate action, according to the Consent Decree schedule.

J. Responses to General Comments on the Proposal

Comment 1: The following commenters support EPA's proposal to disapprove the Texas NSR Reform Program, 1-hour NNSR, 1997 8-hour NNSR, and PCP Standard Permit: HCPHES; several members of the Texas House of Representatives; the Sierra Club; the City of Houston, and the Clinic.

Response: Generally, these comments support EPA's analysis of Texas's NSR Reform Program, 1-hour NNSR, 1997 8-hour NNSR, and PCP Standard Permit, as discussed in detail at in the proposal at 74 FR 48467, at 40471–48476, and further support EPA's action to disapprove the Texas NSR Reform Program submission.

Comment 2: The SCMS and PSR sent numerous similar letters via e-mail that relate to this action. These comments include 1,789 identical letters from SCMS (sent via e-mail) and a comment letter from PSR, which support EPA's proposed ruling that major portions of TCEQ air permitting program do not adhere to the CAA and should be thrown out. While agreeing that the proposed disapprovals are a good first step, the commenters state that EPA should take bold actions such as halting any new air pollution permits being issued by TCEQ utilizing TCEQ's current illegal policy; creating a moratorium on the operations of any new coal fired power plants; reviewing all permits issued since TCEQ adopted its illegal policies and requiring that these entities resubmit their applications in accordance with the Federal CAA; and putting stronger rules in place in order to reduce global-warming emissions and to make sure new laws and rules do not allow existing coal plants to continue polluting with global warming emissions.

The commenters further state that Texas: (1) Has more proposed coal and petroleum coke fired power plants than any other State in the nation; (2) Is number one in carbon emissions; and (3) Is on the list for the largest increase in emissions over the past five years. Strong rules are needed to make sure the coal industry is held responsible and that no permits are issued under TCEQ's illegal permitting process. Strong regulations are vital to cleaning up the energy industry and putting Texas on a path to clean energy technology that boosts economic growth, creates jobs in Texas, and protects the air quality, health, and communities.

In addition, SCMS sent 273 similar letters (sent via e-mail) that contained additional comments that Texas should rely on wind power, solar energy, and natural gas as clean alternatives to coal. Other comments expressed general concerns related to: impacts on global warming, lack of commitment by TCEQ to protect air quality, the need for clean energy efficient growth, impacts upon human health, endangerment of wildlife, impacts on creation of future jobs in Texas, plus numerous other similar concerns. The PSR further commented that as health care professionals, they are concerned about the health effects they are seeing in their patients due to environmental toxins in the air and water.

Response: To the extent that the SCMS and PSR letters comment on the proposed disapproval of the submitted 1-hour ozone standard, 1997 8-hour ozone standard, and NSR Reform Programs, they support EPA's action to disapprove these submitted rules. The remaining comments are outside the scope of our actions in this rulemaking.

Comment 3: TCEQ understands that EPA's review was conducted by applying the current applicable law. The Executive Director will conduct a review of all EPA comments and propose changes to the rules proposed for disapproval.

TCEQ understands EPA's concerns with issues regarding, among other things, applicability, clarity, enforceability, replicable procedures, recordkeeping, and compliance assurance. Specifically, the Executive Director will consider rulemaking to address the following concerns:

- Clarify references for major stationary sources and major modifications to EPA rules for nonattainment and maintenance area definitions and removing rule language indicating that the 1-hour thresholds and offsets are not effective unless EPA promulgates rules, and clarifying the applicability of nonattainment permitting rules;
- Clarify the definition of baseline actual emission rate, and clarify the inclusion of maintenance, startup, and shutdown emissions when determining baseline actual emissions; and
- Add missing items and clarify the existing requirements to obtain and comply with a PAL to meet FNSR requirements.

New and amended rules will be subject to the statutory and regulatory requirements for a SIP revision, as interpreted in EPA policy and guidance on SIP revisions, as well as applicable Texas law. The revised program will ensure protection of the NAAQS, and

demonstrate noninterference with the Texas SIP control strategies and reasonable further progress.

In addition, and as noted, TCEQ will address EPA's concerns regarding public participation in a separate rulemaking action.

Response: EPA appreciates TCEQ's commitment to consider rulemaking to correct the deficiencies in the submitted 1-hour ozone standard, 1997 8-hour ozone standard, and NSR Reform Programs. However, our evaluation is based on the submitted rules that are currently before us.

Comment 4: The Clinic further asks that EPA take action to halt Texas's use of permits-by-rule that, like the PCP standard permit, fail to meet minimum standards for minor source permitting and for general permits and exclusionary rules. Texas has adopted and is applying a number of permits-by-rule that are not source specific, do not include specific emission limitations or monitoring, and are inadequate to protect the NAAQS. These include the permits-by-rule in Subchapter K of Chapter 106 of the Texas rules. In addition, like the PCP, some of these permits—rather than authorizing specific types of minor emission source categories—can be used to increase authorized emissions from any type of facility.[26] EPA has repeatedly stated that Texas's current use of permit-by-rule violates the Act and Texas's approved SIP.[27] Yet EPA has failed take action to stop the illegal use of permits-by-rule.

Response: Any action on Texas's use of permits-by-rule, as requested by the commenter, is outside the scope of our actions in this rulemaking.

Comment 5: Concerned Citizens of Grayson expressed concerns about a hot mix asphalt plant located near the small town of Pottsboro, TX, which is located near public schools and private residences and has caused significant disruptions in the lives of those liming nearby because or "the noxious stench repeatedly emitted from the plant." The commenters are concerned because the plant was authorized under a Standard Permit issued by TCEQ which only had public participation and comment when TCEQ issued the Standard Permit for hot mix asphalt plants and there was no opportunity for public participation and comment on a source that applied for authorization under a Standard Permit for a specific source after the Standard Permit has been authorized.

Response: These comments do not relate to the submitted Standard Permit for Pollution Control Projects that EPA is reviewing in this action. These comments, which relate to a Standard Permit for Hot Mix Asphalt Plants, are outside the scope of this action.

Comment 6: AECT believes that EPA's proposed disapproval has injected uncertainty into the Texas permitting program, will cause tremendous operational-uncertainty for companies-in light of significant air emission rule proposals considered by EPA (*e.g.* mercury MACT, PSD Tailoring Rule), this and other disapprovals may jeopardize or substantially delay the ability of electric generators to obtain necessary air permits to install pollution controls that will be necessary to comply with current and future rules; and prompt EPA approval of the proposed TCEQ NSR SIP Revisions is needed in order to provide the regulatory certainty necessary for economic development, creation of critically needed jobs, and generation of affordable, reliable electricity in Texas.

Response: We are disapproving the submitted Texas NSR Reform Program, 1-hour NNSR, and PCP Standard Permit programs because they do not meet applicable requirements of the Act, as discussed herein. EPA is required to review a SIP revision for its compliance with the Act and EPA regulations. *See* CAA section 110(k)(3); *see also BCCA Appeal Group* v. *EPA,* 355 F 3d.817, 822 (5th Cir 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (DC Cir. 1995).

Comment 7: BCCA and TIP comment that under Texas's integrated air permitting regime, air quality in the State is demonstrating strong, sustained improvement. The commenters cite to substantial reductions in nitrogen oxides and improvements in the ozone concentrations in the Houston-Galveston and Dallas-Fort Worth ozone nonattainment areas.

Response: We are disapproving the submitted Texas NSR Reform Program, 1997 8-hour NNSR, 1-hour NNSR, and PCP Standard Permit programs because they do not meet applicable requirements of the Act, as discussed herein. EPA is required to review a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3); *See also BCCA Appeal Group* v. *EPA,* 355 F 3d. 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (DC Cir. 1995).

Even if the commenters' premises are to be accepted, they fail to substantiate their claim that the Texas NSR Reform Program, 1-hour NNSR, 1997 8-hour NNSR, and PCP Standard Permit programs have had a significant impact on improving air quality in Texas by producing data showing that any such gains are directly attributable to the submitted Programs, and are not attributable to the SIP-approved control strategies (both State and Federal programs) or other Federal and State programs. They provide no explanation or basis for how their numbers were derived.

Furthermore, since the commenters thought EPA was acting inconsistently, they should have identified SIPs that are inconsistent with our actions and provided technical, factual information, not bare assertions.

Comment 8: GCLC, TIP, BCCA, AECT, and TCC comment that EPA ignores the fact that the Texas NSR Program has had a significant impact on improving air quality in Texas. TCEQ commented that significant emission reductions have been achieved by the submitted Program through the large number of participating grandfathered facilities, which resulted in improved air quality based upon the monitoring data.

BCCA, TAB, TxOGA, and ERCC comment that the legal standard for evaluating a SIP revision for approval is whether the submitted revision mitigates any efforts to attain compliance with a NAAQS. EPA's failure to assess the single most important factor in the submitted Program, the promotion of continued air quality improvement, is inconsistent with case law and the Act and is a deviation from the SIP consistency process and national policy. EPA should perform a detailed analysis of approved SIP programs through the United States and initiate the SIP consistency process within EPA to ensure fairness to Texas industries.

Response: EPA is required to review SIP revisions submission for their compliance with the Act and EPA regulations. CAA 110(k)(3); *See also BCCA Appeal Group* v. *EPA,* 355 F 3d. 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (DC Cir. 1995). EPA is not disapproving the

[26] For example, 30 TAC 106.261, 106.262, 106.263, and 106.264.

[27] *See* "Letter to Dan Eden, TCEQ Deputy Director" from Carl Edlund, EPA Region 6, Director Multimedia Planning and Permitting Division (March 12, 2008) ("EPA has consistently expressed concern about PBRs that authorize a category of emissions, such as startup or shutdown emissions, or that modify an existing NSR permit.") (Attachment 10 of the Clinic's comments); "Letter to Richard Hyde, TCEQ, Director, Air Permits Division" from Jeff Robinson, EPA Region 6, Chief, Air Permits Section (November 16, 2007) (Attachment 11 of then Clinic's comments); "Letter to Steve Hagle, TCEQ, Special Assistant, Air Permits Director" from David Neleigh, EPA Region 6, Chief, Air Permits Section (March 30, 2006) (Attachment 12 of the Clinic's comments); "Letter to Lola Brown, TCEQ, Office of Legal Services" from David Neleigh, EPA Region 6, Chief, Air Permits Section (February 3, 2006) (Attachment 13 of the Clinic's comments).

entire Texas NSR SIP. Specifically, on September 23, 2009, EPA proposed to disapprove *revisions* to the Texas NSR SIP submitted by the State of Texas that relate to the Nonattainment NSR (NNSR) Program for the 1-Hour Ozone Standard and the 1997 8-Hour Ozone Standard, NSR Reform, and a specific Standard Permit. Further, EPA is not required to initiate the SIP consistency process within EPA unless the pending SIP revision appears to meet all the requirements of the Act and EPA's regulations but raises a novel issue. EPA is disapproving the submitted revisions because they fail to meet the Act and EPA's regulations. Because the submitted revisions fail to meet the requirements for a SIP revision, the SIP consistency process is not relevant.

Comment 9: The ERCC comments that to avoid negative economic consequences EPA should exercise enforcement discretion statewide for sources that obtained government authorization in good faith and as required by TCEQ, the primary permitting authority. EPA should not require any injunctive relief and should consider penalty only cases in this rulemaking.

Response: EPA enforcement of the CAA in Texas is outside the scope of our actions.

V. Final Action

Under section 110(k)(3) of the Act and for the reasons stated above, EPA is disapproving the following: (1) The submitted definition of "best available control technology" in 30 TAC 116.10(3); (2) Major NSR in areas designated nonattainment for the 1-hour ozone NAAQS; (3) Major NSR in areas designated nonattainment for the 1997 8-hour ozone NAAQS; (4) Major NSR SIP requirements for PALs; (5) Non-PAL aspects Major NNSR SIP requirements; and (6) submittals for a Minor Standard Permit for PCP. EPA is also proposing to take no action on certain severable revisions submitted June 10, 2005, and February 1, 2006.

Specifically, we are disapproving the following regulations:

- Disapproval of the definition of best available control technology at 30 TAC 116.10(3), submitted March 13, 1996, and July 22, 1998;
- Disapproval of revisions to 30 TAC 116.12 and 116.150 as submitted June 10, 2005;
- Disapproving revisions to 30 TAC 116.12, 116.150, 116.151; and disapproving new sections at 30 TAC 116.121, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, 116.610(a), and 116.617, as submitted February 1, 2006.

We are also taking no action on the provisions identified below:

- The revisions to 30 TAC 101.1—Definitions, submitted June 10, 2005;
- The recodification of the existing Subchapter C under 30 TAC Chapter 116 to a new Subchapter E under 30 TAC Chapter 116;
- The provisions of 30 TAC 116.610(d); and
- The recodification of the existing Subchapter E under 30 TAC Chapter 116 to a new Subchapter K under 30 TAC Chapter 116.

Finally, we are making administrative corrections to reinstate an explanation to the SIP-approved 30 TAC 116.115, that was inadvertently removed in a separate action on April 2, 2010 (75 FR 16671).

Sources are reminded that they remain subject to the requirements of the Federally approved Texas Major NSR SIP and subject to potential enforcement for violations of the SIP (*See* EPA's Revised Guidance on Enforcement During Pending SIP Revisions, dated March 1, 1991).

VI. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

This final action has been determined not to be a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993).

B. Paperwork Reduction Act

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

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. This rule will not have a significant impact on a substantial number of small entities because SIP approvals and disapprovals under section 110 and part D of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the States are already imposing.

Furthermore, as explained in this action, the submissions do not meet the requirements of the Act and EPA cannot approve the submissions. The final disapproval will not affect any existing State requirements applicable to small entities in the State of Texas. Federal disapproval of a State submittal does not affect its State enforceability. After considering the economic impacts of today's rulemaking on small entities, and because the Federal SIP disapproval does not create any new requirements or impact a substantial number of small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 7410(a)(2).

D. Unfunded Mandates Reform Act

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

local law should not be approved as part of the Federally approved SIP. It imposes no new requirements. Accordingly, no additional costs to State, local, or Tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications." "Policies that have Federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

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

F. Executive Order 13175, Coordination With Indian Tribal Governments

This action does not have Tribal implications, as specified in Executive Order 13175 (59 FR 22951, November 9, 2000), because the SIP EPA is disapproving would not apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law. This final rule does not have Tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. This action does not involve or impose any requirements that affect Indian Tribes. Thus, Executive Order 13175 does not apply to this action.

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

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

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

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

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act. Today's action does not require the public to perform activities conducive to the use of VCS.

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

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

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

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. section 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 15, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to

enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: August 31, 2010.

Al Armendariz,

Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7410 *et seq.*

Subpart SS—Texas

■ 2. The table in § 52.2270(c) entitled "EPA–Approved Regulations in the Texas SIP" is amended by revising the entry for section 116.115 to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA—APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
*	*	*	*	*
Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification				
*	*	*	*	*
Subchapter B—New Source Review Permits				
*	*	*	*	*
Division 1—Permit Application				
Section 116.115	General and Special Conditions.	8/20/2003	4/2/2010, 75 FR 16671	The SIP does not include subsection 116.115(c)(2)(B)(ii)(I).
*	*	*	*	*

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■ 3. Section 52.2273 is amended by adding a new paragraph (d) to read as follows:

§ 52.2273 Approval status.

* * * * *

(d) EPA is disapproving the Texas SIP revision submittals under 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction and Modification as follows:

(1) The following provisions in 30 TAC Chapter 116, Subchapter A—Definitions:

(i) 30 TAC 116.10—General Definitions—the definition of "BACT" in 30 TAC 116.10(3), adopted February 14, 1996, and submitted March 13, 1996; and repealed and readopted June 17, 1998, and submitted July 22, 1998;

(ii) The revisions to 30 TAC 116.12—Nonattainment Review Definition, adopted May 25, 2005, and submitted June 10, 2005;

(iii) The revisions to 30 TAC 116.12—Nonattainment and Prevention of Significant Deterioration Definitions, adopted January 11, 2006, and submitted February 1, 2006 (which renamed the section title);

(2) The following section in 30 TAC Chapter 116, Subchapter B—New Source Review Permits, Division 1—Permit Application: 30 TAC 116.121—Actual to Projected Actual Test for Emission Increase, adopted January 11, 2006, and submitted February 1, 2006;

(3) The following sections in 30 TAC Chapter 116, Subchapter B—New Source Review Permits, Division 5—Nonattainment Review:

(i) Revisions to 30 TAC 116.150—New Major Source or Modification in Ozone Nonattainment Area—revisions adopted May 25, 2005, and submitted June 10, 2005; and revisions adopted January 11, 2006, and submitted February 1, 2006;

(ii) Revisions to 30 TAC 116.151—New Major Source or Modification in Nonattainment Areas Other Than Ozone—revisions adopted January 11, 2006, and submitted February 1, 2006;

(4) The following sections in 30 TAC Chapter 116, Subchapter C—Plant-Wide Applicability Limits, Division 1—Plant-Wide Applicability Limits:

(i) 30 TAC 116.180—Applicability—adopted January 11, 2006, and submitted February 1, 2006;

(ii) 30 TAC 116.182—Plant-Wide Applicability Limit Permit Application—adopted January 11, 2006, and submitted February 1, 2006;

(iii) 30 TAC 116.184—Application Review Schedule—adopted January 11, 2006, and submitted February 1, 2006;

(iv) 30 TAC 116.186—General and Special Conditions—adopted January 11, 2006, and submitted February 1, 2006;

(v) 30 TAC 116.188—Plant-Wide Applicability Limit—adopted January 11, 2006, and submitted February 1, 2006;

(vi) 30 TAC 116.190—Federal Nonattainment and Prevention of Significant Deterioration Review—adopted January 11, 2006, and submitted February 1, 2006;

(vii) 30 TAC 116.192—Amendments and Alterations—adopted January 11, 2006, and submitted February 1, 2006;

(viii) 30 TAC 116.194—Public Notice and Comment—adopted January 11, 2006, and submitted February 1, 2006;

(ix) 30 TAC 116.196—Renewal of a Plant-Wide Applicability Limit Permit—adopted January 11, 2006, and submitted February 1, 2006;

(x) 30 TAC 116.198—Expiration and Voidance—adopted January 11, 2006, and submitted February 1, 2006;

(5) The following sections in 30 TAC Chapter 116, Subchapter F—Standard Permits:

(i) Revisions to 30 TAC 116.610—Applicability—paragraphs (a)(1) through (a)(5) and (b)—revisions adopted January 11, 2006, and submitted February 1, 2006;

(ii) 30 TAC 116.617—State Pollution Control Project Standard Permit—adopted January 11, 2006, and submitted February 1, 2006;

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