

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-HQ-OAR-2010-1033; FRL-9245-2] RIN 2060-AQ67

Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim Final rule.

SUMMARY: EPA is correcting its previous full approval of Texas's Clean Air Act (CAA) Prevention of Significant Deterioration (PSD) program to be a partial approval and partial disapproval. The state did not address, or provide adequate legal authority for, the program's application to all pollutants that would become newly subject to regulation in the future, including non-National Ambient Air Quality Standard (NAAQS) pollutants, among them greenhouse gases (GHGs). Further, EPA is promulgating a federal implementation plan (FIP), as required following the partial disapproval, to establish a PSD permitting program in Texas for GHG-emitting sources. EPA is

taking this action through interim final rulemaking, effective upon publication, to ensure the availability of a permitting authority—EPA—in Texas for GHG-emitting sources when they become subject to PSD on January 2, 2011. This will allow those sources to proceed with plans to construct or expand. This rule will expire on April 30, 2011. EPA is also proposing a notice-and-comment rulemaking that mirrors this rulemaking.

DATES: This action is effective on December 30, 2010.

ADDRESSES: EPA has established a docket for this rulemaking under Docket ID No. EPA-HQ-OAR-2010-1033. All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the U.S. Environmental Protection Agency, Air Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to

4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

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SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

The only governmental entity potentially affected by this rule is the State of Texas. Other entities potentially affected by this rule include sources in all industry groups within the State of Texas, which have a direct obligation under the CAA to obtain a PSD permit for GHGs for projects that meet the applicability thresholds set forth in the Tailoring Rule.¹ This independent obligation on sources is specific to PSD and derives from CAA section 165(a). The majority of entities potentially affected by this action are expected to be in the following groups:

Industry group	NAICS ^a
Utilities (electric, natural gas, other systems)	2211, 2212, 2213.
Manufacturing (food, beverages, tobacco, textiles, leather)	311, 312, 313, 314, 315, 316.
Wood product, paper manufacturing	321, 322.
Petroleum and coal products manufacturing	32411, 32412, 32419.
Chemical manufacturing	3251, 3252, 3253, 3254, 3255, 3256, 3259.
Rubber product manufacturing	3261, 3262.
Miscellaneous chemical products	32552, 32592, 32591, 325182, 32551.
Nonmetallic mineral product manufacturing	3271, 3272, 3273, 3274, 3279.
Primary and fabricated metal manufacturing	3311, 3312, 3313, 3314, 3315, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329.
Machinery manufacturing	3331, 3332, 3333, 3334, 3335, 3336, 3339.
Computer and electronic products manufacturing	3341, 3342, 3343, 3344, 3345, 4446.
Electrical equipment, appliance, and component manufacturing	3351, 3352, 3353, 3359.
Transportation equipment manufacturing	3361, 3362, 3363, 3364, 3365, 3366, 3369.
Furniture and related product manufacturing	3371, 3372, 3379.
Miscellaneous manufacturing	3391, 3399.
Waste management and remediation	5622, 5629.
Hospitals/nursing and residential care facilities	6221, 6231, 6232, 6233, 6239.
Personal and laundry services	8122, 8123.
Residential/private households	8141.
Non-residential (commercial)	Not available. Codes only exist for private households, construction and leasing/sales industries.

^a North American Industry Classification System.

B. How is the preamble organized?

The information presented in this preamble is organized as follows:

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¹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule. 75 FR

31514 (June 3, 2010). The Tailoring Rule is described in more detail later in this preamble.

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II. Overview of Interim Final Rule*A. Brief Summary*

This rulemaking is intended to assure that large GHG-emitting sources in Texas will be able to obtain preconstruction permits under the CAA New Source Review (NSR) PSD program, and do so when they become subject to PSD, which will occur on January 2, 2011. In this manner, this rulemaking will allow those sources to avoid delays in construction or modification.

In this rulemaking, EPA is determining that it erred in fully approving Texas's PSD program in 1992 because at that time, the program had a gap, which recent statements by Texas have made particularly evident. The program did not address its application to, or provide assurances that it has adequate legal authority to apply to, all pollutants newly subject to regulation, including non-NAAQS pollutants, among them GHGs. As a result, EPA is correcting its previous full approval to be a partial approval and partial disapproval. EPA is taking this action through the error-correction mechanism provided under CAA section 110(k)(6). The partial disapproval requires EPA, under CAA section 110(c)(1)(B), to promulgate a FIP within 2 years, and, as part of this rulemaking, EPA is exercising its discretion to promulgate the FIP immediately. Under the FIP, EPA will become the permitting authority for, and apply federal PSD requirements to, large GHG-emitting sources in accordance with the thresholds established under what we call the Tailoring Rule, which EPA recently promulgated.

By becoming the permitting authority, EPA will be able to process preconstruction PSD permit applications for GHG-emitting sources and thereby allow the affected sources to avoid delays in construction and modification.² According to Texas, 167 GHG-emitting sources will require PSD permits during 2011. It is likely that some of these sources will become subject to PSD soon after January 2, 2011, and therefore will have a pressing need to have a permitting authority in place by that time. Although the CAA allows states to implement PSD, and Texas has been implementing an EPA-approved PSD program since 1992, Texas has recently informed EPA that it

² Texas will continue to be the permitting authority for sources of other pollutants. This split permitting process will also take place in the seven other states for which EPA is implementing a GHG PSD FIP.

does not have the intention or the authority to apply PSD to GHG-emitting sources, and that it could very well maintain this position even if the DC Circuit upholds the GHG rules against legal challenges that Texas and other parties have recently brought. Texas's unwillingness to implement this aspect of the federal PSD program leaves EPA no choice but to resume its role as the permitting authority for this portion, in order to assure that businesses in Texas are not subject to delays or potential legal challenges and are able to move forward with planned construction and expansion projects that will create jobs and otherwise benefit the state's and the nation's economy. It bears emphasizing that it is incumbent on EPA to take action now so that there will be no period of time when sources are unable to obtain necessary PSD permits, beginning on January 2, 2011.

In order to assure no gap in permitting, EPA is taking this action, including the FIP, through an interim final rule that is exempt from notice-and-comment due to the "good cause" exception of the Administrative Procedure Act. This interim final rule will remain in place until April 30, 2011. On a parallel track, EPA is also initiating a proposed rulemaking that mirrors this rulemaking, and that EPA intends to finalize and make effective by May 1, 2011.

B. Detailed Overview

The CAA requires each state, including Texas, to adopt into its State Implementation Plan (SIP) a PSD program. CAA sections 110(a)(2)(C), 110(a)(2)(f), 161. One of the PSD requirements is that PSD applies by operation of law to any pollutant as soon as that pollutant becomes subject to regulation under the CAA for the first time, and that includes non-NAAQS pollutants. CAA section 165(a)(1), 169(1). EPA has consistently interpreted these CAA provisions in that manner. The CAA further requires that EPA-approved PSD programs must meet all CAA requirements, CAA section 110(k)(3), and this includes applying PSD to all pollutants newly subject to regulation, including non-NAAQS pollutants. In addition, the CAA requires each state to adhere to various requirements related to SIP adoption, including that the state "provide * * * necessary assurances that the State * * * will have adequate * * * authority under State * * * law to carry out such implementation plan. * * *" CAA section 110(a)(2)(E)(i). Once a state has made a SIP submittal, the CAA requires EPA to approve or disapprove the SIP revision in whole or in part,

depending on the extent to which the CAA requirements are met. CAA section 110(k)(3),(4). If EPA disapproves, it must promulgate a FIP that addresses the disapproved SIP or portion of the SIP at any time within two years of the disapproval. CAA section 110(c)(1)(B). In addition, the CAA authorizes EPA to “determine []” if a previous action in approving a SIP revision was “in error,” and if so, to “revise such action as appropriate.” CAA section 110(k)(6).

In 1972, EPA approved Texas’s initial SIP to attain and maintain the NAAQS. At that time, EPA approved the state’s assurances of adequate legal authority. In the early 1980s, following the 1977 CAA Amendments that enacted the PSD program, EPA, which at that time administered PSD, delegated to Texas partial authority to implement the PSD program. During this time, EPA made clear to Texas that EPA’s regulatory PSD program covers non-NAAQS pollutants.

In 1985–88, Texas developed a PSD program and in a series of submittals, submitted it to EPA as a SIP revision. The Texas program incorporated by reference much of EPA’s PSD regulations, 40 CFR part 52, including the PSD applicability provisions in 40 CFR part 52.21(b)(1)(i). Thus, the Texas PSD program by its terms applied to “any air pollutant regulated under the Clean Air Act.” However, Texas state law imposed limits that precluded the Texas PSD program from applying automatically, as a matter of law, to each newly regulated pollutant. Rather, Texas’s program applied only to pollutants that were subject to regulation at the time the state adopted the SIP revision establishing the PSD program, so that the state would need to take additional action to subject subsequently regulated pollutants to PSD, for example, an expeditious state law change that would be promptly submitted to EPA as a SIP revision to update the PSD program. Texas and EPA were both well aware of this limitation. In fact, while EPA was reviewing Texas’s PSD SIP revision, EPA promulgated a national ambient air quality standard (NAAQS) for PM₁₀, thereby subjecting that pollutant to PSD for the first time, and Texas updated its state PSD rule to apply to PM₁₀ and submitted that as a SIP revision. Texas did not, however, explicitly recognize that after EPA approved its PSD program, EPA could well subject to PSD for the first time additional pollutants, and Texas did not address that situation in any manner. For example, Texas did not provide assurances that it would take action to apply its PSD program to all pollutants newly subject to regulation, including non-NAAQS

pollutants; nor did Texas provide information as to the method or timing of such action.

During the course of its consideration of Texas’s proposed PSD SIP revision, EPA became concerned that Texas would not implement EPA’s interpretation of the core PSD requirement that sources’ implement best available control technology (BACT). As a result, EPA asked for written commitments that Texas would implement the PSD program in accordance with EPA interpretations. In a September 5, 1989, letter, which we call the Texas PSD Commitments Letter, Texas stated that it was “committed to the implementation of EPA decisions regarding PSD program requirements.” Separately, as for Texas’s legal authority to carry out the PSD program, the state, in its various SIP submittals, made general references to its legal authority for adopting and submitting SIP revisions.

In 1992, EPA fully approved Texas’s PSD rules. In the preamble to this final approval, EPA did not specifically address the issue of how the PSD program would apply to pollutants newly subject to regulation, including non-NAAQS pollutants, or the state’s legal authority for applying PSD to such pollutants. EPA did state that it was basing the approval on (among other things) the 1989 Texas PSD Commitments Letter. However, EPA acknowledged questions about the scope of these commitments and EPA made clear that even with that letter, Texas retained significant discretion in implementing the PSD program.

Because the application of PSD to pollutants newly subject to regulation is a key component of the program, and because Texas’s PSD program, unlike that of most states, did not automatically apply to such pollutants, it was important that Texas, in its SIP submittals, address how it would apply its program to such pollutants. This could include providing, for example, assurances that its program would apply to such pollutants or information as to the method and timing for applying its program to such pollutants. In addition, under CAA section 110(a)(2)(E)(i), Texas was required to provide assurances that it had adequate legal authority to apply its program to such pollutants.

However, as noted previously, there is no indication in the record of Texas’s SIP submissions or EPA’s action on them that Texas specifically addressed its program’s application to pollutants newly subject to regulation. Texas did provide the 1989 Texas PSD Commitments Letter, in which it generally committed “to implement EPA

requirements relative to [PSD].” But by its terms, this 1989 letter did not commit to apply PSD to such pollutants and in any event, EPA, in discussing this letter in the preamble to the final rule, acknowledged that Texas retained substantial discretion in implementing PSD.

Thus, at the time that Texas submitted and EPA approved the state’s PSD program, the program had important gaps. It did not address its application to, or provide the requisite assurance that it had legal authority to apply to, pollutants newly subject to regulation, including non-NAAQS pollutants.

Texas has recently made statements that have made these gaps particularly evident.³ Texas has stated that it is not required to submit a SIP revision to apply PSD to non-NAAQS pollutants, including GHGs. Texas has explained that in its view, the CAA is clear, under the legal doctrine that we call *Chevron* step 1, described later, that the PSD program is limited to NAAQS pollutants and does not apply to non-NAAQS pollutants. In addition, Texas has stated that it does not have the intention or the authority to apply PSD to GHG-emitting sources, and that it could very well maintain this position even if the D.C. Circuit upholds the GHG rules in the current litigation before that Court.

Texas’s recent statements highlight the gaps in its PSD program concerning the application of PSD, and the legal authority for applying PSD, to pollutants newly subject to regulation, including non-NAAQS pollutants, among them GHGs. What’s more, Texas’s recent statements are consistent with the view that the state’s silence on this subject at the time it submitted and EPA approved its PSD SIP means that Texas did not, at that time, view itself as obligated to apply PSD to each pollutant newly subject to regulation, including non-NAAQS pollutants.

Specifically, Texas’s recent statement that the CAA PSD provisions are clear by their terms—which is what a *Chevron* step 1 interpretation means—that they do not apply to non-NAAQS pollutants, suggests that Texas would have interpreted the CAA PSD provisions the same way at the time Texas submitted its PSD program. But at the least, Texas’s PSD program contained a gap because it failed to address this issue; and that gap is significant because it facilitates Texas, at this time, taking the position that PSD does not apply to non-NAAQS

³ Texas made these statements in various letters to EPA in response to rulemakings and in court filings challenging those rulemakings, as discussed in detail later in this preamble.

pollutants.⁴ Texas's recent statement that it does not have the authority to apply PSD to GHG-emitting sources highlights that Texas's PSD program has a gap due to its failure to provide assurances of adequate legal authority. Specifically, Texas's direct statement that it does not have authority to apply PSD to GHGs casts doubt on whether Texas, at the time it submitted the PSD SIP submittals, would have viewed itself as having such authority. There seems to be a meaningful possibility that at the time Texas submitted and EPA approved the state's PSD program, during 1985–1992, Texas considered itself under some legal limit or constraint in applying PSD to all pollutants newly subject to regulation. At the least, it is apparent that at the time that Texas submitted its PSD program, Texas did not provide the “necessary assurances” that it “will have adequate * * * authority under State * * * law to carry out such implementation plan (and is not prohibited by any provision of * * * State law from carrying out such implementation plan or portion thereof),” as required under CAA section 110(a)(2)(E)(i).

The gaps in Texas's PSD SIP—its failure to address, or provide assurances of the requisite legal authority concerning, the application of PSD to all pollutants newly subject to regulation, including non-NAAQS pollutants—means that the PSD SIP was flawed at the time that EPA reviewed it for action. EPA did not address those flaws and instead, issued a full approval of the SIP.

In this rulemaking, therefore, EPA is “determin[ing]” that EPA's previous action fully approving Texas's PSD program was “in error,” under CAA section 110(k)(6). The key terms in this provision, as just quoted, confer broad discretion upon EPA to make decisions as to when it erred in approving a SIP revision. Thus, it is clear that under this provision, EPA erred in approving the Texas PSD program in light of that program's flaws.

Once EPA determines that its previous approval of the Texas PSD SIP was in error, EPA, under CAA section 110(k)(6), “may * * * revise [its previous full approval] as appropriate. * * *” In this rulemaking, EPA is revising its previous full approval of

Texas's PSD SIP to be (i) a partial approval, so that Texas's SIP remains approved to the extent of the pollutants that the PSD program already does cover; and (ii) a partial disapproval. The partial disapproval is based on the Texas PSD SIP's failure to apply PSD to each pollutant newly subject to regulation, including each non-NAAQS pollutant, among them GHGs. An alternative legal basis for this rulemaking is EPA's inherent administrative authority to reconsider a previous action.

It should be noted that even if the general assurances that Texas provided in its 1989 PSD Commitments Letter or may have otherwise provided in the record of its PSD SIP submittal were read to indicate that Texas did provide assurances that it would implement, and had legal authority to implement, EPA's interpretation that PSD applies to each pollutant newly subject to regulation, including non-NAAQS pollutants, then Texas's recent statements to the contrary indicate that Texas now is not complying with those assurances. Under these circumstances, EPA would still be justified in determining that its prior approval was in error and should be converted to a partial approval and partial disapproval. This is because under these circumstances, EPA's prior approval should be considered to have been based on those assurances, so that Texas's explicitly stated intent to not act in accordance with those assurances would eliminate the basis for that prior approval.

After promulgating the partial disapproval in this rulemaking, EPA is required to promulgate a FIP “at any time within 2 years,” under CAA section 110(c)(1). EPA is exercising its discretion to immediately promulgate the FIP, and is doing so as part of this rulemaking. The FIP consists of appropriate action to apply the PSD program to pollutants that are subject to the PSD program under the CAA, but that Texas has not made subject to Texas's PSD program. At present, Texas has stated that it has neither the intention nor the authority to apply its PSD program to GHG-emitting sources. Therefore, the FIP applies the EPA PSD regulatory program to the GHG portion of the PSD permit for GHG-emitting sources in Texas, including the thresholds in what we call the Tailoring Rule that limit PSD to large sources. Further, the FIP commits EPA to take future action as appropriate with respect to any additional newly regulated pollutants. The FIP does not apply to any other currently regulated pollutants because at this point, Texas's PSD

program addresses all other pollutants that are subject to regulation under the CAA. EPA is promulgating the FIP immediately, as opposed to a later time within the two-year period, because certain GHG-emitting sources in Texas will become subject to the PSD program as of January 2, 2011. Immediate promulgation of the FIP will allow EPA to act as the permitting authority in Texas for these sources as of January 2, 2011, and thereby avoid delays in these sources' ability to construct or modify.

It should be noted that EPA has recently taken another action concerning Texas's PSD program as that program relates to GHGs. In a final rule signed on December 1, 2010 and published by notice dated December 13, 2010, EPA issued what we call a SIP call, under CAA section 110(k)(5), requiring Texas and 12 other states whose SIP-approved PSD programs do not apply to GHG-emitting sources to submit a corrective SIP revision; and EPA established a deadline for that SIP submittal for each state, which ranged from as early as December 22, 2010 for seven of the states to December 1, 2011 for Texas. In addition, EPA stated that if Texas or any of the other states failed to submit its corrective SIP revision by its deadline, EPA intended to promulgate a FIP immediately thereafter.

The timing of the SIP call was driven by the fact that the affected states did not have authority to issue PSD permits to GHG-emitting sources and, as a result, those sources could face delays in construction and modification when they become subject to PSD as early as January 2, 2011. EPA designed the SIP call to maximize the opportunity of each affected state to assure that its sources would have a permitting authority available as of that date. EPA did so by allowing each state flexibility for its SIP submittal deadline, and therefore for the date that EPA could put a FIP in place. Each of the affected states except Texas responded with a plan that would assure that its sources would not confront permitting delays. Texas did not submit such a plan and as a result, its sources—according to Texas, as many as 167 during 2011—do confront the possibility of permitting delays. In addition, it was in responding to the SIP call and related EPA rulemakings that Texas made the statements noted earlier in this preamble that made particularly evident the flaws in its PSD program.

This is an important reason why EPA is proceeding with this error-correction/partial-disapproval rulemaking at this time. This rulemaking allows EPA to put a FIP in place immediately, instead of waiting until December 1, 2011;

⁴ It should be noted that in the past, Texas has applied its PSD program to non-NAAQS pollutants. Even so, Texas's recent statements indicate very clearly that Texas does not consider itself obligated to update its PSD program to apply to all newly regulated non-NAAQS pollutants, but instead Texas may choose which non-NAAQS pollutants to which it will apply PSD.

thereby act as the permitting authority in Texas beginning January 2, 2011; and in that capacity, allow Texas sources to avoid delays in construction or modification.

Although this rulemaking and the SIP call have similarities, EPA is authorized to proceed with each rulemaking with respect to Texas at this time, and it is both necessary and appropriate that we do so. EPA is authorized to proceed with the SIP call for reasons explained in that rule. Nothing in CAA section 110(k)(5), which authorizes the SIP call, precludes EPA from proceeding with this rulemaking, which, as noted earlier, is authorized under CAA section 110(k)(6). As we discuss below, it was Texas's response to the SIP call proposal, along with other statements Texas made around the same time, that focused attention on the underlying flaws in Texas PSD SIP, which led to this error-correction rulemaking. EPA is not, at this time, undertaking a similar error-correction rulemaking for any of the other states that are subject to the SIP call. EPA has discretion as to whether and when to undertake such a rulemaking, and each of the other states has chosen a course of action that at present appears to assure that its large GHG-emitting sources will have a permitting authority available when the sources need one, and therefore will not face delays in constructing or modifying. Moreover, none of these other states has made the type of recent statements that may have exposed flaws in its SIP, as Texas has done. As a result, EPA sees no need to inquire into whether any of these other states have flaws in their SIP PSD programs as Texas does.

EPA is applying the "good cause" exemption from notice-and-comment rulemaking, authorized under Administrative Procedure Act section 553(b)(3)(B) to promulgate this action as an interim final rulemaking that takes effect immediately upon publication in the **Federal Register**. As a result, this action, including the FIP, will take effect by January 2, 2011, when GHG-emitting sources become subject to the requirement to obtain a PSD preconstruction permit. The use of the "good cause" exemption is justified because the notice-and-comment process would add delays in issuing the final rule and therefore is impractical and contrary to public interest. Unless and until EPA promulgates this rule, Texas sources will not have available a permitting authority to process their PSD permit applications and as a result, may face delays in construction and modification.

Simultaneously with issuing this interim final rulemaking, EPA is proposing for notice-and-comment an error-correction/partial-disapproval and FIP rule that mirrors this rule. EPA expects to complete final action on this notice-and-comment rule so that it takes effect by May 1, 2011. This interim final rule will stay in place until April 30, 2011, and then be replaced by the notice-and-comment rule.

Although we recognize that Texas has indicated that the state does not intend to submit a SIP revision to apply its PSD program to GHG-emitting sources, we emphasize that it is our preference that Texas assume responsibility for permitting GHG-emitting sources as soon as possible, and we are prepared to work with Texas to bring this about. Thus, we are prepared to work with the state to help it promptly develop and submit to us a SIP revision that extends its PSD program to GHG-emitting sources and if it does so, we intend to act on that SIP revision promptly. We also encourage Texas to accept a delegation of authority to implement the FIP, so that it will still be the state that processes the permit applications, albeit operating under federal law.

III. Background

EPA described the relevant background information in the preambles for several proposed and final rulemakings that implement the PSD GHG permitting program. These include the Tailoring Rule,⁵ 75 FR at 31518–21, and the GHG PSD SIP call,⁶ 75 FR at 53896–98 (September 7, 2010) (proposal), or, simply, the SIP call. Knowledge of this background information is presumed and will be only briefly summarized here.

A. Legal Background

1. Requirements for SIP Submittals and EPA Action

This section reviews background information concerning the CAA requirements for what SIPs must include, the process for state submittals of SIPs, requirements for EPA action on SIPs and SIP revisions, and FIPs.

⁵ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule." 74 FR 55,292 (Oct. 27, 2009) (proposed Tailoring Rule).

⁶ "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule," 75 FR 77698 (Dec. 13, 2010) (final SIP call); "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Proposed Rule," 75 FR 53,892 (proposed SIP call).

a. Requirements for What SIPs Must Include

Congress enacted the NAAQS and SIP requirements in the 1970 CAA Amendments. CAA section 110(a)(1) requires that states adopt and submit to EPA for approval SIPs that implement the NAAQS. CAA section 110(a)(2) contains a detailed list of requirements that all SIPs must include to be approvable by EPA.

Of particular relevance for this action, subparagraph (E)(i) of CAA section 110(a)(2) provides that SIPs must "provide * * * necessary assurances that the state * * * will have adequate personnel, funding, and authority under State * * * law to carry out such implementation plan. * * *" As applicable to PSD programs, this provision means that EPA may approve the SIP PSD provisions only if EPA is satisfied that the state will have adequate legal authority under state law.

b. EPA Action on SIP Submittals

After a SIP or SIP revision has been submitted, EPA is authorized to act on it under CAA section 110(k)(3)–(4). Those provisions authorize a full approval or, if the SIP or SIP revision meets some but not all of the applicable requirements, a conditional approval, a partial approval and disapproval, or a full disapproval. If EPA disapproves a required SIP or SIP revision, then EPA must promulgate a FIP at any time within two years after the disapproval, unless the state corrects the deficiency within that period of time by submitting a SIP revision that EPA approves. CAA § 110(c)(1).⁷

c. SIP Call

The CAA provides a mechanism for the correction of SIPs with certain types of inadequacies, under CAA section 110(k)(5), which provides:

(5) Calls for Plan Revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to * * * comply with any requirement of this Act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.

This provision by its terms authorizes the Administrator to "find[] that [a SIP] * * * is substantially inadequate to

⁷ States are subject to sanctions for failure to submit, or for EPA disapproval of, SIPs for nonattainment areas, under CAA section 179. These sanctions provisions are not relevant for this rule because they do not apply to PSD SIPs.

* * * comply with any requirement of this Act,” and, based on that finding, to “require the State to revise the [SIP] * * * to correct such inadequacies.”

This latter action is commonly referred to as a “SIP call.” In addition, this provision authorizes EPA to establish a “reasonable deadline (not to exceed 18 months after the date of such notice)” for the submission of the corrective SIP revision.

If EPA does not receive the corrective SIP revision by the deadline, CAA section 110(c) authorizes EPA to “find [] that [the] State has failed to make a required submission.” CAA section 110(c)(1)(A). Once EPA makes that finding, CAA section 110(c)(1) requires EPA to “promulgate a Federal implementation plan at any time within 2 years after the [finding] * * * unless the State corrects the deficiency, and [EPA] approves the plan or plan revision, before [EPA] promulgates such [FIP].”

CAA section 110(k)(5), by its terms—specifically, the use of the term “[w]henever”—authorizes, but does not require, EPA to make the specified finding and does not impose any time constraints for EPA to do so. As a result, EPA has discretion in determining whether and when to make the specified finding. See *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 330–31 (2d Cir. 2003) (opening phrase “Whenever the Administrator makes a determination” in CAA section 502(i)(1) grants EPA “discretion whether to make a determination”); *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1533 (DC Cir. 1990) (“whenever” in CAA section 115(a) “impl[ie]d a degree of discretion” in whether EPA had to make a finding).

d. Authority for EPA To Revise Previous Action on SIPs

EPA has authority to revise its previous action concerning SIP submittals. Two mechanisms are available to EPA: The error correction mechanism provided under CAA section 110(k)(6), and EPA’s general administrative authority to reconsider its own actions under CAA sections 110 and 301(a), in light of case law.

(i). Error Correction Under CAA Section 110(k)(6)

CAA section 110(k)(6) provides as follows:

Whenever the Administrator determines that the Administrator’s action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the

approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

The key provisions for present purposes are that the Administrator has the authority to “determine ;” when a SIP approval was “in error,” and when she does so, she may then revise the SIP approval “as appropriate,” in the same manner as the approval, and without requiring any further submission from the state.

As quoted previously, CAA section 110(k)(6) provides EPA with the authority to correct its own “error,” but nowhere does this provision or any other provision in the CAA define what qualifies as “error.” Thus, the term should be given its plain language, everyday meaning, which includes all unintentional, incorrect or wrong actions or mistakes.

The legislative history of CAA section 110(k)(6) is silent regarding the definition of error, but the timing of the enactment of the provision suggests a broad interpretation. The provision was enacted shortly after the Third Circuit decision in *Concerned Citizens of Bridesburg v. U.S. EPA*, 836 F.2d 777 (1987). In *Bridesburg*, the court adopted a narrow interpretation of EPA’s authority to unilaterally correct errors. The court stated that such authority was limited to typographical and other similar errors, and stated that any other change to a SIP must be accomplished through a SIP revision. *Id.* at 786. In *Bridesburg*, EPA determined that it lacked authority to include odor regulations as part of a SIP unless the odor regulations had a significant relationship to achieving a NAAQS, and so directly acted to remove 13-year-old odor provisions from the Pennsylvania SIP. *Id.* at 779–80. EPA found the previous approval of the provisions to have been an inadvertent error, and so used its “inherent authority to correct an inadvertent mistake” to withdraw its prior approval of the odor regulations without seeking approval of the change from Pennsylvania. *Id.* at 779–80, 785. After noting that Congress had not contemplated the need for revision on the grounds cited by EPA, *Id.* at 780, the court found that EPA’s “inherent authority to correct an inadvertent mistake” was limited to corrections such as “typographical errors,” and that instead EPA was required to use the SIP revision process to remove the odor provision from the SIP. *Id.* at 785–86.

When the court made its determination in *Bridesburg* in 1987, there was no provision explicitly

addressing EPA’s error correction authority under the CAA. In 1990, Congress passed CAA section 110(k)(6), apparently for the purpose of overturning the *Bridesburg* opinion. This is apparent because CAA section 110(k)(6) both (i) authorizes EPA to correct SIP approvals and other actions that were “in error,” which, as noted previously, broadly covers any mistake, and thereby contrasts with the holding in *Bridesburg* that EPA’s pre-section 110(k)(6) authority was limited to correction of typographical or similar mistakes; and (ii) provides that the error correction need not be accomplished via the SIP revision or SIP call process, which contrasts with the holding of *Bridesburg* requiring a SIP revision. Because Congress apparently intended CAA section 110(k)(6) to overturn *Bridesburg*, the definition of “error” in that provision should be sufficiently broad to encompass the error that EPA asserted it made in its approval action at issue in *Bridesburg*, which goes well beyond typographical or other similar mistakes.

EPA has used CAA section 110(k)(6) in the past to correct errors of a non-technical nature. For example, EPA has used CAA section 110(k)(6) as authority to make substantive corrections to remove a variety of provisions from federally approved SIPs that are not related to the attainment or maintenance of NAAQS or any other CAA requirement. See, e.g., “Approval and Promulgation of Implementation Plans; Kentucky: Approval of Revisions to the State Implementation Plan,” 75 FR 2440 (Jan. 15, 2010) (correcting the SIP by removing a provision, approved in 1982, used to address hazardous or toxic air pollutants); “Approval and Promulgation of Implementation Plans; New York,” 73 FR 21,546 (April 22, 2008) (issuing a direct final rule to correct a prior SIP correction from 1998 that removed general duties from the SIP but neglected to remove a reference to “odor” in the definition of “air contaminant or air pollutant”); “Approval and Promulgation of Implementation Plans; New York,” 63 FR 65557 (Nov. 27, 1998) (issuing direct final rule to correct SIP by removing a general duty “nuisance provision” that had been approved in 1984); “Correction of Implementation Plans; American Samoa, Arizona, California, Hawaii, and Nevada State Implementation Plans,” 63 FR 34,641 (June 27, 1997) (correcting five SIPs by deleting a variety of administrative provisions concerning variances, hearing board procedures, and fees that had been approved during the 1970s).

CAA section 110(k)(6), by its terms—specifically, the use of the terms “[w]henever” and “may” and the lack of any time constraints—authorizes, but does not require, EPA to make the specified finding. As a result, EPA has discretion in determining whether and when to make the specified finding. See *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 330–31 (2d Cir. 2003) (opening phrase “Whenever the Administrator makes a determination” in CAA section 502(i)(1) grants EPA “discretion whether to make a determination”); *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1533 (D.C. Cir. 1990) (“whenever” in CAA section 115(a) “impl[ie]d a degree of discretion” in whether EPA had to make a finding).

(ii) Inherent Authority To Reconsider

The provisions in CAA section 110 that authorize EPA to take action on a SIP revision inherently authorize EPA to, on its own initiative, reconsider and revise that action as appropriate. The courts have found that an administrative agency has the inherent authority to reconsider its decisions, unless Congress specifically proscribes the agency’s discretion to do so. See, e.g., *Gun South, Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989) (holding that agencies have implied authority to reconsider and rectify errors even though the applicable statute and regulations do not provide expressly for such reconsideration); *Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (“Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider”); see also *New Jersey v. EPA*, 517 F.3d 574 (DC Cir. 2008) (holding that an agency normally can change its position and reverse a prior decision but that Congress limited EPA’s ability to remove sources from the list of hazardous air pollutant source categories, once listed, by requiring EPA to follow the specific delisting process at CAA section 112(c)(9)).⁸

Section 301(a) of the CAA, read in conjunction with CAA section 110 and the case law just described, provides further statutory authority for EPA to reconsider its actions under CAA section 110. CAA section 301(a) authorizes EPA “to prescribe such regulations as are necessary to carry out

[EPA’s] functions” under the CAA. Reconsidering prior rulemakings, when necessary, is part of “[EPA’s] functions” under the CAA—in light of EPA’s inherent authority as recognized under the case law to do so—and as a result, CAA section 301(a) confers such authority upon EPA.

EPA finds further support for its authority to narrow its approvals in APA section 553(e), which requires EPA to give interested persons “the right to petition for the issuance, amendment, or repeal of a rule,” and CAA section 307(b)(1), which expressly contemplates that persons may file a petition for reconsideration under certain circumstances (at the same time that a rule is under judicial review). These authorizations for other persons to petition EPA to amend or repeal a rule suggest that EPA has inherent authority, on its own, to issue such amendment or repeal. This is because EPA may grant a petition from another person for an amendment to or repeal of a rule only if justified under the CAA, and if such an amendment or repeal is justified under the CAA, then EPA should be considered as having inherent authority to initiate the process on its own, even without a petition from another person.

EPA recently used its authority to reconsider prior actions and limit its prior approval of a SIP in connection with California conformity SIPs. See, e.g., 68 FR 15720, 15723 (discussing prior action taken to limit approvals); 67 FR 69139 (taking final action to amend prior approvals to limit their duration); 67 FR 46618 (proposing to amend prior approvals to limit their duration, based on CAA sections 110(k) and 301(a)). EPA had previously approved SIPs with emissions budgets based on a mobile source model that was current at the time of EPA’s approval. Later, EPA updated the mobile source model. But, even though the model had been updated, emissions budgets would continue to be based on the older, previously approved model in the SIPs, rather than the updated model. To rectify this problem, EPA conducted a rulemaking that revised the previous SIP approvals so that the approvals of the emissions budgets would expire early, when the new ones were submitted by states and found adequate, rather than when a SIP revision was approved. This helped California more quickly adjust its regulations to incorporate the newer model. EPA is using its authority to reconsider and limit its prior approval of SIPs generally in the same manner as it did in connection with California conformity SIPs.

f. FIPs

As noted previously, if the state fails to submit a required SIP revision, or does so but EPA then disapproves that SIP revision, then the CAA requires EPA to promulgate a FIP and thereby, in effect, federalize the part of the air pollution control requirements for which the state, through the required SIP revision, would otherwise have been responsible. Specifically, under CAA section 110(c)(1), EPA is required to—

promulgate a [FIP] at any time within 2 years after the Administrator (A) finds that a State has failed to make a required submission * * *, or (B) disapproves a [SIP] submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such [FIP].

Although this provision, by its terms, mandates that EPA promulgate a FIP under the specified circumstances, and mandates that EPA do so within two years of when those circumstances occur, the provision gives EPA discretion to promulgate the FIP “at any time within [that] 2 year []” period. Thus, EPA is authorized to promulgate a FIP immediately after either the specified state failure to submit or EPA disapproval.

However, CAA section 110(c)(1), as quoted earlier, further provides that if EPA delays promulgating a FIP until later in the 2-year period, and, in the meantime, the state corrects the deficiency by submitting an approval SIP revision that EPA approves, then EPA is precluded from promulgating the FIP. Similarly, once EPA promulgates a FIP, it stays on the books until the state submits an approvable SIP that EPA then approves.

2. General Requirements for the PSD Program

The PSD program is a preconstruction review and permitting program applicable, under EPA rules, to large new stationary sources and, in general, expansions of existing sources. The PSD program applies in areas that are designated “attainment” or “unclassifiable” for a NAAQS, and is contained in part C of title I of the CAA.⁹

⁹In contrast, the “nonattainment new source review (NSR)” program applies in areas not in attainment of a NAAQS and in the Ozone Transport Region and is implemented under the requirements of part D of title I of the CAA. We commonly refer to the PSD program and the nonattainment NSR program together as the major NSR program. The EPA rules governing both programs are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, Appendices S and W. There is no NAAQS for CO₂ or any of the other well-mixed GHGs, nor has EPA

⁸For additional case law, see *Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993); *Dun & Bradstreet Corp. v. United States Postal Service*, 946 F.2d 189, 193 (2d Cir. 1991); *Iowa Power & Light Co. v. United States*, 712 F.2d 1292 (8th Cir. 1983).

The applicability of PSD to a particular source must be determined in advance of construction or modification and is pollutant-specific. Sources subject to PSD cannot construct or modify unless they first obtain a PSD permit that, among other things, includes emission limitations that qualify as BACT (discussed later). CAA sections 165(a)(1), 165(a)(4), 169(1).

Under the CAA, PSD applies to a stationary source that qualifies as a “major emitting facility,” and that newly constructs or undertakes a modification. A source is a “major emitting facility” if it emits or has the potential to emit 100 or 250 tpy, depending on the source category, of “any air pollutant.” CAA section 165(a)(1), 169(1). We refer to these levels as the 100/250-tpy thresholds. EPA has implemented these requirements in its regulations, which, as discussed next, use somewhat different terminology for determining PSD applicability and which have interpreted the term “any air pollutant” more narrowly so that only emissions of any pollutant subject to regulation under the CAA trigger PSD.

Specifically, under EPA’s regulations, PSD applies to a “major stationary source” that newly constructs or that undertakes a “major modification.” 40 CFR 52.166(a)(7), (b)(1)(i), (b)(2)(i). A “major stationary source” is any source that emits or has the potential to emit 100 or 250 tpy or more, depending on the source category, of any “regulated NSR pollutant.” 40 CFR 51.166(b)(1)(i)(a). The regulations define that term to include four classes of air pollutants, including, as a catch-all, “any pollutant that otherwise is subject to regulation under the Act.” 40 CFR 51.166(b)(49)(iv). As discussed below, the phrase “subject to regulation” will begin to include GHGs on January 2, 2011, under our interpretation of that phrase as described in the Tailoring Rule, 75 FR at 31,580/3, and what we call the “Johnson Memo Reconsideration” (or the “Timing Decision”).¹⁰

One principal PSD requirement is that a new major source or major modification must meet emissions limitations based on application of BACT, which must be determined on a

proposed any such NAAQS; therefore, unless and until we take further such action, the nonattainment NSR program does not apply to GHGs.

¹⁰ Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs.” 75 FR 17,004 (April 2, 2010). This action finalizes EPA’s response to a petition for reconsideration of “EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program” (commonly referred to as the “Johnson Memo”), December 18, 2008.

case-by-case basis taking into account energy, environmental, and economic impacts, among other factors. To ensure that these criteria are satisfied, EPA has developed and recommends that permitting authorities apply a “top-down” approach for BACT review, a decision process that includes identification of all available control technologies, elimination of technically infeasible options, ranking of remaining options by control and effectiveness; evaluation (and possible elimination) of controls based on economic, environmental or energy impacts; and then selection of the remaining top-ranked option as BACT. When PSD applies to a source because of its emissions of a particular pollutant, then BACT (and other PSD requirements) apply for other pollutants that are subject to regulation and that exceed specified levels.

3. SIP PSD Requirements

The CAA contemplates that the PSD program be implemented by the states through their SIPs. CAA section 110(a)(2)(C) requires that:

Each implementation plan * * * shall * * * include a program to provide for * * * regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in part [] C * * * of this subchapter.

CAA section 110(a)(2)(J) requires that:

Each implementation plan * * * shall * * * meet the applicable requirements of * * * part C of this subchapter (relating to significant deterioration of air quality and visibility protection).

CAA section 161 provides that:

Each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part [C], to prevent significant deterioration of air quality for such region * * * designated * * * as attainment or unclassifiable.

These provisions, read in conjunction with the PSD applicability provisions, CAA section 165(a)(1), 169(1), mandate that SIPs include PSD programs that are applicable to any air pollutant that is subject to regulation under the CAA, including, as discussed later in this preamble, GHGs as of January 2, 2011.¹¹

¹¹ In the Tailoring Rule, we noted that commenters argued, with some variations, that the PSD provisions applied only to NAAQS pollutants, and not GHGs, and we responded that the PSD provisions apply to all pollutants subject to regulation, including GHGs. See 75 FR 31560–62; “Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA’s Response to Public

Most states have EPA-approved SIP PSD programs, and as a result, in those states, PSD permits are issued by state or local air pollution control agencies. In states that do not have EPA-approved SIP PSD programs, EPA issues PSD permits under its own authority, although in some cases, EPA has delegated such authority to the state or local agency.

B. Regulatory Background: Texas SIP and PSD Program

1. Texas’s Initial Attainment SIP Revision

In 1972, shortly after the enactment of the 1970 CAA Amendments, Texas submitted to EPA its SIP to attain and maintain the NAAQS that EPA had promulgated by that time. As part of that SIP revision, Texas provided assurances that it had legal authority to carry out the SIP, in accordance with the predecessor to CAA section 110(a)(2)(E)(i). EPA approved Texas’s SIP, including the assurances of legal authority, by notice dated May 31, 1972. 37 FR 10842.

2. Texas Initial PSD SIP Revision

In the 1977 CAA Amendments, Congress enacted the PSD program. In the immediate aftermath, EPA acted as the PSD permitting authority in the states, but EPA began to delegate to various state authorities all or part of EPA’s authority to issue PSD permits. In addition, at this time, EPA revised its pre-existing regulations, which had established a preconstruction permitting program, to conform to the 1977 CAA requirements. Each state was required to adopt a PSD program and submit it for approval as a SIP revision, and if the PSD program met CAA requirements, EPA approved the program, and the state then became the PSD permitting authority.

This process occurred for most of the states in the Nation, including Texas. A brief history of Texas’s initial PSD SIP approval follows:¹²

a. Texas’s Receipt of Delegation Authority for the PSD Program

Beginning in 1980, when EPA was still the permitting authority for federally required PSD permits in Texas, the state requested delegation of certain

Comments,” May 2010, pp. 38–41. We are not reopening that issue in this rulemaking.

¹² This history is described in “Approval and Promulgation of Implementation Plan, State of Texas; Prevention of Significant Deterioration—Final rulemaking, 57 FR 28,093, 28,094 (June 24, 1992); “Approval and Promulgation of Implementation Plan, State of Texas; Prevention of Significant Deterioration—Proposed rulemaking, 54 FR 52,823, 52,824 (December 22, 1989).

aspects of the Federal PSD program, and in a series of actions, EPA granted that authority.¹³ During this time, Texas also revised its state—i.e., Texas Air Control Board (TACB)—PSD regulations. EPA commented on an early set of proposed revisions to TACB regulations by letter dated December 23, 1980 and made clear that PSD applies to non-NAAQS pollutants.¹⁴ EPA reiterated these statements to Texas in 1983.¹⁵

b. Texas's SIP PSD Program

During 1985–1988, Texas submitted a series of SIP revisions comprising its PSD program to EPA for approval. In these SIP revisions, Texas established key components of its PSD rules by incorporating by reference EPA's PSD rules found in 40 CFR 52.21. Of most importance for present purposes, Texas incorporated by reference (IBR'd) EPA's PSD applicability regulations in 52.21.¹⁶ Under EPA's regulations, as then written, PSD applied to “any pollutant subject to regulation under the [Clean Air] Act.” 40 CFR 52.21(b)(1)(i) (1985–1988). It bears emphasis that this provision, by its terms, applied PSD to each and every air pollutant subject to regulation under the CAA, which, as discussed elsewhere, has been EPA's consistent interpretation of the CAA requirements for PSD applicability. CAA section 165(a)(1), 169(1).¹⁷

¹³ See, e.g., 48 FR 6023 (February 9, 1983).

¹⁴ Letter from Jack S. Divita, U.S. EPA, Region 6, to Roger Wallis, Texas Air Control Board (December 23, 1980), p. 2. In that letter, EPA objected to Texas's proposed definitions of the terms “major facility/stationary source” and “major modification” on grounds they are not equivalent to the definition of those terms in EPA's PSD and nonattainment NSR regulations because Texas's proposed definitions—include only those stationary sources and modifications with emissions of air contaminants for which a [NAAQS] has been issued. Under the PSD and [nonattainment] NSR requirements, [Texas's] definitions must include sources with emissions of “any air pollutant subject to regulation under the Act.” * * * Since the proposed definitions would exclude PSD and [nonattainment] NSR coverage for those sources emitting pollutants subject to regulations under the Act, but for which a NAAQS has not been issued, they are not equivalent to the federal definitions of “major stationary source” and “major modification.” *Id.* (emphasis omitted).

¹⁵ Environmental Protection Agency—Region 6, “EPA Review of Texas Revisions to the General Rules and Regulations VI,” p. 4 (August 1983), cited in 48 FR 55483/1 & n.1 (December 13, 1983).

¹⁶ For convenience, we will use the acronym “IBR” for the various grammatical usages of incorporate by reference, including the noun form, i.e., IBR, for incorporation by reference; as well as the verb form, e.g., IBR'd, for incorporated by reference.

¹⁷ As also discussed elsewhere, this is a narrowing interpretation of the PSD applicability requirements in CAA section 169(1), which, read literally, apply PSD to “any air pollutant.”

(i). Incorporation by Reference

In adopting a particular SIP revision that IBR'd EPA's regulations, however, Texas intended that IBR to apply to only the EPA regulations as they read as of the date that Texas adopted the SIP revision. Texas did not intend that IBR in that SIP revision to apply to subsequent revisions to those regulations. This became readily apparent during the course of EPA's review of Texas's SIP revisions. The TACB adopted the first SIP revision on July 26, 1985.¹⁸ This SIP revision consisted, in relevant part, of a revision to TACB Regulation VI—§ 116.3.(a) to add subparagraph (13), which read, in relevant part,

(13) The proposed facility shall comply with the Prevention of Significant Deterioration of Air Quality regulations promulgated by the [EPA] in the Code of Federal Regulations at 40 CFR 52.21 as amended * * *, hereby incorporated by reference, except for [certain identified] paragraphs [not here relevant].¹⁹

The TACB submitted this SIP revision to EPA on December 11, 1985.²⁰ EPA responded with a letter to Texas, dated July 3, 1986, commenting on several aspects of the SIP revision, including inquiring whether the state had authority to IBR Federal rules prospectively, asking for “legal clarification” on the subject, and recommending that if the TACB did not have such authority, then the TACB should clarify the IBR by “referencing the appropriate date.”²¹

Texas responded with a letter dated October 24, 1986,²² in which it stated:

¹⁸ TACB Board Order No. 85–7 (July 26, 1985).

¹⁹ *Id.*

²⁰ Letter from Mark White, Governor of Texas, to Lee M. Thomas, Administrator of U.S. EPA, December 11, 1985.

²¹ Letter from William B. Hathaway, Director, Air, Pesticides and Toxics Division, EPA Region 6, to Allen Eli Bell, Executive Director, TACB (July 3, 1986). Specifically, EPA stated—State's authority to IBR Federal rules prospectively—The Board approved and signed the incorporation of the PSD regulations on July 26, 1985. An amendment to the Federal PSD regulations [40 CFR 52.21(o)(3), p(1) and p(3)] occurred on July 12, 1985. However, the TACB proposed to adopt the Federal regulations and carried out the public participation process before the July 12, 1985, promulgation date of the amendments. We need a legal analysis from the state concerning the TACB's legal authority to incorporate by reference the Federal rules prospectively. We recognize that the proposed Federal rules were unchanged on the final promulgation; however, the Texas Water Commission believes that the State can not adopt prospective Federal rules under the State laws. We would appreciate a legal clarification on this subject. If the State did not intend prospective adoption, the rules should be clarified by referencing the appropriate date. *Id.* p. 2 and Enclosure p. 5.

²² Letter from to Steve Spaw, Deputy Executive Director, TACB, to William B. Hathaway, Director,

An issue of concern * * * is whether the [TACB] intended to incorporate by reference federal rules prospectively in the PSD rule § 116.3(a)(13) and in the stack height rule § 116.3(a)(14). [A]lthough our intention was not prospective rulemaking and we do not believe the rule language implies such, we have no specific objection to including the date of federal adoption of any federal material adopted by reference by the TACB in future SIP revisions (including the proposed PSD and stack height revisions). By initiating the public hearing process for PSD rules again (to incorporate requested revisions), federal PSD regulations amended on July 12, 1985 will be subject to the state public participation process. This should eliminate the concern expressed in your July 3, 1986 letter.²³

Accordingly, on July 17, 1987, the TACB adopted a revision to its PSD rule, § 116.3(a)(13), so that the rule continued to IBR EPA's PSD regulatory requirements at 40 CFR 52.21, but referenced the date of November 7, 1986.²⁴ Texas submitted that as a SIP revision to EPA on October 26, 1987.²⁵

However, some eight months later, by notice published on July 1, 1987, EPA adopted the PM₁₀ NAAQS,²⁶ and thereby subjected to PSD sources emitting PM₁₀. Recognizing this, the TACB, on July 15, 1988, adopted still another revision to its PSD rule to change the referenced date to August 1, 1987, and thereby incorporated EPA's application of PSD to PM₁₀-emitting sources into Texas's PSD program.²⁷ Texas submitted that revised rule to EPA as a SIP revision on September 29, 1988.²⁸ As so revised, the Texas PSD rule (again, § 116.3(a)(13)) read, in relevant part, as follows:

(13) The proposed facility shall comply with the Prevention of Significant Deterioration (PSD) of Air Quality regulations promulgated by the Environmental Protection Agency (EPA) in the Code of Federal Regulations at 40 CFR 52.21 as amended August 1, 1987 * * *, except for [certain identified] paragraphs [not here relevant].²⁹

EPA proposed to approve this SIP revision, with this iteration of the Texas PSD rule, by notice dated December 22,

Air, Pesticides and Toxics Division, EPA Region 6 (October 24, 1986).

²³ *Id.* 1–2.

²⁴ TACB Board Order No. 87–09 (July 17, 1987). See 12 Tex. Reg. 2575/2 (August 7, 1987) (discussing revision to section 116.3(a)(13) in response to request from U.S. EPA).

²⁵ Letter from William P. Clements, Jr., Governor of Texas, to Lee M. Thomas, Administrator of U.S. EPA (October 26, 1987).

²⁶ 52 FR 24634 (July 1, 1987).

²⁷ TACB Board Order No. 88–08 (July 15, 1988).

²⁸ Letter from William P. Clements, Jr., Governor of Texas, to Lee M. Thomas, Administrator of U.S. EPA (September 29, 1988).

²⁹ TACB Board Order No. 88–08 (July 15, 1988).

1989,³⁰ and EPA issued a final approval by notice dated June 24, 1992.³¹ In the preambles to the proposed and final rule, and in supporting documents, EPA recounted part of this history of Texas revising its regulations to IBR the current EPA regulatory requirements.³²

This history shows that both EPA and Texas were well aware that Texas's method of IBR'ing EPA's regulatory requirements into Texas's PSD rule was not prospective, and that as a result, Texas would need to take further action, such as a SIP revision, to update its PSD rules whenever EPA newly subjected another pollutant to PSD. In fact, Texas did so—to apply PSD to PM₁₀—during the time that EPA was reviewing its PSD SIP. However, after stating simply that it does not intend prospective IBR, Texas did not explicitly address this issue. That is, Texas did not acknowledge that following approval of Texas's PSD program, EPA could well subject to regulation additional pollutants—whether through a revised NAAQS or regulation under another CAA provision—and Texas did not discuss how it would respond.³³

(ii). Legal Authority

The record of Texas's PSD program includes limited references to, or discussion of, legal authority that may be relevant to whether Texas provided assurances that it had adequate legal authority to apply PSD to pollutants newly subject to regulation. The following merit review:

First, in adopting and submitting the PSD SIP revisions, the TACB—the agency charged with taking that action—relied on its general legal authority to adopt and submit the SIP revisions. The TACB adopted regulatory amendments through “Board Orders,” and then submitted those Board Orders to EPA as SIP revisions. The Board Orders typically cited general authority

under the Texas CAA. One example is TACB Board Order No. 88–08 (July 15, 1988), which revised the Texas PSD rule to provide a later date for IBR'ing EPA's PSD program, and which comprised one of the SIP revisions that formed the basis for the Texas PSD program that EPA approved by notice dated June 24, 1992 (57 FR 28093). This Board Order provides, in relevant part, “Section 3.09(a) of the Texas CAA gives the Board authority to make rules and regulations consistent with the general intent and purposes of the Act and to amend any rule or regulation it makes” and “the Board hereby certifies that the amendments as adopted have been reviewed by legal counsel and found to be a valid exercise of the Board's legal authority.” Board Order No. 88–08, page 2.

Second, the 1990 CAA Amendments amended CAA section 169(1) to add another type of source that was subject to PSD: Large municipal combustors. Shortly after the 1990 amendments, and before issuing final approval for the Texas PSD program, EPA asked Texas for assurances that its PSD program would apply to large municipal waste combustors. In a March 30, 1992 letter, EPA stated the following:

Since we proposed approval of this SIP before enactment of the 1990 Clean Air Act Amendments (CAAA), it is necessary that we address several issues in the final approval notice in order to be in conformance with the CAAA.

* * * * *

“Municipal Waste Combustion—Section 169(1) is amended by expanding the list of major emitting facilities that are subject to PSD requirements if they emit or have the potential to emit 100 tons per year or more of any regulated pollutant. This list now includes municipal incinerators capable of charging more than fifty tons of refuse per day. This requirement has been effective since November 15, 1990, for all applicable PSD sources. In the conference call [with EPA Region 6], the * * * TACB * * * legal representative said that the TACB has the existing legal authority, and can and will be reviewing such sources for PSD applicability and permitting.”³⁴

Thus, according to this letter, Texas provided oral statements in a conference call with EPA Region 6 that Texas has legal authority to apply its state PSD rules to large municipal waste combustors.

Texas responded in a letter dated April 17, 1992:

We understand that you need confirmation in several areas to conform with the

requirements of the 1990 Federal Clean Air Act Amendment * * * before the final delegation will be made.

* * * * *

We will address as a major source subject to PSD review, municipal waste combustors capable of changing more than 50 tons of refuse per day as one of the sources subject to PSD review if they emit or have the potential to emit 100 tons per year or more of any regulated pollutant.³⁵

Although the TACB Board Order referred to the TACB's general legal authority, the record reveals no discussion or assurances that this legal authority was adequate to apply PSD to pollutants newly subject to regulation. Similarly, the oral assurance that the TACB apparently provided that it had legal authority to apply PSD to large municipal combustors, as required under the then-newly enacted 1990 CAA Amendments, does not address whether Texas had adequate authority to apply PSD to each pollutant that EPA newly subjects to regulation.

(iii). Texas's Commitments

The rulemaking record of EPA's approval of Texas's PSD SIP shows that Texas provided two commitments that are relevant for present purposes:

(1). 1987 Texas PSD Commitments Statement

The TACB adopted revisions to TACB Regulation VI on July 17, 1987, which the Governor submitted on October 27, 1987. Those revisions included the following statement, which we call the 1987 Texas PSD Commitments Statement:

Revision To The Texas State Implementation Plan For Prevention Of Significant Deterioration Of Air Quality
 The Texas Air Control Board (TACB) will implement and enforce the federal requirements for Prevention of Significant Deterioration of Air Quality (PSD) as specified in 40 CFR 51.166(a) by requiring all new major stationary sources and major modifications to obtain air quality permits as provided in TACB regulation VI, Control of Air Pollution by Permits for New Construction and Modification. In addition, the TACB will adhere to the following conditions in the implementation of the PSD program:

* * * * *

4. Plan assessment

The TACB will review the adequacy of the Texas PSD plan on an annual basis and within 60 days of the time information becomes available that an applicable increment may be violated. If the TACB determines that an increment is being

³⁰ 54 FR 52823.

³¹ 57 FR 28093.

³² 57 FR 28093, 28094/2 (June 24, 1992) (final rule); 54 FR 52823, 52824/1 (December 22, 1989) (proposed rule); Technical Support Document: Texas State Implementation Plan for Prevention of Significant Deterioration, U.S. Environmental Protection Agency, 4 (November 28, 1988). Moreover, Texas submitted another SIP revision on February 18, 1991 to change the date in section 116.3(a)(13) from “August 1, 1987” to “October 17, 1988” to reflect the amendments to 40 CFR 52.21 as promulgated in the Federal Register on October 17, 1988 (53 FR 40656) (Nitrogen Oxides PSD increments). EPA did not act on this SIP revision when it approved the Texas PSD program on June 24, 1992, but did approve this SIP revision later, on September 9, 1994 (59 FR 46556). See 62 FR 44084/2.

³³ Following EPA approval of Texas's PSD program, Texas has occasionally submitted SIP revisions to update its PSD program to accommodate further EPA regulatory revisions. See, e.g., 69 FR 43752, 43753 (July 22, 2004).

³⁴ Letter from A. Stanley Meiburg, Director, Air, Pesticides & Toxics Division, EPA Region 6, to Steve Spaw, Executive Director, TACB (March 30, 1992).

³⁵ Letter from Steve Spaw, Executive Director, TACB, to A. Stanley Meiburg, Director, Air, Pesticides and Toxics Division, EPA Region 6 (April 17, 1992).

exceeded due to the violation of a permit condition, appropriate enforcement action will be taken to stop the violation. If an increment is being exceeded due to a deficiency in the state PSD plan, the plan will be revised and the revisions will be subject to public hearing.

This 1987 Texas PSD Commitments Statement does not specifically address the application of PSD to pollutants newly subject to regulation. The first paragraph, as quoted above, commits TACB to require "all new major stationary sources and major modifications to obtain air quality permits as provided in TACB regulation VI * * *," but this does not commit TACB to address pollutants newly subject to regulation. Instead, this limits the TACB requirement to application of PSD to sources "as provided in TACB regulation VI," and that regulation VI does not automatically update. As for "#4, Plan assessment," although the first sentence calls for the TACB to review the adequacy of the Texas PSD plan on an annual basis, and although the rest of the provision requires a plan revision if an increment violation is determined to result from a deficiency in the plan, this does not address what happens when a new pollutant becomes subject to regulation and does not require a plan revision to apply to the new pollutant. The fact that Texas agreed to revise the plan if the plan is found to be deficient and that deficiency results in an increment being exceeded serves to highlight the lack of any comparable focus on how the plan would deal with pollutants newly subject to regulation.

EPA's technical support document supporting its proposed approval stated, with respect to this 1987 Texas PSD Commitments Statement:

The "Revision to Texas State Implementation Plan for Prevention of Significant Deterioration of Air Quality" specifies how the TACB will fulfill the requirements of 40 CFR 51.166(a), plan revisions, and plan assessment. The EPA has reviewed the State's commitment and has determined that the TACB has addressed the continuous plan revisions and assessments adequately.³⁶

This general discussion by EPA does not indicate that EPA considered the Texas statement to apply to pollutants newly subject to regulation.

(II). 1989 Texas Commitment Letter

In 1989, as EPA considered Texas's SIP revision submittal, EPA became concerned that a Texas official had made statements that lead EPA to

question whether Texas would adhere to EPA's interpretation that BACT must be implemented through the Top-Down process.³⁷ Accordingly, EPA advised Texas that EPA would not approve Texas's PSD program unless Texas provided a letter assuring EPA that Texas would follow EPA requirements in general, and particularly with respect to the interpretation of BACT. Texas provided this letter, which we call the Texas PSD Commitments Letter, on September 5, 1989.³⁸ In this letter, Texas acknowledged EPA's concern that a Texas official had—

indicated a lack of intent to follow federal interpretations of the Clean Air Act and Environmental Protection Agency (EPA) operating policies, most specifically, the "Top-Down" approach for Best Available Control Technology (BACT) analysis in reviewing PSD permit applications.

Texas went on to state:

[Y]ou may be assured that the position of the [Texas Air Control Board (TACB)] is, and will continue to be, to implement EPA requirements relative to programs for which we have received State Implementation Plan approval, and to do so as effectively as possible.* * * Again, the TACB is committed to the implementation of EPA decisions regarding PSD program requirements. We look forward³⁹ approval of the PSD revisions and believe EPA will find the management of that program in Texas to be capable and effective.⁴⁰

By notice dated December 22, 1989, EPA proposed to fully approve Texas's PSD program.⁴¹ In this proposal, EPA focused on the issue of how EPA's current and future interpretations of PSD statutory requirements would be reflected in the state-implemented program. EPA stated:

In adopting the Clean Air Act, Congress designated EPA as the agency primarily responsible for interpreting the statutory provisions and overseeing their implementation by the states. The EPA must approve state programs that meet the requirements of 40 CFR 51.166. Conversely, EPA cannot approve programs that do not meet those requirements. However, PSD is by nature a very complex and dynamic program. It would be administratively impracticable to include all statutory interpretations in the EPA regulations and the SIPs of the various states, or to amend the regulations and SIPs every time EPA interprets the statute or regulations or issues guidance regarding the proper implementation of the PSD program, and the Act does not require EPA to do so.

³⁷ Letter from Allen Eli Bell, Executive Director, Texas Air Control Board to Robert Layton Jr., Regional Administrator, U.S. EPA (September 5, 1989) 1 (Texas's Commitments Letter).

³⁸ Texas's 1989 Commitments Letter, p. 1.

³⁹ *Sic*: the word "to" should be in between "forward" and "approval"

⁴⁰ Texas's 1989 Commitments Letter, p. 1.

⁴¹ 54 FR 52823.

Rather, action by the EPA to approve this PSD program as part of the SIP will have the effect of requiring the state to follow EPA's current and future interpretations of the Act's PSD provisions and EPA regulations, as well as EPA's operating policies and guidance (but only to the extent that such policies are intended to guide the implementation of approved state PSD programs). Similarly, EPA approval also will have the effect of negating any interpretations or policies that the state might otherwise follow to the extent they are at variance with EPA's interpretation and applicable policies. Of course, any fundamental changes in the administration of PSD would have to be accomplished through amendments to the regulations in 40 CFR 52.21 and 51.166, and subsequent SIP revisions.

54 FR 52,824/2–3.

EPA went on to state that it was basing its proposed approval of Texas's PSD program on Texas's agreement, as contained in the September 5, 1989, letter, that Texas would "implement that PSD SIP approved program in compliance with all of the EPA's statutory interpretations and operating policies." 54 FR 82,825/2. EPA stated—

* * * EPA's approval of the Texas PSD SIP requires the state to follow EPA's statutory interpretations and applicable policies[], including those concerning [BACT].* * *

In support of the discussion above, the Executive Director of the TACB has submitted a letter, dated September 5, 1989, which commits the TACB to implement the PSD SIP approval program in compliance with all of the EPA's statutory interpretations and operating policies. Specifically, the TACB's letter states that (1) " * * * you may be assured that the position of the agency is, and will continue to be, to implement EPA requirements relative to programs for which we have received [SIP] approval, and to do so as effectively as possible * * *", and (2) " * * * the TACB is committed to the implementation of the EPA decisions regarding PSD program requirements * * *". The EPA has evaluated the content of this letter and has determined that the letter sufficiently commits the TACB to carry out the PSD program in accordance with the Federal requirements as set forth in the [CAA] applicable regulations, and as further clarified in the EPA's statutory and regulatory interpretations, including the proper conduct of BACT analyses. The EPA also interprets this letter as committing the TACB to follow applicable EPA policies such as the "Top-Down" approach. This letter will be incorporated into the SIP upon the final approval action.

54 FR 52,825/1–2.

EPA issued a final rule to give full approval to the program by notice dated June 24, 1992, 57 FR 28,093. In the final rule, EPA indicated that it had received adverse comments concerning its statements in the proposal that Texas was required to adopt all of EPA's

³⁶ Technical Support Document: Texas State Implementation Plan for Prevention of Significant Deterioration, U.S. Environmental Protection Agency, 6 (November 28, 1988).

interpretations of the PSD requirements. Accordingly, EPA refined its views. EPA stated:

Comment 1: The commenters expressed concern with the preamble language in the proposal notice, suggesting that final approval would require that the State follow EPA's current and future interpretations of the Act's PSD provisions and EPA regulations as well as EPA's operating policies and guidance. The commenter contended that such a condition would be unlawful * * * and would improperly limit the State's flexibility. * * *

Response 1: The EPA did not intend to suggest that Texas is required to follow EPA's interpretations and guidance issued under the Act in the sense that those pronouncements have independent status as enforceable provisions of the Texas PSD SIP, such that mere failure to follow such pronouncements, standing alone, would constitute a violation of the Act. As clarified herein, EPA's intent is merely to place the State and the public on notice of EPA's longstanding views that the Agency must continue to oversee the State's implementation of the PSD SIP. * * *

* * * Texas and other states [have] considerable discretion to implement the PSD program as they see fit. * * * PSD-SIP approved states remain free to follow their own course, provided that state action is consistent with the letter and spirit of the SIP, when read in conjunction with the applicable statutory and regulatory provisions.

* * * * *

Comment 4: One commenter noted that the TACB's letter, dated September 5, 1989, cannot reasonably be interpreted as a legal requirement that the State follow the EPA's present and future new source review interpretations, policies and guidance, including the BACT "Top-Down" approach, because it only commits Texas to implement properly established EPA requirements and legally-binding EPA decisions. The commenter said that the Clean Air Act specifically requires that, if at all, any such change in EPA policy for BACT determinations be accomplished through notice and comment rulemaking, and that the EPA first prepare an economic impact assessment.

Response 4: In certain circumstances, EPA's approval of a SIP revision through notice-and-comment rulemaking procedures can serve to adopt specific interpretations or decisions of the Agency. For example, a state may commit in writing to follow particular EPA interpretations or decisions in administering the PSD program. As part of the SIP revision process, EPA may incorporate that State's commitment into the SIP by reference. This process has been followed in today's action. Of course, EPA agrees with the commenter that the Agency must act reasonably in construing the terms of a commitment letter, so as to avoid approving it in a manner that would contravene the state's intent in issuing the letter in the first place. Moreover, the State commitment must be consistent with the plain language of the applicable statutory or

regulatory provisions at issue. Similarly, EPA cannot unilaterally change the clear meaning of any approved SIP provision by later guidance or policy. Rather, as stated in the proposed approval notice, such fundamental change must be accomplished through the SIP revision process.

Consistent with the terms of the TACB letter dated September 5, 1989, EPA views that letter as a commitment on the part of the TACB to "implement EPA program requirements * * * as effectively as possible," and as a commitment "to the implementation of the EPA decisions regarding PSD program requirements." EPA agrees, however, that the TACB letter need not be interpreted as a specific commitment by the State to follow a "Top-Down" approach to BACT determinations.

57 FR 28095/1-2; 28096/1.

As for the fact that Texas's PSD program was limited to pollutants that were regulated as of the date Texas adopted the program as a SIP revision, but did not automatically apply to newly regulated pollutants, the preamble to the final rule alluded to this limitation:

The State's regulation VI requires review and control of air pollution from new facility construction and modification and allows the TACB to issue permits for stationary sources subject to this regulation. Section 116.3(a)(13) of the TACB Regulation VI incorporates by reference the Federal PSD regulations (40 CFR 52.21) as they existed on August 1, 1987, which include revisions associated with the July 1, 1987, promulgation of revised National Ambient Air Quality Standards for particulate matter (52 FR 24872) and the visibility NSR requirements noted above.

57 FR 28094.

However, there is no indication in the preamble for the final rule that (i) Texas specifically addressed the requirement that its PSD program apply to pollutants newly subject to PSD, including non-NAAQS pollutants, or (ii) Texas provided assurances that it had adequate authority under State law to carry out the PSD program, including applying PSD to pollutants newly subject to regulation, among them non-NAAQS pollutants. Nor is there any indication that EPA asked Texas to do so.⁴²

As discussed later, in 1996 EPA proposed, and in 2002 finalized, what we call the NSR Reform Rule,⁴³ which included a set of amendments to the

⁴² See "Technical Support Document (TSD): State of Texas State Implementation Plan for Prevention of Significant Deterioration" (November 28, 1988).

⁴³ "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects—Final Rule," 67 FR 80186 (December 31, 2002) (NSR Reform rule).

PSD provisions that included revisions to conform to the 1990 CAA Amendments. See 61 FR 38250 (July 23, 1996), 67 FR 80186 (December 31, 2002). The NSR Reform Rule revised the terminology for PSD applicability. In 2006, Texas submitted a SIP revision to incorporate the NSR Reform Rule into its PSD program, including revising its applicability provisions. EPA disapproved this SIP revision by notice dated September 15, 2010.⁴⁴ Accordingly, the applicable Texas PSD applicability provisions remain the ones in the state's currently approved SIP.

C. Regulatory Background: GHG Rules

1. GHGs and Their Sources

Greenhouse gases trap the Earth's heat that would otherwise escape from the atmosphere into space, and form the greenhouse effect that helps keep the Earth warm enough for life. Greenhouse gases are naturally present in the atmosphere and are also emitted by human activities. Human activities are intensifying the naturally occurring greenhouse effect by increasing the amount of GHGs in the atmosphere, which is changing the climate in a way that endangers human health, society, and the natural environment.

Some GHGs, such as carbon dioxide (CO₂), are emitted to the atmosphere through natural processes as well as human activities. Other gases, such as fluorinated gases, are created and emitted solely through human activities. As previously noted, the well-mixed GHGs of concern directly emitted by human activities include CO₂, methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). These six GHGs, for the purposes of this final rule, are referred to collectively as "the six well-mixed GHGs," or, simply, GHGs, and together constitute the "air pollutant" upon which the GHG thresholds in the Tailoring Rule are based. These six gases remain in the atmosphere for decades to centuries where they become well-mixed globally in the atmosphere. When they are emitted more quickly than natural processes can remove them from the atmosphere, their concentrations increase, thus increasing the greenhouse effect. The heating effect caused by the human-induced buildup of GHGs in the atmosphere is very likely the cause of most of the observed global warming over the last 50 years. A detailed explanation of greenhouse gases, climate change and its impact on health, society, and the environment is

⁴⁴ 75 FR 56,424 (September 15, 2010).

included in EPA's technical support document (TSD) for the endangerment finding final rule (Docket ID No. EPA-HQ-OAR-2009-0472-11292).

In the United States, the combustion of fossil fuels (e.g., coal, oil, gas) is the largest source of CO₂ emissions and accounts for 80 percent of the total GHG emissions. Anthropogenic CO₂ emissions released from a variety of sources, including fossil fuel combustion and industrial manufacturing processes that rely on geologically stored carbon (e.g., coal, oil, and natural gas) that is hundreds of millions of years old, as well as anthropogenic CO₂ emissions from land-use changes such as deforestation, all perturb the atmospheric concentration of CO₂ and cause readjustments in the distribution of carbon within different reservoirs. More than half of the energy-related emissions come from large stationary sources such as power plants, while about a third comes from transportation. Of the six well-mixed GHGs, four (CO₂, CH₄, N₂O, and HFCs) are emitted by motor vehicles. In the United States industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management are also important sources of GHGs.

Different GHGs have different heat-trapping capacities. The concept of Global Warming Potential was developed to compare the heat-trapping capacity and atmospheric lifetime of one GHG to another. The definition of a GWP for a particular GHG is the ratio of heat trapped by one unit mass of the GHG to that of one unit mass of CO₂ over a specified time period. When quantities of the different GHGs are multiplied by their GWPs, the different GHGs can be summed and compared on a CO₂e basis. For example, CH₄ has a GWP of 21, meaning each ton of CH₄ emissions would have 21 times as much impact on global warming over a 100-year time horizon as 1 ton of CO₂ emissions. Thus, on the basis of heat-trapping capability, 1 ton of CH₄ would equal 21 tons of CO₂e. The GWPs of the non-CO₂ GHGs range from 21 (for CH₄) up to 23,900 (for SF₆). Aggregating all GHGs on a CO₂e basis at the source level allows a facility to evaluate its total GHG emissions contribution based on a single metric.

2. GHG Regulatory Actions

Over the past year, EPA has completed four distinct actions related to greenhouse gases under the CAA. The result of these rules, in conjunction with the operation of the CAA, has been to trigger PSD applicability for GHG sources on and after January 2, 2011, but

to limit the scope of PSD for those sources. These actions include, as they are commonly called, the "Endangerment Finding" and "Cause or Contribute Finding," which we issued in a single final action;⁴⁵ the Johnson Memo Reconsideration, noted previously; the "Light-Duty Vehicle Rule" (LDVR or Vehicle Rule);⁴⁶ and the "Tailoring Rule," also noted previously.

a. Endangerment Finding, Vehicle Rule, Johnson Memo Reconsideration

In the Endangerment Finding, which is governed by CAA section 202(a), the Administrator exercised her judgment, based on an exhaustive review and analysis of the science, to conclude that "six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations." 74 FR at 66,496. The Administrator also found "that the combined emissions of these greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas air pollution that endangers public health and welfare under CAA section 202(a)." *Id.*

The Endangerment Finding led directly to promulgation of the Vehicle Rule, also governed by CAA § 202(a), in which EPA set standards for the emission of greenhouse gases for new motor vehicles built for model years 2012–2016. 75 FR 25,324. The Vehicle Rule established the first controls for GHGs under the CAA.

The Johnson Memo Reconsideration—as well as the Tailoring Rule, which we discuss later—is governed by the PSD and Title V provisions in the CAA. It was issued to address the automatic statutory triggering of the PSD and Title V programs for GHGs due to the Vehicle Rule establishing controls for GHGs. The Johnson Memo Reconsideration provided EPA's interpretation of a pre-existing definition in its PSD regulations delineating the "pollutants" that are taken into account in determining whether a source must obtain a PSD permit and the pollutants each permit must control. The Johnson Memo Reconsideration stated that when the Vehicle Rule takes effect on January 2, 2011, it will, in conjunction with the applicable CAA requirements, trigger the application of PSD to GHG-emitting sources. 75 FR 17,004.

⁴⁵ "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66,496 (December 15, 2009).

⁴⁶ "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25,324 (May 7, 2010).

b. Tailoring Rule

In the Tailoring Rule, EPA limited PSD applicability, at the outset, to only the largest GHG-emitting sources, and to phase-in PSD applicability, as appropriate, to smaller sources over time. 75 FR 31,514. In the Tailoring Rule, EPA identified the air pollutant that, if emitted or potentially emitted by the source in excess of specified thresholds, would subject the source to PSD requirements, as the aggregate of six GHGs: CO₂, CH₄, N₂O, HFCs, PFCs, and SF₆. EPA based this identification on the Vehicle Rule, which included applicability provisions specifying that the rule "contains standards and other regulations applicable to the emissions of those six greenhouse gases." 75 FR at 25686 (promulgating 40 CFR 86.1818–12(a)). The Tailoring Rule noted that it was because the Vehicle Rule subjected to regulation the pollutant that comprises the six GHGs, that PSD was triggered for that pollutant and that, as a result, the pollutant must be defined for PSD purposes in the same way as it is identified in the Vehicle Rule. 75 FR 31,527. The Vehicle Rule identified the pollutant as the aggregate of the six gases because in the Endangerment Finding, the Administrator found that those six gases—which she described as long-lived and directly emitted GHGs—may reasonably be anticipated to endanger public health and welfare.

c. Scope of PSD Applicability

In the Tailoring Rule and subsequent rulemakings, commenters raised an issue concerning the applicability of PSD to non-NAAQS pollutants. A discussion of this issue is useful background information for the present action, including what we call the automatic-updating nature of PSD requirements under the CAA, that is, that as soon as a pollutant becomes subject to regulation under another CAA provision, it becomes subject to PSD.

i. Applicability of PSD to Non-NAAQS Pollutants

In the Tailoring Rule, EPA responded to a set of comments that PSD applies only to NAAQS pollutants, and not non-NAAQS pollutants such as GHGs. In brief, several commenters advanced the argument that primarily because the PSD provisions in CAA sections 161 and 165(a) limit PSD applicability to sources located in attainment or unclassifiable areas, PSD applicability should be limited to the NAAQS pollutants for which the area in which the source is located is attainment or unclassifiable. On the basis of this interpretation, the commenters urged

EPA to conclude that PSD does not apply to GHGs. 75 FR 31,560/2–3.

EPA disagreed with these comments and reiterated its long-held view that PSD applies to “any pollutant subject to regulation under the CAA,” and that includes non-NAAQS pollutants. 75 FR 31,560/3. EPA explained—

We recognize, as we have said elsewhere, that a major purpose of the PSD provisions is to regulate emissions of NAAQS pollutants in an area that is designated attainment or unclassifiable for those pollutants. However, we do not read CAA sections 161 and the “in any area to which this part applies” clause in 165(a), in the context of the PSD applicability provisions, as limiting PSD applicability to those pollutants. The key PSD applicability provisions are found in sections 165(a) and 169(1). Section 165(a) states, “No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless [certain requirements are met]. A “major emitting facility” is defined, under CAA section 169(1), as “any * * * stationary source[] which emit[s], or ha[s] the potential to emit, one hundred [or, depending on the source category, two hundred fifty] tons per year or more of any air pollutant.” As discussed elsewhere, EPA has long interpreted the term “any air pollutant” to refer to “any air pollutant subject to regulation under the CAA,” and for present purposes, will continue to read the “subject to regulation” phrase into that term.

Although section 165(a) makes clear that the PSD requirements apply only to sources located in areas designated attainment or unclassifiable, it does not, by its terms, state that the PSD requirements apply only to pollutants for which the area is designated attainment or unclassifiable. Rather, section 165(a) explicitly states that the PSD requirements apply more broadly to any pollutant that is subject to regulation.

Id.

EPA went on to discuss the statements by the D.C. Circuit concerning the PSD applicability provisions—which, again, according to their literal terms, apply PSD to “any air pollutant,” CAA section 165(a)(1), 169(1)—in the seminal case interpreting the PSD requirements: *Alabama Power v. Costle*, 636 F.2d 323 (DC Cir. 1980). There, the DC Circuit noted that these PSD applicability provisions must be read to apply PSD quite broadly; indeed, the Court indicated they could apply even to air pollutants not yet regulated under other provisions of the Act. 636 F.2d at 352–53 & n. 60.⁴⁷

EPA also emphasized that EPA’s long-standing regulations have interpreted this provision broadly enough to capture non-NAAQS pollutants:

In addition, it should not be overlooked that we have applied PSD to non-NAAQS

pollutants since the inception of the program over 30 years ago. For example, prior to the 1990 CAA Amendments, PSD applied to HAPs regulated under CAA section 112; and over the years, EPA has established significance levels for fluorides, sulfuric acid mist, hydrogen sulfide, TRS, reduced sulfur compounds, municipal waste combustor organics, municipal waste combustor metals, municipal waste combustor acid gases, and municipal solid waste landfill emissions, see 40 CFR 51.166(b)(23)(i) * * *. Of course, the basis for all these actions is PSD’s applicability to these non-NAAQS air pollutants. We are not aware that EPA’s actions in establishing significance levels for these pollutants gave rise to challenges on grounds that the PSD provisions do not apply to them. As the U.S. Supreme Court recently stated in upholding an EPA approach in another context: “While not conclusive, it surely tends to show that the EPA’s current practice is a reasonable and hence legitimate exercise of its discretion * * * that the agency has been proceeding in essentially this fashion for over 30 years.” *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498, 1509 (2009) (citations omitted).

75 FR 31,581/3 to 31,582/1

To this, it may be added that the regulatory history of the PSD applicability provisions supports their broad application: EPA’s initial, 1977–78 rulemaking implementing the PSD program made explicit that the PSD program applied to “any pollutant regulated under the Clean Air Act.” 43 FR 26380, 26403, 26406 (June 19, 1978) (promulgating 40 CFR 51.21(b)(1)(i)). In 1979–1980, EPA revised the PSD program to conform to *Alabama Power v. Costle*, 636 F.2d 323 (DC Cir. 1980). 44 FR 51924 (September 5, 1979) (proposed rule); 45 FR 52676 (August 7, 1980) (final rule). In this rulemaking, EPA did not disturb the pre-existing provisions that applied the PSD program to regulated air pollutants. In October 1990, EPA prepared the “New Source Review Workshop Manual—Prevention of Significant Deterioration and Nonattainment Area Permitting” (draft NSR Manual), which although in draft form, and not a binding rule, has often been referenced as a reflection of EPA’s thinking on PSD permitting issues. See, *Alaska Dept. of Conservation v. EPA*, 540 U.S. 461, 476 n. 7 (2004); *In re: Indeck-Elwood, LLC*, 13 E.A.D. 133 n. 13 (EAB Sept. 27, 2006); *In re: Prairie State Generating Company*, 13 E.A.D. 6 n. 2 (EAB Aug 24, 2006). This manual states that PSD applies to “each pollutant regulated by the Act,” including “criteria and * * * noncriteria” pollutants. Draft NSR Manual, pp. A.18. See *id.* at A.28, A.30. In 1996 EPA proposed, and in 2002 finalized what we call the NSR Reform

Rule,⁴⁸ which included a set of amendments to the PSD provisions that included revisions to conform to the 1990 CAA Amendments. See 61 FR 38250 (July 23, 1996), 67 FR 80186 (December 31, 2002). In the preamble to the final rule, EPA noted that based on a request from a commenter, EPA was amending the regulations to “clarify which pollutants are covered under the PSD program.” EPA accomplished this by promulgating a definition for “regulated NSR pollutant,” and by substituting that defined term for the phrase “pollutant regulated under the Act” that was previously used in various parts of the PSD regulations. 67 FR 80240. The definition of “regulated NSR pollutant” includes several categories of pollutants, including, in general, NAAQS pollutants and precursors, pollutants regulated under CAA section 111 NSPS, Class I or II substances regulated under CAA title VI, and a catch-all category, “[a]ny pollutant that otherwise is subject to regulation under the Act.” *E.g.*, 40 CFR 52.21(b)(50). The explicit inclusion of Class I or II substances regulated under CAA title VI confirms that PSD applies to non-NAAQS pollutants. 75 FR 31,561/3 to 31,562/1.

In the Tailoring Rule, EPA went on to discuss other PSD and CAA provisions, including their legislative history and interpretation in the case law, that all support applying PSD to any pollutant this is subject to regulation, including non-NAAQS pollutants. *Id.* 31,560/2 to 31,562/2.⁴⁹

ii. Automatic Application of PSD to Newly Regulated Pollutants

Under the PSD applicability requirements, PSD applies to sources automatically, that is, by operation of law, as soon as their emissions of pollutants become subject to regulation

⁴⁸“Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects—Final Rule,” 67 FR 80186 (December 31, 2002) (NSR Reform rule).

⁴⁹EPA gave additional reasons why it does not agree that PSD applies only to NAAQS pollutants in the record for the Tailoring Rule, “Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA’s Response to Public Comments,” May 2010, pp.38–41; and in EPA’s court filings in defense of challenges to the Tailoring Rule. “EPA’s Response To Motions To Stay” 47–59 *Coalition for Responsible Regulation v. EPA*, No. 09–1322 (and consolidated cases) (DC Cir. 2010), *Coalition for Responsible Regulation v. EPA*, No. 09–1073 (and consolidated cases) (DC Cir. 2010), *Coalition for Responsible Regulation v. EPA*, No. 09–1092 (and consolidated cases) (DC Cir. 2010), *Coalition for Responsible Regulation v. EPA*, No. 09–1131 (and consolidated cases) (DC Cir. 2010) (hereafter, *Coalition for Responsible Regulation v. EPA*, No. 09–1322 (and consolidated cases)).

⁴⁷“Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA’s Response to Public Comments,” p. 39.

under the CAA. This is because CAA section 165(a)(1) prohibits “major emitting facilit[ies]” from constructing or modifying without obtaining a permit that meets the PSD requirements, and CAA section 169(1) defines a “major emitting facility” as a source that emits a specified quantity of “any air pollutant,” which, as noted earlier, EPA has long interpreted as any pollutant subject to regulation. Whenever EPA promulgates control requirements for a pollutant for the first time, that pollutant becomes subject to regulation, and any stationary source that emits that pollutant in sufficient quantities becomes a “major emitting facility” that, when it constructs or modifies, becomes subject to PSD without any further action from EPA or a state or local government.

EPA regulations have long codified automatic PSD applicability. See 43 FR 26380, 26403/3, 26406 (June 19, 1978) (promulgating 40 CFR 51.21(b)(1)(i)) and 42 FR 57479, 57480, 57483 (November 3, 1977) (proposing 40 CFR 51.21(b)(1)(i)) (applying PSD requirements to a “major stationary source” and defining that term to include sources that emit specified quantities of “any air pollutant regulated under the Clean Air Act”). Most recently, in the 2002 NSR Reform Rule, noted previously, EPA reiterated these requirements, although changing the terminology to “any regulated NSR pollutant.” 67 FR 80,186. EPA stated in the preamble: “The PSD program applies automatically to newly regulated NSR pollutants, which would include final promulgation of an NSPS applicable to a previously unregulated pollutant.” 67 FR at 80240/1.

In most states with approved PSD programs, PSD does apply automatically. However, in a minority of states with approved PSD programs, it does not.⁵⁰ Instead, each time EPA subjects a previously unregulated air pollutant to regulation, these states must submit a SIP revision incorporating that pollutant into its program. Despite the time needed for the state to submit a SIP revision and EPA to approve it, the pollutant-emitting sources in the state become subject to PSD under the CAA as soon as EPA first subjects that pollutant to control. Because under CAA section 165(a)(1) and 169(1), as interpreted by EPA, a source that emits specified quantities of any air pollutant subject to regulation cannot construct or modify unless it first receives a PSD permit, as a practical matter, in a state with an approved PSD program that

does not automatically update and that has not been revised to include the newly regulated pollutant, the sources may find themselves subject to the CAA requirement to obtain a permit, but without a permitting authority to issue that permit. As discussed later, this action is needed because GHG-emitting sources in Texas would otherwise confront that situation.

In a recent decision, the 7th Circuit, mistakenly citing to PSD provisions when the issue before the court involved the separate and different non-attainment provisions of CAA sections 171–193, concluded that sources could continue to abide by permitting requirements in an existing SIP until amended, even if that SIP does not comport with the law. *United States v. Cinergy Corp.*, No. 09–3344, 2010 WL 4009180 (7th Cir. Oct. 12, 2010). In stark contrast to the nonattainment provisions actually at issue in *Cinergy*—which are not self-executing and must therefore be implemented through a SIP—PSD is self-executing; it is the statute (CAA section 165), not just the SIP, that prohibits a source from constructing a project without a permit issued in accordance with the Act.

3. Implementation of GHG PSD Requirements

Because PSD is implemented through the SIP system, EPA has taken a series of actions to address the obligations of states (including localities and other jurisdictions, as appropriate) to implement PSD requirements for GHG-emitting sources. EPA has taken these actions through the Tailoring Rule and a series of subsequent actions.⁵¹

a. Tailoring Rule

EPA proposed the Tailoring Rule by notice dated October 27, 2009, 74 FR 55292. In that action, EPA proposed to phase in PSD applicability, for GHGs, starting with a threshold of 25,000 tpy on a CO₂e basis. This threshold was above the statutory thresholds of 100 or 250 tpy on a mass basis, depending on the source category, for new construction).⁵²

⁵¹ A detailed description of EPA’s implementation efforts, and the status of state compliance with those efforts, is included in Declaration of Regina McCarthy, *Coalition for Responsible Regulation v. EPA*, DC Cir. No. 09–1322 (and consolidated cases) (McCarthy Declaration), including Attachment 1 (Tables 1, 2, and 3), which can be found in the docket for this rulemaking.

⁵² Even so, EPA recognized that many SIPs with approved PSD programs would continue to require PSD permitting of GHG-emitting sources at the statutory thresholds because these SIPs would remain in place even after EPA finalized the Tailoring Rule. Until the states revised those SIPs, sources in those states would remain subject to

EPA finalized the Tailoring Rule by notice dated June 3, 2010. 75 FR 31514. Comments on the proposed rule had persuaded EPA that the proposed GHG-applicability threshold was too low to avoid undue administrative burdens. Accordingly, in the final Tailoring Rule, EPA raised those threshold levels to, depending on the circumstances, 75,000 and/or 100,000 tpy on a CO₂e basis, while retaining the approach of a phase-in. EPA established the initial levels in the first two steps of the phase-in schedule, committed the agency to take future steps addressing smaller sources, and excluded the smallest sources from PSD permitting for GHG emissions until at least April 30, 2016.

In addition, in the Final Tailoring Rule, EPA incorporated the PSD thresholds for GHGs in the definition of the term “subject to regulation.” As noted previously, under EPA’s PSD regulations, PSD applies to a “major stationary source;” a “major stationary source” is defined as a source that emits 100/250 tpy on a mass basis of a “regulated NSR pollutant;” and a “regulated NSR pollutant,” in turn, is defined as, among other things, a pollutant that is “subject to regulation” under the CAA.⁵³ In the Tailoring Rule, EPA added a limitation to the term “subject to regulation” so that the only GHG emissions that would be treated as “subject to regulation” (and therefore subject to PSD) are those emitted at or above specified thresholds of, depending on the circumstances, 75,000 and/or 100,000 tpy on a CO₂e basis.⁵⁴

those thresholds as a matter of both state and federal law. This would result in the same problems of overwhelming administrative burdens and costs that EPA designed the Tailoring Rule to address. To solve these problems, EPA encouraged each affected state to submit a SIP revision that EPA would approve to raise the thresholds to conform to the Tailoring Rule. EPA recognized that it would take time for the states to develop and submit for approval such SIP revisions, and for EPA to approve them. Accordingly, as an interim measure, EPA proposed, as part of the proposed Tailoring Rule, to narrow its approval of the existing EPA-approved SIPs so that those SIPs would remain approved only to the extent they regulate GHG emissions at or above the Tailoring Rule thresholds. Specifically, EPA proposed to rescind its approval of the SIP permitting threshold provisions to the extent they required PSD permits for sources whose GHG emissions fall below the proposed Tailoring Rule thresholds. 74 FR at 55,340/3 to 55,343/3 (proposed Tailoring Rule).

⁵³ 40 CFR 51.166(a)(7)(i), (b)(1)(i)(a), (b)(49).

⁵⁴ Specifically, under the revised definition of “subject to regulation,” sources that emit at least the 75,000 and/or 100,000 tpy CO₂e threshold amount of GHGs are subject to PSD as long as the amount of GHG emissions also exceeds, in general, 100/250 tpy on a mass basis for new sources and zero tpy on a mass basis for modifications of existing sources. 40 CFR 51.166(b)(48), 75 FR at 31,606; see EPA Office of Air Quality Planning and Standards, “PSD and Title V Permitting Guidance for Greenhouse Gases (November 2010).

⁵⁰ 75 FR at 53,897/3 (proposed GHG PSD SIP call).

Some states advised EPA that it is likely they would be able to implement the Tailoring Rule thresholds by interpreting the term “subject to regulation” in their SIPs, and without having to take further action. A state’s ability to take this approach would have implications for how EPA needed to implement the Tailoring Rule.⁵⁵ Accordingly, in the Tailoring Rule, EPA began a process to gather more information about how states would implement permitting for GHG-emitting sources.

b. 60-Day Letters

To gather this information, EPA, in the Tailoring Rule, asked states to submit letters within 60 days of publication of the Tailoring Rule, which we refer to as the 60-day letters, concerning the status of their PSD program and their legal authority for applying PSD program to GHG-emitting sources. This information would help clarify, for each state, the two central issues for PSD applicability to GHG-emitting sources: (i) Whether the state has an approved PSD program that applies to GHG-emitting sources; and (ii) if so, what action the state would take to limit the applicability of its PSD program to GHG-emitting sources at or above the Tailoring Rule thresholds.⁵⁶ This information would assist EPA to determine what, if any, action it needed to take with respect to the states.

Almost all states submitted 60-day letters, generally by August 4, 2010. The letters, along with other information EPA received through review of state requirements and further communications with state officials, indicate that the states, localities, and other jurisdictions may be divided into three categories, described below, for purposes of EPA’s implementation of the PSD program to GHG-emitting sources.

c. The Three Categories of States and EPA’s Implementation Process

The first category, which includes 7 states, 35 subsections of states, the District of Columbia, American Samoa, Guam, Puerto Rico, the U.S. Virgin

Islands, and Indian Territory, does not have an approved SIP PSD permitting program. Instead, federal requirements apply. Thus, implementation of PSD for GHG-emitting sources in these jurisdictions is the simplest of all the states: GHG-emitting sources will become subject to PSD and the thresholds in the Tailoring Rule will apply as of January 2, 2011 without further action.⁵⁷

The second category includes 14 states and a number of districts within states that have approved PSD SIPs, but those SIPs do not apply the PSD program to GHG-emitting sources. This group includes Texas, which is the focus of this action. The implementation process for this category is discussed later.⁵⁸

The third category includes the remaining states, which have an approved SIP PSD program that applies to GHG-emitting sources. As for the implementation process for this category, some of these states have indicated that they are able to interpret their SIPs to apply PSD only to GHG emissions at or above the Tailoring Rule thresholds, and they do not need to revise their SIPs to do so. However, most indicated that they would need to submit SIP revisions to EPA in order to incorporate the Tailoring Rule thresholds. This means that in these states, until they do submit their SIP revisions and EPA approves them, sources emitting GHGs at or above the 100/250 tpy levels will be subject to PSD requirements as of January 2, 2011 if they construct or modify. EPA has encouraged these states to submit SIP revisions adopting the Tailoring Rule thresholds as soon as possible and some of these states have already done so. Moreover, almost all of these states are proceeding to revise their state law to reflect the Tailoring Rule thresholds and will do so by January 2, 2011 or very soon thereafter. In the meantime, EPA has finalized the Narrowing Rule so that as of January 2, 2011, at least for federal purposes, PSD will apply to GHG-emitting sources only at the Tailoring Rule thresholds or higher.⁵⁹ As a result

of these state actions and EPA’s Narrowing Rule, by January 2, 2011 or shortly thereafter, in all or almost all of these states, only GHG-emitting sources at or above the Tailoring Rule thresholds will be subject to PSD requirements.⁶⁰

d. SIP Call States, Including Texas

As just noted, the second category, which includes Texas, includes 14 states and some districts within states whose SIPs have an approved PSD program but do not have the authority to apply that program to GHG-emitting sources. For most of these states, including Texas, the reason is that their PSD applicability provision applies to any “pollutant subject to regulation” under the CAA (or a similar term), but other provisions of state law preclude automatic updating. As a result, this applicability provision covers only pollutants—not including GHGs—that were subject to regulation at the time the state adopted the applicability provision.

After proposing action by notice dated September 2, 2010,⁶¹ EPA promulgated the final SIP call for 13 states, including Texas, by notice signed on December 1, 2010, and published on December 13, 2010, 75 FR 77,698, which we call the GHG PSD SIP Call or, simply, the SIP call.⁶² In this action, consistent with the requirements of CAA section 110(k)(5), EPA (i) issued a finding that the SIPs for 13 states (comprising 15 state and local programs) are “substantially inadequate to * * * comply with any requirement of this Act” because their PSD programs do not apply to GHG-emitting sources as of January 2, 2011; (ii) issued a SIP call requiring submission of a corrective SIP revision; and (iii) established a “reasonable deadline[] (not to exceed 18 months after the date of such notice)” for the submission of the corrective SIP revision. This deadline ranges, for different states, from 3 weeks to 12

state PSD obligations of sources below the Tailoring Rule thresholds. *Id.* paragraph 92, page 19.

⁶⁰ *Id.* paragraphs 62–94, pages 13–20, and Attachment 1, Table 3.

⁶¹ “Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call—Proposed Rule,” 75 FR 53892 (September 2, 2010); “Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan—Proposed Rule,” 75 FR 53883 (September 2, 2010).

⁶² “Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call—Final Rule,” 75 FR 77,698 (December 13, 2010).

⁵⁵ Specifically, a state’s implementation of the Tailoring Rule in this manner prior to January 2, 2011 would obviate the need for EPA to narrow its approval of that state’s SIP, as EPA had proposed in the proposed Tailoring Rule. Thus, in the Final Tailoring Rule, EPA delayed final action on its narrowing proposal so that EPA could gather information about the process and time-line for states to implement the Tailoring Rule.

⁵⁶ Alternatively, a state could choose to apply its PSD program to sources below the Tailoring Rule thresholds and acquire sufficient resources to implement the program as expanded, but no state had indicated an intention to proceed in this manner.

⁵⁷ McCarthy Declaration, paragraphs 28–33, page 8, and Attachment 1, Table 1.

⁵⁸ *Id.*, paragraphs 34–55, pages 8–12, and Attachment 1, Table 2.

⁵⁹ Specifically, for these states, EPA has stated that it intends to finalize its proposal in the Tailoring Rule to narrow its approval of their PSD applicability provisions to only the extent they apply PSD to GHG-emitting sources at or above the Tailoring Rule thresholds, which we call the Narrowing Rule. *Id.* paragraph 90, page 19. In addition, recognizing that GHG-emitting sources also have permitting obligations under state law, EPA has strongly encouraged states to revise their state law as promptly as possible to eliminate the

months after the date of the final SIP call, as discussed below.

EPA justified its finding that the affected SIPs are “substantially inadequate” to comply with CAA requirements on grounds that (i) the CAA requires that PSD requirements apply to any stationary source that emits specified quantities of any air pollutant subject to regulation under the CAA, and those PSD requirements must be included in the approved SIPs; (ii) as of January 2, 2011, GHG-emitting sources will become subject to PSD; (iii) as a result, the CAA requires PSD programs to apply to GHG-emitting sources; and (iv) accordingly, the failure of any SIP PSD applicability provisions to apply to GHG-emitting sources means that the SIP fails to comply with these CAA requirements.

In the SIP call proposal, EPA discussed in some detail the SIP submittal deadline under CAA section 110(k)(5). Under this provision, in issuing a SIP call, EPA “may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.” EPA proposed to allow each of the affected states up to 12 months from the date of signature of the final finding of substantial inadequacy and SIP call within which to submit the SIP revision, unless, during the comment period, the state expressly advised that it would not object to a shorter period—as short as 3 weeks from the date of signature of the final rule—in which case EPA would establish the shorter period as the deadline. EPA stated that, assuming that EPA were to finalize the SIP call on or about December 1, 2010, as EPA said it intended to do in the proposal, then the earliest possible SIP submittal deadline would be December 22, 2010.

EPA made clear that the purpose of establishing the shorter period as the deadline for any interested state is to accommodate states that wish to ensure that a FIP is in effect as a backstop to avoid any gap in PSD permitting. EPA also made clear that if a state did not advise EPA that it does not object to a shorter deadline, then the 12-month deadline would apply. EPA emphasized that for any state that receives a deadline after January 2, 2011, the affected GHG-emitting sources in that state may be delayed in their ability to receive a federally approved permit authorizing construction or modification. This is because after January 2, 2011, these sources may not have available a permitting authority to review their permit applications until the date that EPA either approves the SIP submittal or promulgates a FIP.

EPA asked that each of the affected states write EPA a letter during the comment period to identify the deadline for SIP submission to which the state would not object if EPA established. We call these the 30-day letters. Each affected state wrote a 30-day letter to EPA, as requested. Except for Texas, each state identified a SIP submittal deadline, which differed among the states, and which ranged from three weeks to 12 months. In the final SIP call, EPA established SIP submittal deadlines identified by the states, except that EPA established a deadline of 12 months for Texas, in accordance with EPA’s proposal. Except for Texas, each state explained in its 30-day letter and in subsequent communications with EPA, that it was planning on either receiving a FIP or adopting a SIP and that it chose a deadline that would result in having either the FIP or an approved SIP, as appropriate, in place by January 2, 2011 or soon enough thereafter so as to avoid any hardship to its sources. In the final SIP call, EPA justified approving this three-week-to-12-month time period, although expeditious, as meeting the CAA section 110(k)(5) requirement to be a “reasonable” deadline in light of: (i) The SIP development and submission process; (ii) the preference of the state; and (iii) the imperative to minimize the period when sources will be subject to PSD but will not have available a PSD permitting authority to act on their permit application and therefore may face delays in constructing or modifying.

In the final SIP call, based on the states’ 30-day letters and other communications, EPA established a SIP submittal deadline of December 22, 2010 for seven states. Each of the states indicated that it did not expect to submit a SIP revision by that date and instead expected to receive a FIP. On December 23, 2010, for each of the seven states, EPA issued a finding of failure to submit its corrective SIP revision by that deadline, and EPA promulgated a FIP.

Except for Texas, EPA expects each of the other states subject to the SIP call to adopt a SIP revision and receive EPA approval of it, or receive a FIP, within the first half of 2011, and, in most cases, substantially sooner. Although none of these states will have a permitting authority in place as of January 2, 2011, none of these states expects that gap to pose meaningful difficulties for sources because, depending on the state, the gap is brief, the state does not expect any sources to seek a permit during the gap, or even if the state were the permitting authority during the gap, it could not

complete processing the permits during that time.⁶³

As discussed later, Texas has responded to the SIP call differently than the other states. As a result, its GHG-emitting sources do face the prospect of permitting delays. This rulemaking action addresses that situation.

4. Summary of the Effect of EPA’s Implementation Actions in States Other Than Texas

EPA recently summarized the status of its implementation efforts, for all three categories of sources, as follows:

Overall, EPA has received information about the status of 99 jurisdictions (49 states,⁶⁴ 4 territories, 45 localities, and the District of Columbia), and included that information in Attachment 1. Of these jurisdictions, 94 will have, for Federal law purposes, a PSD permitting program for GHG emissions at the Tailoring Rule thresholds on Jan. 2, 2011. Of these 94 entities, 84 will have made any necessary amendments to state or local law to ensure that state or local permits are not required for GHG emissions below Tailoring Rule thresholds. By the end of the first quarter of 2011, only one jurisdiction will not have authority to permit GHG sources, and that jurisdiction will obtain authority by July 1, 2011 and in the meantime, does not expect large sources seeking permits for their GHGs. In addition, by the end of the first quarter of 2011, all but one more state will have made any necessary amendments to state or local law to ensure that permits are not required for GHG emissions below Tailoring Rule levels. 1 program with GHG permitting authority at the lower statutory levels has not yet determined how, and on which timeline, it will incorporate the Tailoring Rule thresholds into its state law.⁶⁵

Thus, under EPA’s implementation program, (i) in every state, (a) only sources at or above the Tailoring Rule thresholds will be subject under federal law to obtain a PSD permit when they construct or modify as of January 2, 2011, and (b) only those same sources will be subject under state law to obtain a PSD permit when they construct or modify as of January 2, 2011 or very

⁶³ McCarthy Declaration, p. 12, paragraph 55.

⁶⁴ In California’s PSD program is administered in its entirety by local jurisdictions.

⁶⁵ McCarthy Declaration, p. 20, paragraph 98. There have been a few changes in the status of individual states since this time, but the overall picture remains the same. In no small part, the current state of EPA’s implementation effort is attributable to the fact that EPA has been in close communication with almost every state and many other jurisdictions, along with multi-state organizations such as the National Association of Clean Air Agencies (NACAA). In addition to the letters that states have sent responding to the Tailoring Rule (the 60-day letters) and proposed SIP Call (the 30-day letters), EPA officials, primarily through the Regional offices, have had numerous communications with their state counterparts.

soon thereafter; and (ii) in every state, except for Texas, as of January 2, 2011 or very soon thereafter, GHG sources that construct or modify will be able to receive permits when they need them, so that the sources will not face obstacles to constructing and modifying. Again, Texas has responded to EPA's implementation program in a manner that has resulted in its sources facing obstacles to constructing and modifying, as discussed next, which this rulemaking addresses.

5. EPA's Implementation Approach for Texas and Texas's Response

The following describes the progress to date of implementing PSD for GHG emissions in Texas, based on extensive communications between EPA and TCEQ. It should be borne in mind, as noted earlier, that Texas is in the second of the three categories of states, that is, it has an approved PSD program that does not apply to GHGs-emitting sources.

a. Texas's 60-Day Letter

Texas's 60-day letter provides the state's clearest articulation of its response to EPA's efforts to implement PSD for GHG-emitting sources at the Tailoring Rule thresholds beginning January 2, 2011. As noted previously, in the preamble to the final Tailoring Rule, EPA asked each state to send EPA a letter within 60 days to identify which category the state was in and what action the state intended to take. Specifically, with regard to sources in Category 2, EPA stated:

In our proposed rule, we also noted that a handful of EPA-approved SIPs fail to include provisions that would apply PSD to GHG sources at the appropriate time. This is generally because these SIPs specifically list the pollutants subject to the SIP PSD program requirements, and do not include GHGs in that list, rather than include a definition of NSR regulated pollutant that mirrors the federal rule, or because the state otherwise interprets its regulations to limit which pollutants the state may regulate. At proposal, we indicated that we intended to take separate action to identify these SIPs, and to take regulatory action to correct this SIP deficiency.

We ask any state or local permitting agency that does not believe its existing SIP provides authority to issue PSD permits to GHG sources to notify the EPA Regional Administrator by letter, and to do so no later than August 2, 2010. This letter should indicate whether the state intends to undertake rulemaking to revise its rules to apply PSD to the GHG sources that will be covered under the applicability thresholds in this rulemaking, or alternatively, whether the state believes it has adequate authority through other means to issue federally-enforceable PSD permits to GHG sources

consistent with this final rule. For any state that lacks the ability to issue PSD permits for GHG sources consistent with this final rule, we intend to undertake a separate action to issue a SIP call, under CAA section 110(k)(5). As appropriate, we may also impose a FIP through 40 CFR 52.21 to ensure that GHG sources will be permitted consistent with this final rule.

75 FR 31582/3.

With regard to states in category 3, EPA requested that in the states' 60-day letter,

The state should explain whether it will apply EPA's meaning of the term "subject to regulation" and if so, whether the state intends to incorporate that meaning of the term through interpretation, and without undertaking a regulatory or legislative process. If a state must undertake a regulatory or legislative process, then the letter should provide an estimate of the time needed to adopt the final rules. If a state chooses not to adopt EPA's meaning by interpretation, the letter should address whether the state has alternative authority to implement either our tailoring approach or some other approach that is at least as stringent, whether the state intends to use that authority. If the state does not intend to interpret or revise its SIP to adopt the tailoring approach or such other approach, then the letter should address the expected shortfalls in personnel and funding that will arise if the state attempts to carry out PSD permitting for GHG sources under the existing SIP and interpretation.

For any state that is unable or unwilling to adopt the tailoring approach by January 2, 2011, and that otherwise is unable to demonstrate adequate personnel and funding, we will move forward with finalizing our proposal to limit our approval of the existing SIP.

75 FR 31582/3.

On August 2, 2010, Texas submitted its 60-day letter, signed by the Texas Attorney General and the Chairman of the Texas Commission on Environmental Quality.⁶⁶ In that letter, Texas responded specifically to EPA's request that "any state * * * that does not believe its existing SIP provides authority to issue PSD permits to GHG sources to notify [EPA and] * * * indicate whether the state intends to * * * to revise its rules to apply PSD to * * * GHG sources" by stating: "Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emission." *Id.* p. 1. Texas offered several

explanations for this position. First, Texas noted:

Texas' stationary source permitting program encompasses all "federally regulated new source review pollutants," including, "any pollutant that otherwise is subject to regulation under the [federal Clean Air Act]." 30 Tex. Admin. Code § 116.12(14)(D). The rules of the Texas Commission on Environmental Quality (TCEQ), like the EPA's rules, do not define the phrase "subject to regulation."

Id. p. 2. Texas then explained that it had several objections to interpreting the phrase "subject to regulation" to allow regulation of GHGs. For one thing, according to Texas, long-standing state case law precluded the term—and the PSD applicability provisions generally—from automatically incorporating newly regulated pollutants. Specifically, Texas said:⁶⁷

* * * Texas' stationary source permitting program encompasses all "federally regulated new source review pollutants," including "any pollutant that otherwise is subject to regulation under the [federal Clean Air Act]." 30 Tex. Admin. Code § 116.12(14)(D). This delegation of legislative authority to the EPA is limited solely to those pollutants regulated when Texas Rule 116.12 was adopted (1993) and last amended (2006). As the Texas Supreme Court has explained, "The general rule is that when a statute is adopted by a specific descriptive reference, the adoption takes the statute as it exists at that time, and the subsequent amendment thereof would not be within the terms of the adopting act." *Trimmer v. Carlton*, 296 S.W. 1070 (1927). Thus, in order for Texas Rule 116.12 to pass constitutional muster, it must be limited to adopting by reference the definition of "subject to regulation" in existence when Rule 116.12 was last amended in 2006. In other words, Texas Rule 116.12 cannot delegate authority to the EPA to define "subject to regulation" in 2010 to include pollutants that were not "subject to regulation" in 2006.

Id. at 4.

Secondly, Texas took the position that PSD applies only to NAAQS pollutants, and not non-NAAQS pollutants. Texas stated:

The only sensible interpretation of the Clean Air Act is one that requires the EPA to promulgate a National Ambient Air Quality Standard (NAAQS) for greenhouse gases before the EPA can require PSD permitting of greenhouse gases.* * * EPA, however, has not developed a NAAQS for greenhouse gases.* * *

Id. at 4–5.

Texas provided a more detailed exposition of its view that PSD applies

⁶⁶ Letter from Bryan W. Shaw, Chairman, Texas Commission on Environmental Quality, and Greg Abbott, Attorney General of Texas, to Hon. Lisa Jackson, Administrator, U.S. Environmental Protection Agency, and Dr. Alfredo "Al" Armendariz, Regional Administrator, U.S. Environmental Protection Agency, Region 6 (August 2, 2010) (Texas's 60-day letter), included in the docket for this rulemaking.

⁶⁷ In this explanation, Texas was referring to the PSD applicability provision that Texas adopted under State law in 2006, which differed slightly from the applicability provision approved into the SIP in 1993.

only to NAAQS pollutants in its challenges before the D.C. Circuit to EPA's GHG actions, where Texas moved to stay the Endangerment Finding, the Vehicle Rule, and the Johnson Memo Reconsideration (Texas's Motion to Stay Three GHG Actions).⁶⁸ (In a separate motion, Texas also moved to stay the Tailoring Rule.⁶⁹) There, Texas reiterated arguments based on the text of some of the CAA PSD provisions that, in Texas's view, lead to the conclusion that the CAA precludes applying PSD to non-NAAQS. As noted previously, these arguments were raised by commenters to the Tailoring Rule. Texas concluded that EPA's efforts to apply PSD to GHGs—

Thus violates the CAA. Moreover, [EPA's] interpretation of the CAA is not entitled to deference because the text of the statute is unambiguous. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984) (the Agency must give effect to the unambiguously expressed intent of Congress). Accordingly, EPA's attempt to short cut the CAA's NAAQS process in order to regulate GHG emissions from stationary sources through PSD and Title V must fail.⁷⁰

At the close of its 60-day letter, Texas added, "In the event a court concludes EPA's actions comport with the law, Texas specifically reserves and does not waive any rights under the federal Clean Air Act or other law with respect to the issues raised herein."⁷¹

b. Texas's 30-Day Letter

As noted previously, in the GHG PSD SIP call proposal, EPA proposed to establish, for each affected state, a deadline of 12 months from the date of signature of the final SIP call for submitting the corrective SIP revision, unless the state expressly advised EPA in its 30-day letter that it would not object to a shorter period. Texas submitted a 30-day letter on October 4, 2010,⁷² and in that letter, voiced various

objections to the proposed SIP call. Texas reiterated its view that PSD is limited to NAAQS pollutants, and therefore cannot apply to GHGs, and added that the SIP call is "based on an impermissible interpretation of the [Clean Air Act]. EPA cannot * * * impose permitting through [the PSD] program without first setting a NAAQS. * * *" Texas 30-day letter p. 2, 4. EPA responded to those objections in the final SIP call.⁷³

In its 30-day letter, Texas went on to discuss the SIP submission schedule and FIP that EPA proposed, but Texas declined EPA's invitation to identify a specific deadline for the state's SIP submission. As a result, in the final SIP call, EPA was obliged to establish the default SIP submission deadline for Texas of December 1, 2011, in accordance with EPA's proposal. Because Texas has clearly stated that it does not intend, and, in its view, does not have the authority, to adopt a SIP revision to apply PSD to GHG-emitting sources, EPA expects to promulgate a FIP to do so. But, again, because Texas did not identify an earlier deadline for its SIP submittal, the earliest that EPA could promulgate such a FIP would be December 2, 2011. Under this approach, due to the position Texas has taken, absent further action, sources in Texas could not expect to have a permitting authority with authority to issue preconstruction permits for their GHG emissions until that December 2, 2011 date. As a result, absent further action, sources in Texas would face obstacles in constructing or modifying before that date.

Texas's 30-day letter indicates that Texas was well aware of the consequences of its decision not to identify a specific deadline for its SIP submission, but had several reasons for making that decision. These included its view, again, that PSD applies only to NAAQS pollutants, and also that EPA was required to employ a different process for requiring a SIP revision, one that would have provided the state with more time to adopt a SIP revision. Texas 30-day letter at 4–5. In addition, Texas asserted that there is no reason to allow EPA to promulgate an early FIP for the benefit of Texas's sources because, in Texas's view, for practical reasons, EPA could not issue those permits for the "foreseeable future" anyway. Specifically, Texas explained that EPA had not issued guidance for determining BACT, the key element of a PSD permit for a GHG source. Texas added that even

after EPA issued that guidance, BACT will, in Texas's view, remain uncertain and contentious, and the guidance will be of limited usefulness until the control technology is proven. *Id.* at 5. Texas added that "[i]ndustry should be particularly concerned about EPA's lack of resources and experience to issue these permits * * *." *Id.* at 6. Texas concluded, "The result of all this is that, even under a FIP, it is unlikely that construction of new major GHG sources or major modifications will commence in the foreseeable future." *Id.* at 6.

It should be noted that Texas stated in filings before the D.C. Circuit in which it challenged the Tailoring Rule that it believed 167 projects in Texas would be affected by the lack of a permitting authority during 2011.⁷⁴

IV. Interim Final Action

In this action, EPA is taking the following actions on an interim final basis to ensure that the PSD program in Texas complies with the CAA. First, EPA is determining that the Administrator's action approving the Texas SIP PSD program was in error under CAA section 110(k)(6).

Second, EPA, in the same manner as its action to approve the Texas SIP PSD program, is revising such action as appropriate without requiring any further submission from Texas. *Id.* The appropriate revision is to convert the previous approval to a partial approval and a partial disapproval. The partial approval applies to the extent that Texas's PSD program actually covers pollutants that are required to be included in PSD. The partial disapproval applies to the extent that Texas failed to address or to include assurances of adequate legal authority (required under CAA section 110(a)(2)(E)(i)) for the application of PSD to each newly regulated pollutant, including non-NAAQS pollutants, under the CAA. Note that as an alternative basis to CAA section 110(k)(6) for taking these first two steps, EPA relies on its inherent administrative authority to reconsider its previous action.

Third, in this rulemaking, EPA is promulgating a FIP to apply appropriate measures to assure that EPA's PSD regulatory requirements will apply to non-NAAQS pollutants that are newly subject to regulation under the CAA that the Texas PSD program does not already cover. At present, the only such pollutant is GHGs. Therefore, EPA's FIP will at present apply the EPA regulatory PSD program in the GHG portion of PSD

⁶⁸ "State of Texas's Motion For A Stay Of EPA's Endangerment Finding, Timing Rule, and Tailpipe Rule," *Coalition for Responsible Regulation v. EPA*, No. 09–1322 (and consolidated cases) (September 15, 2010). On December 10, 2010, the DC Circuit denied Texas's, and other parties', motions to stay. Order, *Coalition for Responsible Regulation v. EPA*, No. 09–1322 (and consolidated cases) (December 10, 2010).

⁶⁹ "State of Texas's Motion For A Stay Of EPA's Greenhouse Gas Tailoring Rule," *Coalition for Responsible Regulation v. EPA*, No. 09–1322 (and consolidated cases) (September 15, 2010) (Texas's Motion to Stay the Tailoring Rule).

⁷⁰ Texas's Motion to Stay Three GHG Actions, at 27.

⁷¹ *Id.* at 5.

⁷² "Texas Commission on Environmental Quality Comments on Actions to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions, Finding of Substantial Inadequacy and SIP Call, Docket ID No. EPA–HQ–OAR–2010–0107, FRL–9190–7 Federal Implementation Plan

(FIP), Docket ID No EPA–HQ–OAR–2010–0107, FRL–9190–8 (October 4, 2010) (Texas 30-day letter).

⁷³ Final SIP Call, 75 FR at 77706/2–3 and n. 18.

⁷⁴ Texas's Motion to Stay the Tailoring Rule, pp. 2, 16.

permits for GHG-emitting sources in Texas, and EPA commits to take whatever steps are appropriate if, in the future, Texas fails to apply PSD to another newly regulated non-NAAQS pollutant.

In light of the immediate need of Texas's GHG-emitting sources for a permitting authority to process their permit applications for GHGs, EPA is promulgating this action immediately through an interim final rule, in reliance on the good cause exemption from notice-and-comment rulemaking under section 553(b)(3)(B) of the Administrative Procedures Act. This action will remain in effect until April 30, 2011. At the same time, EPA is initiating a notice-and-comment rulemaking that mirrors this one and that EPA expects to replace this one.

A. Determination That EPA's Previous Approval of Texas's PSD Program Was in Error

In applying CAA section 110(k)(6), EPA must first "determine[]" that the Administrator's action approving * * * [the Texas PSD program] was in error * * *." EPA has determined that the Texas PSD program had flaws at the time Texas submitted it and EPA approved it, so that EPA's approval was in error.

1. Gaps in Texas's PSD Program Concerning Application of PSD to Pollutants Newly Subject to Regulation and Concerning Assurances of Legal Adequacy

Texas's PSD program, although approved by EPA, contained important gaps concerning the application of PSD to pollutants newly subject to regulation, including non-NAAQS pollutants, and Texas's legal authority for doing so.

a. Gaps in Texas's PSD Program at the Time of EPA Approval

The application of the PSD program to pollutants newly subject to regulation, including non-NAAQS pollutants, is a key component of the program. As noted earlier, it is EPA's long-standing position that PSD applies to all such pollutants, and most of the states' PSD programs do apply to such pollutants automatically, as soon as those pollutants become subject to regulation.

In particular, as noted previously, EPA had previously made clear to Texas, during 1980 and again during 1983, that PSD applies to non-NAAQS pollutants. Because Texas's PSD program, unlike that of most states, did not automatically apply to such pollutants, it was important that during the time when Texas submitted SIP revisions and EPA acted on them, 1985–

1992, that Texas address the application of PSD to pollutants newly subject to regulation.

It is clear from the record that both Texas and EPA were well aware that the Texas PSD rules' IBR of EPA PSD regulatory requirements did not automatically update. Indeed, when EPA promulgated the NAAQS for PM₁₀, a previously unregulated pollutant, and thereby subjected that pollutant to PSD for the first time, Texas revised its PSD rules to update the IBR and thereby assure that the state PSD program applied to PM₁₀.

Had Texas recognized that following approval of its PSD program, EPA would likely continue to subject previously unregulated pollutants to regulation, and therefore to PSD for the first time, Texas could have addressed how it would handle that situation. Texas could have provided both assurances that the state would apply PSD to such pollutants and information as to the method and timing for doing so. The most likely method would be through a separate SIP revision. The timing would most likely relate to the time necessary to adopt and submit a SIP revision. This timing issue is important because the sources emitting pollutants are subject to PSD under the CAA as soon as the pollutants become subject to regulation, but if the SIP PSD program does not automatically apply to the sources, then the state does not have authority to issue permits to the sources as soon as the sources become required to obtain the permits. By comparison, as noted earlier in this preamble, Texas committed to submit a SIP revision if a SIP inadequacy led to an increments violation.

However, there is no indication in the record of Texas's SIP submissions that Texas specifically addressed this issue of the treatment of pollutants that would newly become subject to PSD after Texas's PSD SIP was approved, or that Texas provided any such information as to method or timing. Nor is there any indication in the record that during this 1985–92 period, EPA identified this issue and sought such information from Texas.

Texas did provide the 1987 Texas PSD Commitments Statement, in which Texas agreed to "implement and enforce the federal requirements for [PSD] as specified in [EPA regulations] by requiring all new major stationary sources and major modifications to obtain air quality permits as provided in TACB regulation VI, Control of Air Pollution by Permits for New Construction and Modification." However, this 1987 statement does not specifically address the application of

PSD to pollutants newly subject to regulation. It commits TACB to require "all new major stationary sources and major modifications to obtain air quality permits as provided in TACB regulation VI * * *", but that regulation VI does not automatically update.

Texas also provided the 1989 Texas PSD Commitments Letter, in which Texas generally committed "to implement EPA requirements relative to [PSD]." However, as quoted previously, this letter was phrased generally and did not specifically commit to apply PSD to pollutants newly subject to regulation, including non-NAAQS pollutants; nor did the letter identify the method and timing for doing so. Accordingly, we do not read this letter as a commitment by Texas to apply PSD to each newly regulated pollutant, including non-NAAQS pollutants, whether through a SIP revision or some other method, or on any particular timetable. Moreover, although EPA approved the Texas PSD program in reliance on the letter, EPA indicated, in the final approval preamble, that the scope and binding impact of the letter were limited and that Texas retained discretion in implementing the PSD program.

In addition, the rulemaking record for Texas's PSD program does not indicate that Texas provided, as required under CAA § 110(a)(2)(E)(i), assurances that Texas had adequate legal authority to carry out the PSD program, including, insofar as relevant for this rulemaking, applying PSD to pollutants newly subject to regulation, among them non-NAAQS pollutants. Some 15 years previously, in Texas's 1972 submission of its original SIP, the state had provided assurances of legal authority to carry out the SIP, and EPA had approved those assurances. But the record for the PSD SIP submission does not indicate whether, or how, that legal authority applied to PSD applicability to such pollutants. In submitting the PSD SIP program, the TACB provided general references to legal authority, but the TACB did not indicate whether PSD applies to such pollutants either. Nor did the Texas PSD Commitments Letter specifically identify legal authority to apply PSD to such pollutants. Nor did the assurance of legal authority to apply the Texas PSD program to large municipal waste combustors, as required by the 1990 CAA Amendments, which assurances Texas apparently made in a 1992 conference call with EPA Region 6 officials, address legal authority to apply PSD to pollutants that newly become subject to PSD as a result of EPA regulation.

Therefore, the Texas PSD SIP submittal contained gaps: It did not

address the application of PSD to pollutants newly subject to regulation, including non-NAAQS pollutants; and it did not include any information concerning Texas's methods or timing for doing so. Nor did the program provide assurances that the state had adequate legal authority to apply PSD to such pollutants.

b. Recent Statements by Texas That Confirm the Gaps in Texas's PSD Program

Texas has recently made several statements that confirm that at the time EPA approved the state's PSD program, that program had gaps.⁷⁵

(i). Gap Concerning Application of PSD to All Pollutants Newly Subject to Regulation, Including Non-NAAQS Pollutants

First, Texas has made clear that it is not required to apply PSD to non-NAAQS pollutants that are newly subject to regulation, including GHGs. Specifically, in its August 2, 2010 60-day letter, Texas stated that it interprets the CAA PSD applicability provisions to apply to only NAAQS pollutants, and therefore to not include non-NAAQS pollutants, among them GHGs. Texas asserted that "the only sensible interpretation of the CAA" is that PSD applies to only NAAQS pollutants. Texas 60-day letter, p. 4. Similarly, in its court challenge to EPA's four GHG rules, Texas stated that its interpretation is mandated under *Chevron* step 1. There, Texas stated that EPA's "interpretation of the CAA [that PSD applies to non-NAAQS pollutants] is not entitled to deference because the text of the statute is unambiguous. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984) (the Agency must give effect to the unambiguously expressed intent of Congress)." ⁷⁶ As noted previously, EPA responded at length to this argument in the Tailoring Rule and in EPA's response in the court challenge to EPA's GHG rules. EPA asserts that the CAA mandates that PSD apply to non-NAAQS pollutants, including GHGs, once they become subject to regulation; and EPA is not reopening this issue on the merits in this rulemaking.

For present purposes, however, what is important is that Texas takes the position that under a *Chevron* step 1 reading of the CAA, the PSD program does not apply to non-NAAQS

pollutants. This position has important ramifications for how Texas must interpret EPA's PSD applicability regulations and for the meaning of Texas's SIP PSD applicability provisions. As noted previously, under EPA's current regulations, PSD applies to "any pollutant that otherwise is subject to regulation under the [CAA]." 52.166(b)(49)(iv). These regulations have read this way since they were revised in EPA's 2002 NSR Reform Rule, and the regulations that predated them were phrased in much the same way: They applied PSD to "any air pollutant regulated under the Clean Air Act."⁷⁷ These regulations are based on the CAA PSD applicability requirements, and as a result, cannot apply PSD to any pollutants that the CAA does not itself subject to PSD. Accordingly, although Texas did not specifically address the meaning of EPA's regulations in its 60-day letter or court filings, it must be that in Texas's view, these EPA regulations may lawfully apply PSD to only NAAQS pollutants.

Texas's SIP PSD applicability provisions, in turn, mirror EPA's. As quoted earlier, Texas's EPA-approved PSD applicability provisions apply PSD to "any air pollutant subject to regulation under the [Clean Air] Act." Although these Texas provisions mirror EPA's regulatory applicability provisions—which, again, Texas appears to interpret as limited to applying PSD only to NAAQS pollutants—Texas is authorized to apply them more expansively than the EPA regulations. This is because a state must comply with CAA requirements as a minimum, but retains authority to impose additional or more stringent requirements. CAA section 116. Therefore, it is in accordance with Texas's view that the CAA and EPA regulatory requirements for PSD applicability be limited to NAAQS pollutants, that Texas would nevertheless consider itself authorized—but not required—to apply its PSD program to particular non-NAAQS pollutants. This position would allow Texas, in effect, to choose which non-NAAQS pollutants to subject to PSD.

In fact, Texas has clearly stated that it does not consider itself required to apply its PSD program to one non-NAAQS pollutant in particular: GHGs.

In its 60-day letter, Texas stated: "Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions." Texas 60-day letter, at 1. Texas's letter went on to provide numerous reasons for why it did not believe EPA lawfully subjected GHGs to PSD; why, in any event, EPA was required to allow states more time before PSD would apply to GHG-emitting sources; and, as noted previously, why, in any event, Texas' SIP does not automatically update to apply PSD to newly regulated pollutants. Texas added, "[i]n the event a court concludes EPA's actions comport with the law, Texas specifically reserves and does not waive any rights under the federal Clean Air Act or other law with respect to the issues raised here." Texas 60-day letter, p. 5. With this statement, Texas intimated that it may not consider itself obligated to apply PSD to GHGs even if a Court dismissed all of Texas's arguments and upheld all of EPA's actions that lead to the requirement to apply PSD to GHGs.

With these two statements—that (i) "Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions," and (ii) Texas would not necessarily consider itself bound by EPA requirements even if those requirements are upheld in Court—Texas has made clear that it does not view itself as obligated to apply PSD to GHGs under the CAA. Thus, these statements confirm Texas's view that it is not obligated to apply PSD to each newly regulated non-NAAQS, including, of course, GHGs.⁷⁸

These statements from Texas are significant because they confirm that Texas's PSD program, as approved by EPA, had an important gap: Texas did not address the applicability of its PSD program to pollutants newly subject to regulation, including non-NAAQS pollutants, such as by providing assurances that Texas would take action to apply PSD to such pollutants or describing the methods (such as SIP revision) and timing for doing so.

⁷⁸ It should be noted that Texas has applied its PSD program to non-NAAQS pollutants because Texas has IBR'd EPA's PSD regulatory requirements and those requirements apply to non-NAAQS pollutants. However, as noted earlier, Texas has made clear that it has no intention of submitting a SIP revision to apply PSD to GHGs. All this is consistent with the view described previously that Texas interprets its PSD applicability provision to authorize it to apply PSD to non-NAAQS pollutants at Texas's discretion, but that Texas does not view itself as required to apply PSD to non-NAAQS pollutants.

⁷⁵ As noted previously, Texas has also recently confirmed, in Texas' 60-day letter, that its PSD program does not automatically apply to pollutants newly subject to regulation.

⁷⁶ See Texas "Motion to Stay Three GHG Actions" 27, *Coalition for Responsible Regulation v. EPA*, No. 09-1322 (and consolidated cases).

⁷⁷ See 43 FR 26380, 26403/3, 26406 (June 19, 1978) (promulgating 40 CFR 51.21(b)(1)(i)) and 42 FR 57479, 57480, 57483 (November 3, 1977) (proposing 40 CFR 51.21(b)(1)(i)) (applying PSD requirements to a "major stationary source" and defining that term to include sources that emit specified quantities of "any air pollutant regulated under the Clean Air Act").

Moreover, Texas's recent statements are consistent with the view that Texas's silence on the subject at the time of the PSD SIP action means that Texas did not, at that time, view itself as obligated to apply PSD to each pollutant.⁷⁹

In particular, Texas's recent statement that the CAA PSD provisions are clear by their terms, as a matter of *Chevron* step 1, that they do not apply to non-NAAQS pollutants, suggests that Texas would have viewed the CAA PSD provisions the same way at the time Texas submitted its PSD program. As noted earlier, the Texas Attorney General and the Chairman of the Texas Commission on Environmental Quality, who are the joint signatories of Texas's 60-day letter, are of the view that "[t]he only sensible interpretation of the Clean Act" is that PSD applies only to NAAQS pollutants, and not non-NAAQS pollutants. Texas 60-day letter, p. 4. Texas has confirmed its reading—and clarified that it is based on a *Chevron* step 1 interpretation—in filings before the D.C. Circuit. The fact that these high state officials view this reading of the CAA as, again, "[t]he only sensible reading," indicates that in the past, Texas is less likely to have adopted the opposite reading, which would be that the CAA mandates that PSD applies to non-NAAQS pollutants. Statutory provisions whose meaning is clear on their face, at least to a particular reader, would not be expected to have had a different or uncertain meaning to that same reader at an earlier point in time. By the same token, Texas's insistence, noted previously, that it does not have the intention or authority to apply PSD to one non-NAAQS in particular, GHGs, suggests that Texas could well have expressed the same view, had the issue arisen, at the time EPA approved Texas's PSD program.

We further note that Texas itself appears to take the position that an agency's present interpretation of its regulations should be presumed to have been the agency's past interpretation of those regulations, so that Texas's current interpretation that its PSD program does not apply to at least one non-NAAQS, GHGs, should be presumed to be Texas's interpretation of its PSD program in the past, including at the time Texas submitted its program as a SIP revision to EPA and EPA approved it. Specifically, in its 60-day letter, Texas noted that in the Tailoring Rule, EPA asked states to consider whether their SIPs that include the term

"subject to regulation" can be interpreted to incorporate the Tailoring Rule thresholds on grounds that the state interprets that term as being sufficiently open-ended. 75 FR 51,581/2. Texas stated,

In the Tailoring Rule you have asked TCEQ to report to you by August 2, 2010, whether it would "interpret" the undefined phrase "subject to regulation" in TCEQ Rule 116.12 consistent with the newly promulgated definition in EPA Rule 51.166, in all its specifics and particulars. That is, you have effectively requested that Texas agree to regulate greenhouse gases in the exact manner and method proscribed by the EPA.

In other words, you have asked Texas to agree that when it promulgated its air quality permitting program rules for pollutants "subject to regulation" in 1993, that Texas really meant to define the term "subject to regulation" as set forth in the dozens of paragraphs and subparagraphs of EPA Rule 51.166, first promulgated in 2010.

Texas 60-day letter, p. 3. In these statements, Texas appears to reveal Texas's own understanding of the circumstances under which Texas can be said to give the term "subject to regulation" a particular interpretation, and that is if Texas interpreted that term that same way at the time that Texas first promulgated the term in 1993. By that same logic, Texas's position, as stated in its 60-day letter, that it "has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions" would have applied to "its laws"—including the SIP PSD requirements—at the time that Texas adopted those rules. Therefore, it seems reasonable to conclude that just as Texas does not currently view its PSD program as applying to all newly regulated non-NAAQS pollutants, Texas did not, at the time it submitted and EPA approved its PSD program, view its PSD program as applying to all newly regulated non-NAAQS pollutants.

By the same token, Texas's recent statements also confirm that the assurances Texas provided in its 1989 Texas PSD Commitments Letter cannot be interpreted as having committed Texas to apply PSD to all pollutants newly subject to regulation, including non-NAAQS pollutants. The assurances, by their terms, were phrased generally and did not address the application of PSD to such pollutants; and EPA, in the preamble for the final approval of Texas's PSD SIP, indicated that the scope and binding impact of the assurances were limited.⁸⁰ Texas's recent direct statements that PSD does not cover non-NAAQS pollutants

indicates that the generally phrased assurances in the letter, whatever they meant, did not mean that Texas would apply PSD to each newly regulated pollutant, including non-NAAQS pollutants.

As a result, it stands to reason that at the time Texas submitted its PSD program, Texas did not view the CAA as mandating the application of PSD to at least certain pollutants newly subject to regulation, non-NAAQS pollutants. But at a minimum, it can be said that Texas's PSD program contained a gap: EPA required that PSD apply to each pollutant newly subject to regulation, including non-NAAQS pollutants; Texas's program applied only to pollutants already subject to regulation at the time Texas adopted its program, not to subsequently regulated pollutants, including non-NAAQS; and Texas did not address its program's applicability to such pollutants, including how or when its program would do so. This gap is significant because it facilitates Texas's current position, with which EPA disagrees, that PSD does not apply to non-NAAQS pollutants.

(ii). Gap Concerning Assurances of Adequate Legal Authority

Texas's recent statement that it does not have the authority to apply PSD to GHG-emitting sources also highlights that Texas's PSD program had a gap in its failure to provide "necessary assurances" of adequate legal authority to carry out the PSD program. Although Texas's letter described obstacles to applying PSD to GHG-emitting sources without first adopting a SIP revision, and did not describe obstacles that precluded Texas from adopting a SIP revision if it chose to do so, Texas's direct statement that it does not have authority to apply PSD to GHGs at least casts doubt on whether Texas has such authority under any circumstances. Moreover, Texas has never indicated that there has been a recent change that places new limits on its legal authority to carry out the CAA.

Accordingly, it is possible that at the time that Texas submitted its PSD program, Texas considered itself under limits in its legal authority to apply PSD to each non-NAAQS pollutant. At a minimum, in light of Texas's recent statement that it does not have authority to apply PSD to at least one newly regulated, non-NAAQS, GHGs, it is apparent that at the time that Texas submitted its PSD program, Texas did not provide the "necessary assurances" that it "will have adequate * * * authority under State * * * law to carry out such implementation plan (*and is*

⁷⁹ By the same token, we see nothing in these recent statements to indicate that Texas views itself as rescinding any pre-existing understanding that it would apply PSD to each such pollutant.

⁸⁰ 57 FR at 28095/2, 28096/1.

not prohibited by any provision of State law from carrying out such implementation plan or portion thereof.” CAA section 110(a)(2)(E)(i) (emphasis added). “[C]arrying out such implementation plan” includes meeting all CAA requirements applicable to the plan and, in the case of a PSD SIP program, that includes applying PSD to each pollutant newly subject to regulation, including non-NAAQS pollutants.

2. Flaws in PSD Program

The Texas PSD program’s gaps—which are, again, that Texas did not address the applicability of PSD to all pollutants newly subject to regulation, including non-NAAQS pollutants; and Texas did not provide assurances of adequate legal authority to do so—mean that the state’s PSD program has flaws. These flaws were present at the time that EPA approved Texas’s PSD program. Moreover, these flaws are significant. They have figured prominently into the present situation in which EPA takes the position that Texas is obligated under the CAA and EPA regulations to apply its PSD program to a newly regulated pollutant—GHGs—but Texas takes the opposite position.

3. EPA’s Error in Approving Texas’s PSD Program

In this rulemaking, EPA is “determin[ing]” that EPA’s action fully approving Texas’s PSD program was “in error” within the meaning of CAA section 110(k)(6). This section contains EPA’s basis for that determination.

a. CAA Section 110(k)(6) Error Correction

Under the familiar *Chevron* two-step framework for interpreting administrative statutes, an agency must, under *Chevron* step 1, determine whether “Congress has directly spoken to the precise question at issue.” If so, “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” However, under *Chevron* step 2, 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.” *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

As noted previously, the term “error” in CAA section 110(k)(6) is not defined and, as a result, should be given its ordinary, everyday meaning. The dictionary definition of “error” is “a mistake” or “the state or condition of being wrong in conduct or judgment,” *Oxford American College Dictionary* 467

(2d ed. 2007); or “(1) an act, assertion, or belief that unintentionally deviates from what is correct, right or true (2) the state of having false knowledge * * * (4) a mistake * * *.” *Webster’s II New Riverside University Dictionary* 442 (Houghton Mifflin Co. 1988). These definitions are broad, and include all unintentional, incorrect or wrong actions or mistakes.

Moreover, CAA section 110(k)(6) authorizes EPA to “determine[]” that its action was in error, and does not direct or constrain that determination in any manner. That is, the provision does not identify any factors that EPA must, or may not, consider in making the determination. This further indicates that this provision confers broad discretion upon EPA.

b. Gaps in Texas PSD Program

As previously discussed, the Texas SIP PSD program was flawed because it contained gaps: Texas did not address the applicability of PSD to all pollutants newly subject to regulation, including non-NAAQS pollutants; and Texas did not provide assurances of adequate legal authority to do so. EPA did not address these gaps in its action on Texas SIP PSD program and instead, EPA fully approved the PSD program.

Therefore, EPA’s action in fully approving Texas’s SIP PSD program in the face of these flaws was “in error” under CAA section 110(k)(6), in accordance with *Chevron* step 1. “[E]rror” should be defined broadly to include any mistake, and approval of a flawed SIP is a mistake. Moreover, this flaw is significant because it affects the applicability of the PSD program to a pollutant and, as a result, to an entire set of sources.

Even if the term “error” is not considered unambiguously to encompass, under *Chevron* step 1, the mistake that EPA made in approving the Texas PSD SIP, and instead is considered ambiguous on this question, then under *Chevron* step 2 EPA has sufficient discretion to determine that its approval action meets the definition of “error.” That is, under CAA section 110(k)(6), the breadth of the term “error” and of the authorization for EPA to “determine[]” when it made an error, mean that EPA has sufficient discretion to identify the gaps in Texas’s PSD program as flawed and to identify EPA’s action in approving Texas’s PSD SIP in the face of those flaws as an error.

c. Alternative Basis for Error Correction

As explained previously, we view Texas’s recent statements that the CAA does not apply to non-NAAQS pollutants and that Texas has neither

the authority nor the intention to apply PSD to GHGs as an indication that at the time Texas submitted its PSD program, Texas did not address the applicability its program to pollutants newly subject to regulation or provide assurances that it legal authority to do so. Absent specific evidence to the contrary, we are not inclined to conclude that at the time EPA approved the Texas PSD program in 1992, Texas in fact had filled those gaps—by, for example, providing assurances that it would apply PSD to each newly regulated non-NAAQS pollutants and had the legal authority to do so—but that more recently, Texas has failed to comply with those assurances. The CAA is based on a partnership between the states and the federal government, and we think it more consonant with the principles of that partnership to interpret the evidence as indicating that Texas never addressed the gap or provided the requisite assurances.

However, in the alternative, if one were to conclude that during the course of Texas’s submittal of, and EPA’s action on, the state’s PSD program, Texas did in fact provide the requisite assurances—in particular, that the 1989 Texas PSD Commitment Letter provided adequate assurances that Texas would apply PSD to pollutants newly subject to regulation, including non-NAAQS—so that no gaps in Texas’s PSD program existed at that time, then Texas’s recent statements would amount to failing to comply with, or even rescinding, those assurances. Under these circumstances, EPA would still consider its previous approval of Texas’s PSD SIP to have been in error. This is because if one assumes that Texas provided the appropriate assurances, then one should also assume that EPA’s approval would have been based on those assurances. In fact, EPA stated in approving the Texas PSD program that EPA was relying on the Commitments Letter. Rescinding or failing to comply with those assurances—if that is what Texas is considered to have done—would eliminate the basis for EPA’s approval. Compare CAA section 110(k)(4) (authorizing EPA to approve a SIP revision based on a commitment by the state to adopt certain measures by a date certain, but if the state does not do so, then the conditional approval is treated as a disapproval).

B. Error Correction: Conversion of Previous Approval to Partial Approval and Partial Disapproval

Under CAA section 110(k)(6), once EPA determines that its previous action approving a SIP revision was in error, EPA “may * * * revise such action as

appropriate without requiring any further submission from the State. * * * Under this provision, EPA may revise its previous full approval of Texas's PSD program as appropriate, without requiring any submission from Texas.

This provision offers EPA a great deal of discretion in revising its previous action. Indeed, the use of the term "may" means that this provision simply authorizes, and does not require, EPA to revise its previous action even after EPA has determined the error, and that, in turn, implies that EPA has discretion in determining how to revise its previous action. Moreover, if EPA does decide to revise its previous action, EPA may do so in any way that is "appropriate." The term "appropriate" offers EPA significant latitude in deciding what type of revision to do.

Here, EPA is revising its previous full approval of Texas's PSD program to be a partial approval and a partial disapproval. Specifically, EPA is retaining the approval of Texas's PSD program to the extent of the pollutants that the PSD program already does cover. This amounts to a partial approval. In addition, EPA is disapproving the Texas PSD program because it has not provided assurances that its PSD program will apply to each pollutant newly subject to regulation, including non-NAAQS pollutants, and because it has not provided assurances of adequate legal authority to do so.

C. Reconsideration Under CAA Section 301, Other CAA Provisions, and Case Law

As an alternative to the error correction provision of CAA section 110(k)(6), EPA is using its inherent administrative authority to reconsider its prior approval actions as a basis for revising its previous full approval of the Texas PSD program to a partial approval and partial disapproval. This authority lies in CAA section 301(a), read in conjunction with CAA section 110 and case law holding that an agency has inherent authority to reconsider its prior actions.

As noted earlier, EPA approved the Texas PSD program by notice dated June 24, 1992, 57 FR 28,093, under the authority of CAA section 110(k)(3)–(4). These provisions authorize EPA to approve a SIP submittal "as a whole," "approve [the SIP submittal] in part and disapprove [it] in part," or issue a "conditional approval" of a SIP submittal. CAA section 110(k)(3)–(4). EPA issued a full approval under CAA section 110(k)(3).

In its approval action under that provision, EPA retained inherent

authority to revise that action. The courts have found that an administrative agency has the inherent authority to reconsider its decisions, unless Congress specifically proscribes the agency's discretion to do so. *See, e.g., Gun South, Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989) (holding that agencies have implied authority to reconsider and rectify errors even though the applicable statute and regulations do not provide expressly for such reconsideration); *Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider").

Section 301(a) of the CAA, read in conjunction with CAA section 110(k)(3) and the case law just described, provides statutory authority for EPA's reconsideration action in this rulemaking. Section 301(a) authorizes EPA "to prescribe such regulations as are necessary to carry out [EPA's] functions" under the CAA.

Reconsidering prior rulemakings, when necessary, is part of "[EPA's] functions" under the CAA—in light of EPA's inherent authority as recognized under the case law to do so—and as a result, CAA section 301(a) confers authority upon EPA to undertake this rulemaking.

EPA finds further support for its authority to narrow its approval in APA section 553(e), which requires EPA to give interested persons "the right to petition for the issuance, amendment, or repeal of a rule;" and CAA section 307(b)(1), which expressly contemplates that persons may file a petition for reconsideration under certain circumstances (at the same time that a rule is under judicial review). These authorizations for other persons to petition EPA to amend or repeal a rule suggest that EPA has inherent authority, on its own, to issue such amendment or repeal. This is because EPA may grant a petition from another person for an amendment to or repeal of a rule only if justified under the CAA, and if such an amendment or repeal is justified under the CAA, then EPA should be considered as having inherent authority to initiate the process on its own, even without a petition from another person.

EPA recently used its authority to reconsider prior actions and limit its prior approval of a SIP in connection with California conformity SIPs. *See, e.g.,* 68 FR 15720, 15723 (discussing prior action taken to limit approvals); 67 FR 69139 (taking final action to amend prior approvals to limit their duration); 67 FR 46618 (proposing to amend prior approvals to limit their duration, based

on CAA sections 110(k) and 301(a)). EPA had previously approved SIPs with emissions budgets based on a mobile source model that was current at the time of EPA's approval. Later, EPA updated the mobile source model. But, even though the model had been updated, emissions budgets would continue to be based on the older, previously approved model in the SIPs, rather than the updated model. To rectify this problem, EPA conducted a rulemaking that revised the previous SIP approvals so that the approvals of the emissions budgets would expire early, when the new ones were submitted by states and found adequate, rather than when a SIP revision was approved. This helped California more quickly adjust its regulations to incorporate the newer model. In this rule, EPA is using its authority to reconsider and limit its prior approval of SIPs generally in the same manner as it did in connection with California conformity SIPs.

EPA is relying, in the alternative, on this inherent authority to convert its previous approval of Texas's PSD program to a partial approval and partial disapproval for the same reasons discussed previously in connection with the "error" correction provision of CAA section 110(k)(6). That is, EPA approved Texas's PSD program even though that program had significant flaws because Texas did not provide the requisite assurances that it would apply PSD to all pollutants newly subject to regulation, including non-NAAQS, and that Texas had adequate legal authority to do so.

EPA's inherent authority to reconsider its previous action also supports revising its previous action in the same manner, and for the same reasons, as under CAA section 110(k)(6), as described earlier. That is, in light of the flaws in the Texas PSD program, EPA is revising EPA's previous full approval to be a partial approval (to the extent of the pollutants regulated under the CAA that are subject to Texas's PSD program) and a partial disapproval (to the extent Texas's program does not provide assurances that it will apply to pollutants newly subject to regulation, including non-NAAQS pollutants).

D. Relationship of This Action to GHG PSD SIP Call

As noted previously, EPA has recently taken another action concerning Texas's PSD program as that program relates to GHGs: the GHG PSD SIP call, which we published by notice dated December 13, 2010, 75 FR 77698 (December 13, 2010). This section describes the relationship of this error-correction/partial-

disapproval/FIP action to the SIP call. For convenience, the background for the SIP call, although described in detail earlier in this preamble, is reiterated here.

EPA promulgated the SIP call under CAA section 110(k)(5), which provides:

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to * * * comply with any requirement of [the CAA], the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator * * * may establish reasonable deadlines (not to exceed 18 months after [notifying the state of the inadequacies] for the submission of such plan revisions.

In the SIP call, EPA made a finding that the PSD SIPs of each of 13 states, including Texas, do not apply to GHG-emitting sources and therefore are “substantially inadequate to * * * comply with [the PSD applicability] requirement[s]” of the CAA. Accordingly, EPA required each state, including Texas, to submit a corrective SIP revision. EPA established a deadline for the SIP submittal for each state as 12 months from the date of the SIP call, or December 1, 2011, unless the state indicated in its 30-day letter that it did not object to an earlier deadline. Each state for which EPA would finalize the SIP call submitted a 30-day letter, and each, except for Texas, indicated a date sooner than December 1, 2011. Texas did not indicate any particular date and, as a result, EPA established December 1, 2011 as Texas’s deadline. In addition, EPA stated that if Texas or any of the other states failed to submit its corrective SIP revision by its deadline, EPA intended to promulgate a FIP immediately thereafter.

The timing of the SIP call—both the time that EPA promulgated the SIP call and the deadlines it established for SIP submittal—was driven by the fact that the affected states did not have authority to issue PSD permits to GHG-emitting sources and as a result, those sources could face delays in construction and modification when they became subject to PSD as early as January 2, 2011. EPA designed the SIP call to maximize the opportunity of each affected state to assure that its sources would have a permitting authority available as of that date or a later date, if the state concluded that a later date would not leave its sources facing delays. EPA did so by allowing each state flexibility for its SIP submittal deadline.

Each of the affected states except Texas responded with a plan that would assure that its sources would not confront permitting delays. Most

states—seven of the 13—indicated they would not object to EPA’s establishing a SIP submittal date of December 22, 2010, recognizing that as a practical matter, that meant that EPA would promulgate a FIP on December 23, 2010. The other five states indicated a later date, and again, one indicated a date as late as July 1, 2011. This means that purely as a legal matter, there will be no permitting authority in place in those states to issue GHG permits on January 2, 2011, when GHG-emitting sources become subject to PSD. Even so, the later dates were acceptable to each of the five states because (i) they intended to submit a SIP revision by their date, and (ii) they did not expect the lack of a permitting authority during the period before their deadline to place their sources at risk for delays in construction or expansion.

Texas responded differently than the other states. In its 30-day letter, Texas did not indicate a particular date for its SIP submittal, and as a result, EPA, as we had proposed, established Texas’s deadline at December 1, 2011. But shortly before submitting its 30-day letter, Texas stated, in its 60-day letter, that “Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emission.”⁸¹ Texas has never qualified this statement, and as a result, EPA reads this statement to indicate that Texas does not intend to submit a SIP revision as required under the SIP call.

This means that a permitting authority for GHG-emitting sources would not be in place until EPA promulgated a FIP, no earlier than December 2, 2011. Importantly, Texas has indicated that this one-year delay in the availability of a permitting authority would, in fact, mean that under EPA’s interpretation of the CAA, Texas’s sources would face delays in constructing and modifying.⁸² Moreover, Texas indicated that during 2011, some 167 construction or modification projects would be affected,⁸³ which are significantly more sources than any other state.

Moreover, Texas’s indication that it does not intend to submit a SIP revision, and that it does not consider its PSD program as being required to apply to non-NAAQS pollutants, including GHGs, have cast a spotlight on

underlying flaws in Texas’s fully approved PSD SIP, and that, in turn, has brought into play the error-correction provision in CAA section 110(k)(6). All this is discussed in detail earlier in this preamble, but to reiterate for convenience: CAA section 110(k)(6) provides, “Whenever the Administrator determines that the Administrator’s action approving * * * any [SIP] * * * was in error, the Administrator may * * * revise such action as appropriate. * * *” Here, the Texas SIP was flawed at the time EPA approved it because it did not address, or assure adequate legal authority for, application of the PSD program to pollutants newly subject to regulation, including non-NAAQS pollutants. As a result, EPA has the authority to determine that its full approval of the SIP was “in error” and to convert that action to a partial approval/partial disapproval; and as a result of that, EPA is authorized to promulgate a FIP immediately.

This is an important reason why EPA is proceeding with this error-correction/partial-disapproval rulemaking at this time. By allowing EPA to implement a FIP immediately, instead of waiting until December, 2011; EPA may act as the permitting authority in Texas beginning January 2, 2011, and in that capacity, allow Texas sources to avoid delays in construction or modification.

With the present rulemaking, EPA has both (i) promulgated a SIP call and established a SIP deadline of December 1, 2011 for Texas, under CAA section 110(k)(5); and (ii) corrected its error in previous fully approving Texas’s PSD program by converting that action to a partial approval and partial disapproval, under CAA section 110(k)(6), and then promulgating a FIP immediately under CAA section 110(c)(1)(B). For the reasons just discussed, each of these actions is fully justified under the applicable CAA provisions.

Moreover, there is no preclusion against taking both of these actions with respect to Texas at this time, for the following reasons: First, the two actions are based on CAA provisions—CAA section 110(k)(5) (SIP call), and section 110(k)(6) (error correction)—that overlap, so that it is to be expected that circumstances may arise in which both apply. If EPA approves a flawed SIP, then circumstances could well arise under which EPA has a basis for concluding both that (i) the SIP is “substantially inadequate” to meet a CAA requirement, under CAA section 110(k)(5); and (ii) EPA’s action in approving the SIP was “in error,” under CAA section 110(k)(6). The same flaw in

⁸¹ Texas’s 60-day letter, p. 1.

⁸² Texas 30-day letter, at 5, 6; Texas “Motion to Stay Three GHG Actions” 40–41, *Coalition for Responsible Regulation v. EPA*, No. 09–1322 (and consolidated cases).

⁸³ See Texas “Motion to Stay Three GHG Actions” 41, *Coalition for Responsible Regulation v. EPA*, No. 09–1322 (and consolidated cases).

the SIP would be the basis for each of those actions.⁸⁴

This is case with EPA's two actions concerning Texas. As EPA stated in the SIP call, the basis for the finding of "substantial inadequacy" was the failure of Texas's approved SIP PSD program to apply to GHGs, which was rooted in the program's failure to apply pollutants newly subject to regulation. As EPA stated earlier in this preamble, the basis for the determination that EPA's previous full approval of Texas's SIP was "in error" was the gap in the SIP due to the SIP's failure to address, or assure that it has adequate legal authority for, the application to pollutants newly subject to regulation.⁸⁵

Second, each provision, by its terms, is discretionary to EPA, and neither provision precludes the application of the other. CAA section 110(k)(5) applies "[w]henver the Administrator finds" that the SIP is substantially inadequate. CAA section 110(k)(6) applies "[w]henver the Administrator determines" that her previous action was in error. Neither provision references the other. Neither provision includes any requirement or limitation that constrains the application of the other at any time.

Third, each provision serves a different purpose and when applied to this case—including in conjunction with the FIP provision in CAA section 110(c)(1)—leads to a different outcome, but each outcome is neither dependent on, or compromised by, the other outcome. CAA section 110(k)(5), as applied in the current case, is focused on a present problem with the SIP, that is, a "substantial [] inadequacy" that presently exists. This provision mandates that EPA require a corrective SIP revision to address that inadequacy, but further provides that EPA must allow a reasonable deadline for the state to submit the SIP revision. In the GHG PSD SIP call, EPA allowed states to, in effect, choose within a range of

deadlines. But if the state fails to submit the required SIP revision by its deadline, then EPA is required to promulgate a FIP under CAA section 110(c)(1)(A). CAA section 110(k)(6), as it applies in the current case, is focused on a past problem with SIP, that is, a flaw that existed at the time EPA approved the SIP, so that EPA's approval was "in error." This provision authorizes EPA to convert the approval to a disapproval, but does not mandate that the State submit a new SIP revision. This is because the state has already submitted a SIP revision, the one that is flawed, and EPA has acted on it. Instead, EPA is required to promulgate a FIP under CAA section 110(c)(1)(B), and EPA may do so immediately.

Viewing the two provisions as applied here together: (i) CAA section 110(k)(5) allows EPA to exercise its discretion to make a finding that Texas's SIP is "substantially inadequate," and then to establish a SIP submittal schedule for Texas, one that is consistent with whatever choice as to deadline Texas had available to it; and (ii) CAA section 110(k)(6) allows EPA to exercise its discretion to convert its previous approval of Texas's SIP, which EPA made "in error," to a disapproval, and then to promulgate a FIP immediately. The requirement that Texas submit a corrective SIP revision and do so by a date certain—a date that Texas exercised some control over—serves the useful function of establishing a mechanism and a timeframe for Texas to address the substantial inadequacy in its PSD SIP.⁸⁶ The immediate promulgation of a FIP serves the useful purpose of assuring the availability of a permitting authority as of January 2, 2011, so that Texas sources will not face delays in their plans to construct or modify. Importantly, the immediate promulgation of a FIP through this rulemaking does not compromise in any manner the SIP submittal deadline established for Texas through the SIP call. After EPA's promulgation of the FIP, Texas remains obligated to submit the corrective SIP revision by December 1, 2011. As soon as Texas does submit that SIP revision and EPA approves it, EPA will rescind the FIP. It is always the case that when EPA has promulgated a FIP of any type in a particular state, the state remains obligated to adopt a SIP revision. Nothing about a FIP impedes the state from doing so; and when the state does

so and EPA approves the SIP revision, then EPA rescinds the FIP.

It is true that one of the purposes of the SIP call, as applied here, is to allow states to in effect select an early FIP—by selecting an early SIP submittal date and then not submitting a SIP by that date—so as to assure the availability of a permitting authority for their sources by that early date. And it is further true that Texas, in its 30-day letter, chose not to select such an early date and, on the contrary, stated its opposition to a FIP; yet, in this present rulemaking, EPA is promulgating an immediate FIP for Texas. But this does not mean that the present rulemaking has compromised the SIP call or any choices made available to Texas in the SIP call. The focus of the SIP call, as it related to Texas, was the finding of a substantial inadequacy in Texas's PSD program, the imposition of a requirement for Texas to submit a corrective SIP revision, and—based on Texas's choice—the establishment of a deadline of December 1, 2011 for Texas to do so. The promulgation of an immediate FIP through the present rulemaking does not disturb that. Texas remains subject to the December 1, 2011, SIP submittal schedule that EPA established for it, based on Texas's decision not to respond directly to EPA's request that Texas itself identify a deadline.⁸⁷ Texas's expressed opposition to a FIP does not preclude EPA from imposing one as justified through the present rulemaking.

It is also true that, as EPA stated in the SIP call, "federalism principles * * * underlie the SIP call process and the SIP system as a whole," and that means that "in the first instance, it is to the state to whom falls the responsibility of developing pollution controls through an implementation plan." 75 FR 77710/2. And it is further true that the immediate promulgation of a FIP through the present error-correction action means that a FIP will be in place in Texas before the December 1, 2011 deadline established under the SIP call for Texas to adopt its SIP. However, imposition of the FIP is fully justified under this error-correction action, as discussed previously, and is essential to assure that Texas sources will not face delays

⁸⁴ In contrast, situations could also arise in which EPA has a basis for imposing a SIP call but not issuing an error correction because the SIP currently has a substantial inadequacy but was not flawed at the time of its submittal and approval.

⁸⁵ In this case, the substantial inadequacy for which EPA issued the SIP call, which was the PSD program's failure to apply to GHGs, is narrower than the flaw in the SIP for which EPA is issuing the error correction, which is the PSD program's failure to address, or assure legal authority for, application of PSD to all pollutants newly subject to regulation. In another case, it is conceivable that the opposite would be true, that the substantial inadequacy would be broader than the flaw in the SIP for which EPA issues the error correction. In that case, if EPA imposed a FIP after the deadline for SIP submittal related to the SIP call, the FIP would be broader than the FIP imposed after the disapproval related to the error correction.

⁸⁶ We recognize that Texas has indicated that it does not intend to submit a SIP revision, but this does not eliminate the utility of establishing a SIP submittal schedule.

⁸⁷ In any event, to conclude that the promulgation of a FIP under this error-correction rulemaking compromised the SIP call rulemaking would be tantamount to concluding that the SIP call should somehow take priority over this error correction. There would be no basis for taking that position. Each action is fully justifiable in its own right. The process of completing one before the other does not give the first one a priority simply because it is first any more than that process would give the second a priority because the latter is more recent.

in construction or modification, a risk that Texas acknowledges will occur under EPA's interpretation of the applicable CAA requirements. In any event, Texas's statement that "Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emission,"⁸⁸ as we read it, is tantamount to a direct statement that it does not intend to submit a GHG PSD SIP revision, and is a direct statement that it does not intend to require its sources to obtain permits for their GHG emissions. Accordingly, it is difficult to see how it could meaningfully be claimed that an early FIP, promulgated through this rulemaking, could displace any prerogatives Texas may have under the SIP call to develop its own SIP revision before the imposition of a FIP or to exercise control over the permitting of GHG emissions of its sources. Similarly, Texas has stated that it does not believe that EPA's FIP will be effective because, according to Texas, EPA will be unable to issue permits for a lengthy period due to uncertain over how to apply PSD requirements to GHG-emitting sources.⁸⁹ Accordingly, it is difficult to see how it could meaningfully be claimed that a FIP, which Texas considers ineffective, could adversely affect Texas's interests.

It is also true that under the principles of federalism that underlie the SIP system, states exercise some discretion over controls for their industry, so that a state may impose more stringent controls than minimum CAA requirements. CAA section 116. But this discretion does not mean that Texas is authorized to create the circumstances under which its sources face delays in constructing or modifying and EPA is precluded from promulgating a FIP—when justified under this rulemaking—for the purpose of protecting those sources against such delays. Absent this action, Texas sources would face delays in construction and modification resulting from Texas's decision during the course of the SIP call to neither adopt a SIP promptly nor facilitate an early FIP. Those delays do not result from Texas's decision to impose more stringent controls than the CAA requires. On the contrary, Texas's action is inconsistent with one of the purposes of the PSD provisions, which is "to insure that economic growth will occur in a manner consistent with the preservation of clean air resources." CAA section 160(3). EPA is justified in interpreting and applying CAA section

110(k)(6) to correct errors related to Texas's SIP PSD program in order to effectuate this purpose of PSD. The D.C. Circuit has held that the terms of the PSD provisions should be interpreted with the PSD purposes in mind, *New York v. EPA*, 413 F.3d 3, 23 (DC Cir.), *rehearing en banc den.*, 431 F.3d 801 (2005), and the same should be true of CAA section 110(k)(5) as applied to PSD requirements.

E. Relationship of This Rulemaking to Other States

EPA is not, at this time, undertaking a similar error-correction rulemaking for any of the other states that are subject to the SIP call. EPA has discretion as to whether and when to undertake such a rulemaking, and each of the other states has chosen a course of action that at present appears to assure that its large GHG-emitting sources will have a permitting authority available when the sources need one, and therefore will not face delays in constructing or modifying. As a result, EPA has not inquired into whether any of these other states have flaws in their SIP PSD programs as Texas does.

V. Federal Implementation Plan

A. Authority To Promulgate a FIP

In this rulemaking, EPA is promulgating a FIP to apply EPA's PSD regulatory program to GHG-emitting sources in Texas and to commit to take action as appropriate with respect to pollutants that become newly subject to regulation.

The CAA authority for EPA to promulgate a FIP is found in CAA section 110(c)(1), which provides—

The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator * * * (B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such [FIP].

As indicated earlier in this notice, EPA is partially disapproving Texas's PSD program by correcting EPA's previous full approval to be a partial approval and disapproval. Accordingly, under CAA section 110(c)(1)(B), EPA is required to promulgate a PSD FIP for Texas.

The FIP must be designed to address the flaws in Texas's PSD program. As discussed earlier in this preamble, the Texas PSD program contains significant gaps: It does not address, or provide assurances of adequate legal authority for, application to pollutants newly subject to regulation, including non-

NAAQS pollutants. As a practical matter, at present, the only pollutant the program does not address is GHGs. Accordingly, the FIP applies the EPA regulatory PSD program to GHGs. In addition, the FIP commits to address pollutants that become newly subject to regulation, as appropriate.

B. Timing of FIP

EPA is promulgating the FIP in this rulemaking, so that it takes effect immediately upon the partial disapproval. This timing for FIP promulgation is authorized under CAA section 110(c)(1), which authorizes us to promulgate a FIP "at any time within 2 years after" EPA disapproves a SIP submission in whole or in part. The quoted phrase, by its terms, establishes a two-year period within which EPA must promulgate the FIP, and provides no further constraints on timing. Accordingly, this provision gives EPA discretion to promulgate the FIP at any point in time within that two-year period, and in this rulemaking, EPA is promulgating the FIP immediately.

The reason why we are exercising our discretion to promulgate the FIP immediately is to minimize any period of time during which larger-emitting sources in Texas may be under an obligation to obtain PSD permits for their GHGs when they construct or modify, but no permitting authority is authorized to issue those permits. We believe that acting immediately is in the best interests of the regulated community. Note that for similar reasons, in EPA's recently promulgated SIP call, EPA stated that if a state failed to submit its required SIP revision by its deadline, EPA would immediately make a finding of failure to submit and immediately thereafter promulgate a FIP. 75 FR 53889/2.

The lack of constraints in CAA section 110(c)(1)(B) stands in contrast to other CAA provisions that do impose requirements for the timing of proposals. See CAA sections 109(a)(1)(A), 111(b)(1)(B). In light of the lack of constraints, EPA was free to promulgate the FIP concurrently with the disapproval action.

C. Substance of GHG PSD FIP

1. Components of FIP

The FIP consists of two components. The first mirrors the GHG PSD FIP that EPA is promulgating for seven states for which EPA issued the PSD GHG SIP call and, subsequently, issued a finding of failure to submit a required SIP submittal. Thus, this component of the FIP constitutes the EPA regulations found in 40 CFR 52.21, including the

⁸⁸ Texas 60-day letter, p. 1.

⁸⁹ Texas 30-day letter.

PSD applicability provisions, with a limitation to assure that, strictly for purposes of this rulemaking, the FIP applies only to GHGs. Under the PSD applicability provisions in 40 CFR 52.21(b)(50), the PSD program applies to sources that emit the requisite amounts of any “regulated NSR pollutant[s],” including any air pollutant “subject to regulation.” However, Texas’s partially approved SIP already applies PSD to other air pollutants. To appropriately limit the scope of the FIP, EPA amends 40 CFR 52.21(b)(50), as incorporated into the Texas FIP, to limit the applicability provision to GHGs.

We adopt this FIP because, as we stated in the proposed GHG PSD FIP—

It would, to the greatest extent possible, mirror EPA regulations (as well as those of most of the states). In addition, this FIP would readily incorporate the phase-in approach for PSD applicability to GHG sources that EPA has developed in the Tailoring Rule and expects to develop further through additional rulemaking. As explained in the Tailoring Rule, incorporating this phase-in approach—including Steps 1 and 2 of the phase-in as promulgated in the Tailoring Rule—can be most readily accomplished through interpretation of the terms in the definition “regulated NSR pollutant,” including the term “subject to regulation.”

In accordance with the Tailoring Rule, * * * the FIP would apply in Step 1 of the phase-in approach only to “anyway sources” (that is, sources undertaking construction or modification projects that are required to apply for PSD permits anyway due to their non-GHG emissions and that emit GHGs in the amount of at least 75,000 tpy on a CO₂e basis) and would apply in Step 2 of the phase-in approach to both “anyway sources” and sources that meet the 100,000/75,000-tpy threshold (that is, (i) sources that newly construct and would not be subject to PSD on account of their non-GHG emissions, but that emit GHGs in the amount of at least 100,000 tpy CO₂e, and (ii) existing sources that emit GHGs in the amount of at least 100,000 tpy CO₂e, that undertake modifications that would not trigger PSD on the basis of their non-GHG emissions, but that increase GHGs by at least 75,000 tpy CO₂e).

Under the FIP, with respect to permits for “anyway sources,” EPA will be responsible for acting on permit applications for only the GHG portion of the permit, and the state will retain responsibility for the rest of the permit. Likewise, with respect to permits for sources that meet the 100,000/75,000-tpy threshold, our preferred approach—for reasons of consistency—is that EPA will be responsible for acting on permit applications for only the GHG portion of the permit, that the state permitting authorities will be responsible for the non-GHG portion of the permit, and EPA will coordinate with the state permitting authority as needed in order to fully cover any non-GHG emissions that, for example,

are subject to BACT because they exceed the significance levels.

75 FR 53889/3 to 53,890/1.

This formulation of the FIP is authorized because it is part of the “appropriate” action EPA is authorized to take as part of EPA’s correction of its previous, erroneous full approval, under CAA section 110(k)(6).

The second component of the FIP consists of a commitment that EPA will take such action as is appropriate to ensure that pollutants that become newly subject to regulation are subject to the FIP. If a pollutant becomes newly subject to regulation in the future, and if Texas does not take steps to subject it to its PSD program, then EPA will take the appropriate action.

2. Dual Permitting Authorities

In the GHG PSD FIP proposal, commenters raised concerns about how having EPA issue the GHG portions of a permit while allowing states under a FIP to continue to be responsible for issuing the non-GHG portions of a PSD permit will work in practice. Commenters specifically identified the potential for a source to be faced with conflicting requirements and the need to mediate among permit engineers making BACT decisions.

We well recognize that dividing permitting responsibilities between two authorities—EPA for GHGs and the state for all other pollutants—will require close coordination between the two authorities to avoid duplication, conflicting determinations, and delays. We note that this situation is not without precedent. In many instances, EPA has been the PSD permitting authority but the state has accepted a delegation for parts of the PSD program, so that a source has had to go to both the state and EPA for its permit. In addition, all nonattainment areas in the nation are in attainment or are unclassifiable for at least one pollutant, so that every nonattainment area is also a PSD area. In some of these areas, the state is the permitting authority for nonattainment NSR and EPA is the permitting authority for PSD. As a result, there are instances in which a new or modifying source in such an area has needed a nonattainment NSR permit from the state and a PSD permit from EPA.

EPA is working expeditiously to develop recommended approaches for EPA regions and affected states to use in addressing the shared responsibility of issuing PSD permits for GHG-emitting sources.

In addition, we note that the concern over dual permitting authorities would

become moot if Texas were either to submit and EPA approve a SIP revision that applies PSD to GHGs or request a delegation of permitting responsibility. If it did request and receive a delegation, it would be responsible for issuing both the GHG part and the non-GHG part of the permit, and that would moot concerns about split-permitting.

D. Period for GHG PSD FIP To Remain in Place

In the FIP proposal, we stated our intention to leave any promulgated FIP in place for as short a period as possible, and to process any corrective SIP revision submitted by the state to fulfill the requirements of the SIP call as expeditiously as possible. Specifically, we stated:

After we have promulgated a FIP, it must remain in place until the state submits a SIP revision and we approve that SIP revision. CAA section 110(c)(1). Under the present circumstances, we will act on a SIP revision to apply the PSD program to GHG sources as quickly as possible. Upon request of the state, we will parallel-process the SIP submittal. That is, if the state submits to us the draft SIP submittal for which the state intends to hold a hearing, we will propose the draft SIP submittal for approval and open a comment period during the same time as the state hearing. If the SIP submittal that the state ultimately submits to us is substantially similar to the draft SIP submittal, we will proceed to take final action without a further proposal or comment period. If we approve such a SIP revision, we will at the same time rescind the FIP.

75 FR 53889/2–3.

We continue to have these same intentions. Thus, we reaffirm our intention to leave the GHG PSD FIP in place only as long as is necessary for the state to submit and for EPA to approve a SIP revision that includes PSD permitting for GHG-emitting sources. As discussed in more detail later in this preamble, EPA continues to believe that the states should remain the primary permitting authority.

Specifically, EPA will rescind the FIP, in full or in part, if (i) Texas submits, and EPA approves, a SIP revision to apply Texas’s PSD program to GHG-emitting sources, (ii) Texas provides assurances that in the future, it will apply its PSD program to all pollutants newly subject to regulation, including non-NAAQS pollutants, and (iii) Texas provides “necessary assurances” under CAA section 110(a)(2)(E)(ii) that it “will have adequate * * * authority under State law” to apply its PSD program to such pollutants.

E. Primacy of Texas’s SIP process

This action to partially approve and partially disapprove Texas’s SIP PSD

program and to promulgate a FIP is secondary to our overarching goal, which is to assure that it will be Texas that will be the permitting authority. EPA continues to recognize that Texas is best suited to the task of permitting because the state and its sources have experience working together in the state PSD program to process permit applications. EPA seeks to remain solely in its primary role of providing guidance and acting as a resource for Texas as it makes the various required permitting decisions for GHG emissions.

Accordingly, we are prepared to work closely with Texas to help it promptly develop and submit to us a SIP revision that extends its PSD program to GHG-emitting sources and that assures that the program will apply to each pollutant newly subject to regulation in the future. If Texas submits such a SIP revision, we intend to promptly act on it, and if we approve it, then we intend to rescind the FIP immediately. Again, EPA's goal is to have in place in Texas the necessary permitting authority by the time businesses seeking construction permits need to have their applications processed and the permits issued—and to achieve that outcome by means of engaging with Texas directly through a concerted process of consultation and support.

EPA is taking up the additional task of partially disapproving Texas's PSD program and promulgating the FIP at this time only because the Agency believes it is compelled to do so by the need to assure businesses, to the maximum extent possible and as promptly as possible, that a permitting authority is available to process PSD permit applications for GHG-emitting sources once they become subject to PSD requirements on January 2, 2011. At the same time, we invite Texas to accept a delegation of authority to implement the FIP, so that it will still be the state that processes the permit applications, albeit operating under federal law.

VI. Interim Final Rule, Good Cause Exception

EPA is issuing this action as an interim final rule. As an interim final rule, this action is time-limited. It will be effective from the date of signature until the earlier of April 30, 2011 or the date that EPA promulgates final rules on its proposals for (i) a partial approval and partial disapproval of Texas's PSD SIP and (ii) a FIP for Texas's PSD program and those final rules take effect.

The present rule is effective upon publication, without first undergoing notice and comment. Under APA

section 553, a federal agency generally must provide for public notice and comment prior to finalizing an agency rule. However, this obligation is excused, under APA section 553(b)(3)(B), "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." While the good cause exception is to be narrowly construed, *Utility Solid Waste Activities Group v. Environmental Protection Agency*, 236 F.3d 749, 754 (DC Cir. 2001), it is also "an important safety valve to be used where delay would do real harm." *U.S. Steel Corp. v. U.S. Environmental Protection Agency*, 595 F.2d 207, 214 (5th Cir. 1979). Notice and comment is impracticable where "an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required." *Utility Solid Waste Activities Group*, 236 F.3d at 754. Notice and comment is contrary to the public interest where "the interest of the public would be defeated by any requirement of advance notice." *Id.* at 755.

Notice and comment here would be contrary to the public interest. As discussed previously, major stationary sources of GHG emissions will be subject to PSD permitting requirements as of January 2, 2011, a date which is rapidly approaching. As of that date, no major stationary source emitting GHG at or above the levels set in the Tailoring Rule will be able to construct or modify without first obtaining a permit for its GHG emissions. In the absence of this rule, such sources will have no permitting authority from which to obtain such a permit. Without a permitting authority in place, sources would be subject to delays in construction or modification, causing economic harm to those sources and to others secondarily affected.

Specifically, the State of Texas has estimated that 167 sources will require GHG permits in 2011.⁹⁰ This is a substantial number of entities and the economic harm that they face as a result of permitting delays could affect a substantial number of related entities, employees, shareholders, and the public.

This rule serves the necessary function of ensuring that a permitting authority is available to issue permits for these sources, and thus that large

sources in Texas do not face a long delay in their ability to construct or modify. The public interest would certainly be hindered if EPA did not act now to ensure that economic progress is not impeded by a lack of access to an authorized permitting authority.

The good cause exception also applies here because of the impracticability of notice and comment. EPA only recently became aware that no GHG PSD permitting authority would be authorized to issue permits to Texas sources on January 2, 2011, and thus had insufficient time to seek public comment before acting. As discussed previously, Texas submitted its 60-day letter to EPA on August 2, 2010; it submitted its Motion to Stay Three GHG Actions on September 15, 2010; and it submitted its 30-day letter to EPA on October 4, 2010. It was only after having received and analyzed all of these recent documents that it became clear that, due to underlying flaws in the Texas SIP PSD program and to Texas's position regarding amending its SIP or seeking a FIP, all as described earlier, no permitting authority had authority to issue GHG PSD permits as of January 2, 2011, and that there was no other way besides this rulemaking action to ameliorate that situation in a timely manner. The EPA's agency functions would be compromised if it must impose legal obligations on sources when sources have no legal means to fulfill those obligations. In light of the limited time frame and the harmful effects on sources if this action is delayed, notice and comment is impracticable.

In addition, the public has had and will have some opportunity to comment. The public was given the opportunity to comment on some of the issues in this action in response to proposals for the Tailoring Rule and the GHG PSD SIP call. This rule is also only an interim rule; the public will be given full opportunity to comment on the permanent rule that EPA is concurrently proposing, which mirrors this rule. By issuing this rule as an interim final rule, paired with a comment period on the proposal for more permanent action, EPA is providing as much opportunity for notice and comment as possible on the issues presented by this rule, and is striving to replace this rule with a rule encompassing that further comment as soon as is reasonably possible.

For the same reasons cited earlier, EPA finds that there is good cause for this rule to take immediate effect. In addition, since this is not a major rule under the Congressional Review Act, the 60-day delay in effective date

⁹⁰ "State Of Texas's Motion for Stay of EPA's Endangerment Finding, Time Rule and Tailpipe Rule," *Coalition for Responsible Regulation v. EPA*, No. 09-1322 (and consolidated cases) at 41.

required for major rules under the CRA does not apply.

EPA is taking this action to do an error correction under CAA section 110(k)(6) “in the same manner as [EPA’s previous] approval” of the Texas PSD program. The term “in the same manner” is not defined by statute, and it therefore takes on its ordinary, everyday meaning. It is a broad term, and thus undergoing any proper type of rulemaking process should be considered to be “in the same manner” as undergoing a proper rulemaking process of any other type. Both the original approval of Texas’s SIP and this action are rulemakings, conducted in accordance with the rulemaking process. It is immaterial that the original approval underwent notice and comment, and this action is subject to the good cause exception, since both of these processes are provided for by the prescribed agency rulemaking process.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action” because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The OMB has previously approved the information collection requirements contained in the existing regulations for PSD (*see, e.g.*, 40 CFR 52.21) under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0003. The OMB control numbers for EPA’s regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

This interim final rule is not subject to the Regulatory Flexibility Act (RFA) which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice-and-comment requirements under the APA

or any other statute because, although the rule is subject to the APA, the agency has invoked the “good cause” exemption under 5 U.S.C. 553(b); therefore, it is not subject to the notice and comment requirement.

Notwithstanding the previous conclusion, EPA is publishing a proposed rule in this **Federal Register** that mirrors this interim final rule, and the applicability of the RFA is addressed further in that proposed rule.

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. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. With this action, EPA is only revising its previous approval of the Texas PSD SIP to be a partial approval and partial disapproval and promulgating a FIP to address the deficiencies as authorized by the CAA. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on Texas, on the relationship between the national government and Texas, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. With this action, EPA is only revising its previous approval of the Texas PSD SIP to be a partial approval and partial disapproval and promulgating a FIP to address the deficiencies as authorized by the CAA. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA is specifically soliciting comment on the proposed rule also published in this **Federal Register** that mirrors this interim final rule.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9,

2000). In this action, EPA is not addressing any tribal implementation plans. This action is limited to Texas’s PSD SIP. 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 EO 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 EO has the potential to influence the regulation. This action is not subject to EO 13045 because EPA is only revising its previous approval of the Texas PSD SIP to be a partial approval and partial disapproval and promulgating a FIP to address the deficiencies as authorized by the CAA.

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

This action is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. With this action, EPA is only revising its previous approval of the Texas PSD SIP to be a partial approval and partial disapproval and promulgating a FIP to address the deficiencies as authorized by the CAA.

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, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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 U.S.

EPA has determined that this interim final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. With this action, EPA is only revising its previous approval of the Texas PSD SIP to be a partial approval and partial disapproval and promulgating a FIP to address the deficiencies as authorized by the CAA.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary, or contrary to the public interest. This determination must be supported by a brief statement, 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of December 30, 2010. EPA will submit a report containing this rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

VIII. Judicial Review

Section 307(b)(1) of the CAA specifies which Federal Courts of Appeal have

jurisdiction to hear petitions for review of which final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) When the agency action consists of “nationally applicable regulations promulgated, or final actions taken, by the Administrator,” or (ii) when such action is locally or regionally applicable, if “such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.”

This rule is based on a determination of nationwide scope or effect. Texas’s response to the SIP call—including Texas’s statements that it does not intend to submit a SIP revision and its decision not to identify a SIP submittal deadline, which have placed its sources at risk for delays in construction or modification—led us to determine that we should examine whether there may be a flaw in Texas’s SIP that was present at the time of our approval. We then conducted a closer inquiry and on the basis of that, we are concluding that in fact a flaw was present. As a result, we are authorized to undertake an error correction, as we are doing in this rulemaking. For all other states subject to the SIP call, their response to the SIP call—which did not raise the concerns Texas’s did and which assured that their sources would not be at risk for delays in construction or modification—lead us to determine that it was not necessary to examine further whether their SIPs were flawed at the time we approved them. That determination—whether to examine the SIPs further—is a determination of nationwide scope or effect because it affected Texas and the 12 other states subject to the SIP call. Further indication that this determination of nationwide scope or effect is that EPA is making it as part of the complex of rules EPA has promulgated to implement the GHG PSD program for each of the states in the nation. Those rules include (i) the Tailoring Rule and the Johnson Memo Reconsideration, which revise EPA regulations to incorporate the Tailoring Rule thresholds, and which apply in each state that does not have an approved SIP PSD program, and therefore operates under EPA’s regulations; (ii) the SIP call, which applies in each state that has an EPA-approved SIP PSD program but does not apply that program to GHG-emitting sources; and (iii) the PSD Narrowing rule, which applies in each state that has an EPA-approved SIP PSD program

that does apply to GHG-emitting sources.

Thus, under section 307(b)(1) of the Act, judicial review of this final action is available by filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by February 28, 2011.

IX. Statutory Authority

The statutory authority for this action is provided by sections 101, 110, 114, 116, 160–169, and 301 of the CAA as amended (42 U.S.C. 7401, 7410, 7414, 7416, 7470–7479, and 7601).

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Carbon monoxide, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Incorporation by reference, Intergovernmental relations, Lead, Methane, Nitrogen dioxide, Nitrous oxide, Ozone, Particulate matter, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride, Sulfur oxides, Volatile organic compounds.

Dated: December 23, 2010.

Lisa P. Jackson,
Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

■ 2. Section 52.2303 is amended by adding paragraph (d) to read as follows:

§ 52.2303 Significant deterioration of air quality.

* * * * *

(d)(1) The Texas PSD SIP is partially disapproved as of December 30, 2010 because the Texas PSD SIP fails to apply to pollutants newly subject to regulation, including the pollutant greenhouse gases (GHGs) from stationary sources described in § 52.21(b)(49)(iv).

(2) The requirements of sections 160 through 165 of the Clean Air Act are not met to the extent the plan, as approved, does not apply with respect to emissions of pollutants subject to regulation under the Clean Air Act, including the pollutant GHGs from certain stationary sources as of January 2, 2011. Therefore, from January 2, 2011 through April 30, 2011, the provisions of § 52.21 except paragraph (a)(1) are hereby made a part of the plan for the

pollutant GHGs from stationary sources described in § 52.21(b)(49)(iv). In addition, the United States Environmental Protection Agency shall take such action as is appropriate to

assure the application of PSD requirements to any other pollutants that become subject to regulation under the federal Clean Air Act for the first time after January 2, 2011.

(3) For purposes of this section, the “pollutant GHGs” refers to the pollutant GHGs, as described in § 52.21(b)(49)(i).

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