ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2010–1033; FRL–9299–9]

RIN 2060–AQ68

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing a correction to 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 and is also promulgating a Federal Implementation Plan (FIP) for Texas. These actions are based on EPA's determination that at the time EPA approved Texas's PSD program, the program was flawed because the state did not address how the program would apply 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). The partial disapproval requires EPA to promulgate a FIP and EPA is doing so to assure that GHG-emitting sources in Texas are able to proceed with plans to construct or expand.

DATES: This action is effective on May 1, 2011.

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.

FOR FURTHER INFORMATION CONTACT: For information on this rule, contact Ms. Cheryl Vetter, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, NC 27711; *telephone number:* (919) 541–4391; *fax number:* (919) 541–5509; *e-mail address: vetter.cheryl@epa.gov*.

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.
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:

[1] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule. 75 FR 31,514 (June 3, 2010). The Tailoring Rule is described in more detail later in this preamble.

II. Overview of Rulemaking

This notice-and-comment final rulemaking is intended to assure that large GHG-emitting sources in Texas, which became subject to PSD on January 2, 2011, will continue to be able to obtain preconstruction permits under the CAA New Source Review (NSR) PSD program beyond the April 30, 2011, expiration date of the FIP that EPA put in place for this purpose via an Interim Final Rule. "Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program; Interim Final Rule." 75 FR 82,430 (Dec. 30, 2010). In this manner, this rulemaking will allow those sources to avoid delays in construction or modification.

As in the interim final rulemaking, EPA is determining in this rulemaking 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 published by notice dated June 3, 2010, 75 FR 31,514.[2]

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. According to Texas, 167 GHG-emitting sources will require PSD permits during 2011. These sources have a real need to have a permitting authority in place in Texas. 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 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 U.S. Court of Appeals for the DC Circuit (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. EPA has determined that this action is necessary at this time so that there is no period of time when sources are unable to obtain necessary PSD permits.

In order to assure no gap in permitting, EPA is establishing May 1, 2011, as the effective date for the FIP, which immediately follows the expiration of the interim-final FIP EPA published by notice dated December 30, 2010. EPA stated in the interim final rule that the FIP would remain in place until April 30, 2011.

III. Background

A. 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.

1. 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.

2. 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 2 years after the disapproval, unless the state corrects the deficiency within that period of time by submitting a SIP revision that EPA approves. CAA section 110(c)(1).[3]

[2] Texas will continue to be the permitting authority for non-GHG pollutants for sources that triggered PSD requirements due to such other pollutants. EPA will be the permitting authority for all pollutants for sources that trigger PSD solely because of their GHGs, which may occur after July 1, 2011, under the Tailoring Rule. This permitting process will also take place in the seven other states for which EPA is implementing a GHG PSD FIP.

[3] States are subject to sanctions for failure to submit, or for EPA disapproval of, SIPs for nonattainment areas, under CAA section 179. These

Continued

3. 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 * * * 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[ied] a degree of discretion" in whether EPA had to make a finding).

sanctions provisions are not relevant for this rule because they do not apply to PSD SIPs.

4. Authority for EPA to Revise Previous Action on SIPs

EPA has authority to revise its previous actions 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.

(a) 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). The legislative history says little about the provision, and does not mention *Bridesburg.* Even so, the terms of the provision make it evident that Congress authorized EPA to undertake a broader set of revisions under the guise of error correction than the *Bridesburg* court read the pre-existing Clean Air Act to authorize, and that Congress did not intend to codify the holding of *Bridesburg.* 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. By the same token, because the *Bridesburg* decision stood for the proposition that EPA could not correct anything more than a narrow range of errors, had Congress intended to codify the decision in *Bridesburg,* it is logical that Congress would have described the type of error that EPA was authorized to correct in the same limited way that the decision did. In this manner, the fact that Congress adopted CAA section 110(k)(6) against the backdrop of the *Bridesburg* case confirms that the provision cover a broad range of errors.

EPA has used CAA section 110(k)(6) in the past to correct errors of a non-technical nature. Most recently, EPA withdrew its approval of SIP PSD

programs in 24 states to the extent they apply PSD to GHG-emitting sources below the thresholds in the final Tailoring Rule. "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting Sources in State Implementation Plans; Final Rule," 75 FR 82,536 (Dec. 30, 2010)(Narrowing Rule). In addition, 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 2,440 (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 65,557 (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 (DC Cir. 1990) ("whenever" in CAA section 115(a) "impl[ied] a degree of discretion" in whether EPA had to make a finding).

(b) 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)).[4]

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 the Administrative Procedures Act (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 15,720, 15,723 (discussing prior action taken to limit approvals); 67 FR 69,139 (taking final action to amend prior approvals to limit their duration); and 67 FR 46,618 (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.

5. 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

[4] For 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).

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 2 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 approvable 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.

B. 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.[5] 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 later in this preamble, the phrase "subject to regulation" began 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").[6]

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 sections 165(a)(1) and 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.[7]

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.

1. Applicability of PSD to Non-NAAQS Pollutants

EPA has long held the view that PSD applies to "any pollutant subject to regulation under the CAA," and that includes non-NAAQS pollutants. EPA's long-standing regulations have interpreted CAA section 165(a) broadly enough to capture non-NAAQS pollutants. A detailed discussion of these positions was provided in the Tailoring Rule at 75 FR 31,560/3, and in the Interim Final Rule at 75 FR 82,443.

2. 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 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 26,380, 26403/3, 26406 (June 19, 1978) (promulgating 40 CFR 51.21(b)(1)(i)) and 42 FR 57,479, 57,480, 57,483 (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, 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 80,240/1.

In most states with approved PSD programs, PSD does apply automatically. However, in a minority of

[5] In 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 CO_2 or any of the other well-mixed GHGs, nor has EPA proposed any such NAAQS; therefore, unless and until we take further such action, the nonattainment NSR program does not apply to GHGs.

[6] "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.

[7] 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 31,560–62; "Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA's Response to Public Comments," May 2010, pp.38–41. We did not reopen that issue in this rulemaking.

states with approved PSD programs, it does not.[8] Instead, each time EPA subjects a previously unregulated air pollutant to regulation, these states must submit a SIP revision incorporating that pollutant into their programs. 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 U.S. Court of Appeals for the 7th Circuit (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.

C. 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 10,842.

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.[9]

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 aspects of the Federal PSD program, and in a series of actions, EPA granted that authority.[10] 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.[11] EPA reiterated these statements to Texas in 1983.[12]

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.[13] 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).[14]

(1) 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.[15] 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

[8] 75 FR at 53,897/3 (proposed GHG PSD SIP call).

[9] 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).

[10] *See, e.g.,* 48 FR 60236,023 (February 9, 1983).

[11] 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 in original).

[12] 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 55,483/1 & n.1 (December 13, 1983).

[13] 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.

[14] 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."

[15] TACB Board Order No. 85–7 (July 26, 1985).

reference, except for [certain identified] paragraphs [not here relevant].[16]

The TACB submitted this SIP revision to EPA on December 11, 1985.[17] 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."[18]

Texas responded with a letter dated October 24, 1986,[19] in which it stated:

> 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.[20]

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.[21] Texas submitted that as a SIP revision to EPA on October 26, 1987.[22]

However, some 8 months later, by notice published on July 1, 1987, EPA adopted the PM_{10} NAAQS,[23] and thereby subjected to PSD sources emitting PM_{10}. 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 PM_{10}-emitting sources into Texas's PSD program.[24] Texas submitted that revised rule to EPA as a SIP revision on September 29, 1988.[25] 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].[26]

EPA proposed to approve this SIP revision, with this iteration of the Texas PSD rule, by notice dated December 22, 1989,[27] and EPA issued a final approval by notice dated June 24, 1992.[28] In the preambles to the proposed and final rules, and in supporting documents, EPA recounted part of this history of Texas revising its regulations to IBR the current EPA regulatory requirements.[29]

This history shows that both EPA and Texas were well aware that Texas's method of incorporating by reference EPA's regulatory requirements into Texas's PSD rule was not prospective and therefore did not automatically update to incorporate a pollutant newly subject to regulation.[30] In fact, during the time that EPA was reviewing Texas's PSD SIP, Texas revised its SIP to apply PSD to PM_{10}, which EPA subjected to regulation for the first time during that time. 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.[31] Simply put, Texas failed to look down the road and address a problem with its PSD SIP—the mechanism for applying PSD to pollutants newly subject to regulation—that was bound to recur.

(2) 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 28,093). 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

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[16] *Id.*

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

[18] 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 cannot 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.

[19] Letter from Steve Spaw, Deputy Executive Director, TACB, to William B. Hathaway, Director, Air, Pesticides and Toxics Division, EPA Region 6 (October 24, 1986).

[20] *Id.* 1–2.

[21] 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).

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

[23] 52 FR 24,634 (July 1, 1987).

[24] TACB Board Order No. 88–08 (July 15, 1988).

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

[26] TACB Board Order No. 88–08 (July 15, 1988).

[27] 54 FR 52,823.

[28] 57 FR 28,093.

[29] 57 FR 28,093, 28,094/2 (June 24, 1992) (final rule); 54 FR 52,823, 52,824/1 (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 40,656) (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 46,556). *See* 62 FR 44,084/2.

[30] It should be noted that although Texas subsequently made certain commitments, discussed below, none of those commitments, on its face, suggested that Texas's PSD SIP should be interpreted to automatically update to incorporate a pollutant newly subject to regulation.

[31] 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 43,752, 43,753 (July 22, 2004).

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.[32]

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 cha[n]ging 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.[33]

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.

(3) 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:

(a) 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 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 previously in this preamble, 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.[34]

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

(b) 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 led EPA to question whether Texas would adhere to EPA's interpretation that Best Available Control Technology (BACT) must be implemented through the Top-Down process.[35] 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

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

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

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

[35] 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).

this letter, which we call the Texas PSD Commitments Letter, on September 5, 1989.[36] 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 forward [37] approval of the PSD revisions and believe EPA will find the management of that program in Texas to be capable and effective.[38]

By notice dated December 22, 1989, EPA proposed to fully approve Texas's PSD program.[39] 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. 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 approved 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 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

[36] Texas's 1989 Commitments Letter, p. 1.

[37] *Sic:* the word "to" should be between "forward" and "approval".

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

[39] 54 FR 52,823.

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 28,095/1–2; 28,096/1.

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 28,094.

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.[40]

As discussed previously, in 1996 EPA proposed, and in 2002 finalized, what we call the NSR Reform Rule,[41] which included a set of amendments to the PSD provisions that included revisions to conform to the 1990 CAA Amendments. *See* 61 FR 38,250 (July 23, 1996), 67 FR 80,186 (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.[42] Accordingly, the applicable Texas PSD applicability provisions remain the ones in the state's currently approved SIP.

D. Regulatory Background: GHG Rules

1. GHGs and Their Sources

As discussed in detail in the rule EPA calls the "Endangerment Finding," [43] 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 (CO_2), 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. The well-mixed GHGs of concern directly emitted by human activities include CO_2, methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). These six GHGs will, for the purposes of this final rule, be 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 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 CO_2 emissions and accounts for 80 percent of the total GHG emissions. Anthropogenic CO_2 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 CO_2 emissions from land-use changes such as deforestation, all perturb the atmospheric concentration of CO_2 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 (CO_2, CH_4, N_2O, 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 (GWP) 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 CO_2 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 CO_2-equivalent (CO_2e) basis. For example, CH_4 has a GWP of 21, meaning each ton of CH_4 emissions would have 21 times as much impact on global warming over a 100-year time horizon as 1 ton of CO_2 emissions. Thus, on the basis of heat-trapping capability, 1 ton of CH_4 would equal 21 tons of CO_2e. The GWPs of the non-CO_2 GHGs range from 21 (for CH_4) up to 23,900 (for SF_6). Aggregating all GHGs on a CO_2e 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 sources covered by PSD. These actions include, as they are commonly called, the "Endangerment Finding" and "Cause or Contribute Finding," which we issued in a single

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

[41] "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 80,186 (December 31, 2002) (NSR Reform rule).

[42] 75 FR 56,424 (September 15, 2010).

[43] "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).

final action;[44] the Johnson Memo Reconsideration, noted previously; the "Light-Duty Vehicle Rule" (LDVR or Vehicle Rule);[45] and the "Tailoring Rule," also noted previously.

a. Endangerment Finding, Vehicle Rule, Johnson Memo Reconsideration

In the Endangerment and Cause or Contribute 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 section 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.

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: CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6. 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 25,686 (promulgating 40 CFR 86.1818–12(a)). The Tailoring Rule noted that it was because the Vehicle Rule subjected to regulation the pollutant that is comprised of 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.

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 discussed elsewhere in this preamble and a series of subsequent actions.[46]

a. Tailoring Rule

In the 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 tons per year (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.[47] 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 CO_2e basis.[48] EPA explained in the Tailoring Rule that it intends these levels to be the first steps in a phase-in approach for PSD applicability, and EPA committed in that rule to conduct additional rulemaking by 2012 and 2016 that would consider taking additional steps.

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.[49] 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

[44] "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).

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

[46] 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.

[47] 40 CFR 51.166(a)(7)(i), (b)(1)(i)(a), (b)(49).

[48] Specifically, under the revised definition of "subject to regulation," sources that emit at least the 75,000 and/or 100,000 tpy CO_2e 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." (March 2011 update).

[49] 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.

above the Tailoring Rule thresholds.[50] 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 later in this preamble, 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 became subject to PSD and the thresholds in the Tailoring Rule as of January 2, 2011, without further action.[51]

The second category includes 13 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.[52]

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 that 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 are 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 either did so by January 2, 2011, or very soon thereafter, or are currently in the process of revising their SIPs. In the meantime, EPA has finalized what we call 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.[53] As a result of these state actions and EPA's Narrowing Rule, as of 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 are subject to PSD requirements. [54]

d. SIP Call States, Including Texas

As just noted, the second category, which includes Texas, includes 13 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,[55] 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.[56] 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 months after the date of the final SIP call, as discussed later in this preamble.

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

[50] 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.

[51] McCarthy Declaration, paragraphs 28–33, page 8, and Attachment 1, Table 1.

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

[53] "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting Sources in State Implementation Plans; Final Rule, 75 FR 82535 (December 30, 2010). Specifically, in the Narrowing Rule, EPA narrowed its approval of the affected states' SIP PSD applicability provisions to only the extent they apply PSD to GHG-emitting sources at or above the Tailoring Rule thresholds. 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 state PSD obligations of sources below the Tailoring Rule thresholds. *McCarthy Declaration* paragraph 92, page 19.

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

[55] "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 (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 53,883 (September 2, 2010).

[56] "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).

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 3-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 expected 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 had a permitting authority in place as of January 2, 2011, none of these states expected that gap to pose meaningful difficulties for sources because, depending on the state, the gap would be brief, and the state did not expect any sources to seek a permit during the gap, or even if the state had been the permitting authority during the gap, it could not have completed processing the permits during that time.[57]

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,[58] 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.[59]

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 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

[57] McCarthy Declaration, p. 12, paragraph 55.

[58] California's PSD program is administered in its entirety by local jurisdictions.

[59] 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. 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. It is as a result of the prompt action taken by the states that implementation efforts have been so successful to date.

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 31,582/3.

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 31,582/3.

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.[60] 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 * * * 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:[61]

> * * * 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 only to NAAQS pollutants in its challenges before the DC 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).[62] (In a separate motion, Texas also moved to stay the Tailoring Rule.[63]) 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

[60] 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.

[61] 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.

[62] "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).

[63] "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).

process in order to regulate GHG emissions from stationary sources through PSD and Title V must fail.[64]

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."[65]

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,[66] 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.[67]

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 respond to the SIP Call, including to apply PSD to GHG-emitting sources, EPA expects to promulgate a FIP to continue to apply PSD to these sources in December, 2011. 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 3 years 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.

In order to reduce uncertainty for sources and permitting authorities, EPA has issued guidance for use in determining BACT, provided training for permitting authorities and sources, and is continuing to maintain and update resources for use in making these determinations. These resources include question and answer documents and white papers on proven and emerging technologies for reducing greenhouse gas emissions in different industries as well as continued close interaction between sources, permitting authorities, and EPA.

It should be noted that Texas stated in filings before the DC 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.[68]

IV. Final Action and Response to Comments

In this action, EPA is taking the following actions to ensure that there is a mechanism for large, GHG-emitting sources in Texas to obtain PSD permits under a program that 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 past 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 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 for the GHG portion of PSD 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, this rule will be effective on May 1, 2011.

[64] Texas's Motion to Stay Three GHG Actions, at 27.

[65] *Id.* at 5.

[66] "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).

[67] Final SIP Call, 75 FR at 77,706/2–3 and n. 18.

[68] Texas's Motion to Stay the Tailoring Rule, pp. 2, 16.

A. Response to General Comments on the Operation of the PSD Program

1. Comments on the Self-Executing Nature of the PSD Program

Several commenters disagreed with EPA's position regarding section 165(a) of the CAA and argue that EPA's decision to regulate GHGs had no self-executing effect on the permitting requirements applicable to sources in Texas. These commenters state that the only CAA requirements that are self-executing are found in CAA section 168, a section of the statute that incorporated PSD changes made in the 1977 amendments to the Act. Instead, according to these commenters, GHG-emitting sources became subject to PSD requirements through EPA's revisions to the PSD regulations in 40 CFR 51.166, and those regulations provide states 3 years to revise their SIPS to incorporate changes in the PSD program. Accordingly, one commenter asserted that rather than imposing a "construction permitting moratorium" upon EPA's adoption of a new minimum PSD requirement, the PSD rules provide states a reasonable period of time for incorporating a new minimum PSD requirement, with prospective effect, into SIPs, during which time the EPA-approved SIP continues in force and the state may continue to issue permits under that SIP without addressing the new minimum requirement promulgated by EPA.

2. EPA Response

EPA indicated in the proposal for this rulemaking, 75 FR at 82,388/2, that in earlier rulemakings, EPA took comment on and resolved the issue of whether the CAA PSD requirements apply by their terms, so that EPA was not soliciting comment on that issue in this rulemaking. In those earlier rulemakings, EPA concluded that the CAA PSD requirements do apply by their terms, so that sources in a state are subject to PSD for their emissions of pollutants newly subject to regulation even if the state has an approved SIP that does not apply PSD to those pollutants. *See* 75 FR 31,514 (June 3, 2010) and 75 FR 77,698 (December 13, 2010). As noted earlier in this preamble, notwithstanding the proposal, EPA did receive comments on this issue in this rulemaking. Because EPA resolved this issue in those earlier rulemakings, and those dissatisfied with that resolution may challenge it in court—and in fact are so doing—and because the present rulemaking is based on those rulemakings, EPA is not obliged to respond to those comments in this rulemaking.

Even so, for the sake of completeness, and without reopening this issue in this rulemaking, EPA does provide the following response. EPA disagrees with these commenters and EPA continues to take the view that the CAA PSD requirements apply by their terms to pollutants newly subject to regulation, regardless of whether a state with an approved SIP applies PSD to such pollutants. As discussed at length in the preamble to the final PSD GHG SIP call (75 FR 77,707–77,709, Dec 13. 2010), the CAA requirements (i) prohibit a "major emitting facility" from constructing or modifying without obtaining a permit that meets the PSD requirements, CAA section 165(a)(1); and (ii) define a "major emitting facility" as a source that emits a specified quantity of "any air pollutant," CAA section 169(1), which EPA has long interpreted as any pollutant subject to regulation. 40 CFR 52.166(b)(49)(iv). In this manner, the CAA requirements for PSD applicability are what we call automatically updating, that is, at the very time EPA regulates a previously unregulated pollutant, any source emitting that pollutant in sufficient quantities becomes a "major emitting facility," and that source cannot construct or modify without receiving a PSD permit. That is, PSD applies to that pollutant at the time it becomes subject to regulation, without further regulatory action by EPA.

EPA regulations have codified this automatically updating aspect of the CAA PSD requirements. *See* 43 FR 26,380, 26,403/3, 26,406 (June 19, 1978) (promulgating 40 CFR 51.21(b)(1)(i)) and 42 FR 57,479, 57,480, 57,483 (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 our 2002 NSR Reform rule, EPA reiterated these requirements, although changing the terminology. 67 FR 80,186 (December 31, 2002). Specifically, EPA required that emissions of "any regulated NSR pollutant" be subject to PSD requirements when emitted in specified quantities by sources and defined that term to include pollutants regulated under certain CAA requirements, as well as "any pollutant that otherwise is subject to regulation under the [CAA]." 40 CFR 52.166(b)(49)(iv). EPA made clear in the preamble to the NSR Reform rule that PSD applicability was automatically updating. 67 FR 80,240.

GHG-emitting sources became subject to PSD due to the operation of these CAA and regulatory provisions, in conjunction with the Light-Duty Vehicle Rule. The latter rule subjected GHGs to regulation for the first time, as of January 2, 2011, so that, by operation of the CAA PSD provisions and the associated regulatory provisions, PSD automatically applied to GHG-emitting stationary sources as of that date. The Tailoring Rule codified in 40 CFR 51.166 an interpretation that, read in conjunction with the Light-Duty Vehicle Rule regulations, had the effect of establishing the January 2, 2011 date by which GHGs became subject to regulation, *see* 40 CFR 51.166(b)(48) along with a phase-in schedule, *see id* at 51.166(b)(48)(iv)–(v). However, contrary to commenters arguments, the Tailoring Rule did not itself require that PSD apply to GHG-emitting sources, and the provisions that the Tailoring Rule incorporated into 40 CFR 51.166(b)(48), as just described, did not impose that requirement.

Accordingly, commenters are incorrect in arguing that the authorization for states to submit PSD SIP revisions within a three-year period, under 40 CFR 51.166(a)(6), means that PSD does not apply to GHG-emitting sources until states submit such a SIP revision. Section 51.166(a)(6) provides, in relevant part: "Any State required to revise its implementation plan *by reason of an amendment to this section* * * * shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the Federal Register"; and "[a]ny [such] revision * * * shall take effect no later than the date of its approval and may operate prospectively. 40 CFR 51.166(a)(6)(i), (iii) (emphasis added). There are several reasons why this provision does not mean that PSD does not apply to GHG-emitting sources until after a state revises its SIP in accordance with the Tailoring Rule. For one thing, because this provision is a regulation, it cannot, no matter how it is interpreted, override the CAA requirements that apply PSD requirements to GHG-emitting sources so that those CAA requirements do not take effect as of January 2, 2011.

For another, this provision does not apply to the requirement that GHG-emitting sources became subject to PSD as of January 2, 2011. GHG-emitting sources became subject to PSD by operation of the CAA and existing regulations, in conjunction with the Light-Duty Vehicle Rule, not because of any amendment to 40 CFR 51.166. The Tailoring Rule did amend section 51.166, but, again, those amendments did not impose PSD applicability on

GHG-emitting sources; rather, they clarified the date of PSD applicability for GHG-emitting sources and provided a timetable for phasing-in PSD applicability. Therefore, no state is required "by reason of an amendment to * * * section [51.166]" to revise its SIP to apply PSD to GHG-emitting sources, and as a result, any three-year delay in section 51.166 does not apply to PSD applicability for GHG-emitting sources.

3. Comments on Stationary Sources' Ability To Rely on Approved State SIP

Several industry commenters stated that in light of their contention that the PSD program is not self-executing, as discussed earlier in this preamble, then it follows that stationary sources do not violate the CAA if they get permits in accordance with the requirements of an approved state SIP, and they may lawfully construct or modify in accordance with the terms of those permits, even though those permits do not cover their GHG emissions. According to these commenters, sources in Texas need only look to the content of Texas's existing SIP in determining the permitting requirements with which they must comply and sources in Texas can obtain permits now, without addressing GHGs, and lawfully construct or modify in accordance with those permits. One commenter states that CAA Section 113(a)(1) "provides a shield to these sources so long as they comply with the applicable SIP." Commenters cited the recent decision of the 7th Circuit, *United States* v. *Cinergy Corporation, 623 F.3d* 455 (7th Cir. 2010) to support the opinion that actions taken in compliance with an approved SIP are valid.

4. EPA Response

Here, too, EPA stated in the proposal for this rulemaking that because EPA addressed this comment in earlier rulemakings on which this rulemaking is based—including the Tailoring Rule and the GHG PSD SIP Call—EPA was not soliciting comment on this issue and was not required to respond to such comments. 75 FR at 82,388/2, *see* 75 FR 31,514 (June 3, 2010) and 75 FR 77,698 (December 13, 2010). Even so, for the sake of completeness, and without re-opening this issue in this rulemaking, EPA provides the following response: EPA disagrees with the comment. As we stated earlier in this preamble, EPA has long interpreted the PSD applicability provisions in the CAA to be self-executing,[69] that is, they apply by their terms so that a source that emits any air pollutant subject to regulation becomes subject to PSD—and, therefore, cannot lawfully construct or modify without obtaining a PSD permit—and these provisions apply by their terms in this manner regardless of whether the state has an approved SIP PSD program. What is more, until an applicable implementation plan is in place—either an approved SIP or a FIP—no permitting authority is authorized to issue a permit to the source.

In the recent *Cinergy* decision, the 7th Circuit confronted a case that, at the district court level, involved both nonattainment NSR and PSD claims, with the appeal involving a substantive nonattainment NSR issue and an evidentiary PSD issue. However, in its opinion, the 7th Circuit described the substantive nonattainment NSR issue as if it applied to both nonattainment NSR and PSD. On that issue, the Court held 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. Again, notwithstanding the Court's broader description of the case, that holding applied only to the nonattainment NSR claims because, again, only those claims were before the Court on that issue. *United States* v. *Cinergy Corp.,* 623 F.3d 455 (7th Cir. 2010). In stark contrast to the nonattainment provisions actually at issue in *Cinergy*—which are not self-executing and must therefore be enforced 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 Clean Air Act.

B. Determination That EPA's Previous Approval of Texas's PSD Program was in Error

In this action, EPA is determining that EPA's previous approval of Texas's PSD program was in error under CAA section 110(k)(6). 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 in this preamble, 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 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, including non-NAAQS pollutants.

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 PM_{10}, 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 PM_{10}.

Had Texas recognized that following approval of its PSD program, EPA would in all likelihood 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. For example, Texas could have provided assurances that the state would apply PSD to such pollutants, and could have included those assurances in the form of a SIP revision or as a separate letter. Texas could also have provided information as to the method and timing for applying PSD to such pollutants. The most likely method would be through a separate SIP revision, which would apply PSD specifically with respect to that pollutant. By comparison, as noted earlier in this preamble, Texas committed to submit a SIP revision if a SIP inadequacy led to an increments violation. Alternatively, another method would be to adopt the approach of most other states and adopt a SIP revision to update the program to apply

[69] EPA likewise did not reopen this issue in this rulemaking.

automatically to any pollutant newly subject to regulation.

In addition, depending on how it addressed the need to update its PSD program to apply to pollutants newly subject to regulation, Texas could have addressed the timing of that action. 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.

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. As noted elsewhere in this preamble, although both Texas and EPA were well aware that the Texas SIP did not automatically update to include pollutants newly subject to regulation, both failed to look down the road and anticipate that EPA would in all likelihood newly subject more pollutants to regulation. As noted elsewhere in this rulemaking, because the SIP did not address PSD applicability to pollutants newly subject to regulation, the SIP did not meet CAA requirements.

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. As just quoted, 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, and therefore does not apply to pollutants newly subject to regulation, and does not further address such pollutants.

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 phrasing is general and therefore cannot be read to 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 approving Texas's rule, EPA did not recognize that Texas's SIP did not address pollutants newly subject to regulation. In its 1992 approval rulemaking, EPA noted that "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," and added:

> 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* * *.
>
> * * *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.

57 FR 28,094–28,095 (June 24, 1992). EPA made these statements in response to comments that EPA should not require that (i) the Texas PSD program must automatically incorporate any revision to the PSD program that EPA might adopt, such as a revision to how the central technological requirement—best available control technology (BACT)—is determined; or (ii) that the Texas PSD program incorporate any new interpretation or guidance that EPA may issue with respect to PSD. Rather, according to these statements, EPA would revise the PSD program through regulatory changes and Texas would adopt them through SIP revisions, and Texas retained discretion as to whether to follow revisions to EPA interpretation or guidance. However, these statements do not concern EPA's newly subjecting pollutants to regulation, and thereby triggering PSD requirements for those pollutants, because that action does not constitute a "fundamental change[] in the administration of PSD * * * accomplished through amendments to the regulations in 40 CFR 52.21 and 51.166. * * *." Nor is that action any type of new interpretation or guidance for the PSD program itself. Rather, that action is a regulatory action outside the PSD program that has the effect of newly subjecting a pollutant to regulation; does not alter the underlying requirements of the PSD program; and instead, simply makes an incremental addition (however large the increment may be) to the types of pollutants subject to the existing PSD program.

In addition, the rulemaking record for Texas's PSD program does not indicate that Texas provided, as required under CAA section 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 1989 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, assurances which Texas apparently made in a 1992 conference call with EPA Region 6 officials, and which were referenced in a letter from the Region to TACB, address legal authority to apply PSD to pollutants that newly become subject to PSD as a result of EPA regulation.[70]

Therefore, the Texas PSD SIP submittal contained gaps: it did not address the application of PSD to pollutants newly subject to regulation,

[70] Letter to Steve Spaw, Executive Director, Texas Air Control Board, from A. Stanley Meiburg, Director, Air Pesticides, and Toxics Division, Region 6, USEPA, Request for Commitments for Prevention of Significant Deterioration (PSD) Program. March 30, 1992.

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 the gaps described previously.

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

First, Texas has made clear its view 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 only to 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. Indeed, 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)."[71] 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]." 40 CFR 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."[72] 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 EPA-approved SIP PSD applicability provisions apply PSD to "any air pollutant subject to regulation under the [Clean Air] Act." Although these Texas provisions mirror EPA's provisions—which, again, Texas appears to interpret as limited to applying PSD only to NAAQS pollutants—Texas is authorized to apply its provisions 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, and which not.

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's SIP does not automatically update to apply PSD to newly regulated pollutants. *Id.* at 5.

With this 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 emissions"– Texas has made clear that it does not view itself as obligated to apply PSD to GHGs under the CAA. Thus, this statement is fully consistent with, and highlights, Texas's view that it is not obligated to apply PSD to each newly regulated non-NAAQS, including, of course, GHGs.[73]

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. 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.[74]

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

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

[72] *See* 43 FR 26,380, 26,403/3, 26,406 (June 19, 1978) (promulgating 40 CFR 51.21(b)(1)(i)) and 42 FR 57,479, 57,480, 57,483 (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").

[73] 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.

[74] 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.

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 DC 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.[75] 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 so apply. This gap is significant because it facilitates Texas's current position, with which EPA disagrees, that PSD does not apply to non-NAAQS pollutants.

(2). Gap Concerning Assurances of Adequate Legal Authority

Texas's statement in its 60-day letter that it "has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order 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.

It is possible that at the time that Texas submitted its PSD program, Texas considered itself under the same limits in its legal authority. At a minimum, in light of these recent statements 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 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, in the case of the Texas PSD SIP program, fully implementing the SIP in a manner consistent with the CAA, and that includes the applicability of 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.

[75] 57 FR at 28,095/2, 28,096/1.

a. Comments on the Flaws in PSD Program

Several commenters, including both the Texas Commission on Environmental Quality (TCEQ) and the Texas Attorney General, object to EPA's determination that the Texas SIP is flawed. TCEQ comments that nothing in " * * * the CAA or federal PSD rules require that state PSD programs apply to pollutants *newly* subject to regulation." The Texas Attorney General states that 40 CFR 51.166 does not require automatic updating of SIPs to incorporate pollutants that subsequently become subject to regulation.

b. Response to Comments

EPA disagrees with these comments. Contrary to the TCEQ's comments, as discussed elsewhere in this rulemaking preamble, the PSD requirements in the CAA and regulations do require that PSD SIPs address the applicability of PSD to pollutants newly subject to regulation. As discussed previously, the CAA PSD provisions and EPA's PSD regulations are clear that PSD applies to each newly regulated pollutant, whether a NAAQS pollutant or a non-NAAQS pollutant. Moreover, the CAA is clear that SIPs must include provisions to assure that CAA requirements are met. *See* CAA section 110(a)(2)(J) (each SIP must "meet the applicable requirements of * * * part C * * * (relating to prevention of significant deterioration of air quality * * *)"; CAA section 161 ("each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region [to which PSD applies]"). Accordingly, each PSD SIP must include provisions that address how PSD will apply to pollutants newly subject to regulation. As noted earlier in this preamble, there are several different ways for SIP to address PSD applicability to such pollutants, but SIPs must adopt one of those ways.

With respect to the Texas Attorney General, the comment that EPA's regulations do not require automatic updating of SIPs to incorporate such pollutants misses the point. In the Interim Final Rule and the proposal, EPA did not identify the gap in Texas's SIP PSD provisions as based on the lack of automatic updating to apply PSD to each pollutant newly subject to regulation. Rather, EPA identified the gap as the failure of the State, at the time it submitted and EPA approved the PSD program, to address such pollutants. The State could have specifically acknowledged the issue of the applicability of PSD to newly regulated pollutants and addressed that issue in several different ways. Providing an automatic updating mechanism is one way, which is what most of the other states do. Second, the State could have committed, in either the SIP itself or in a letter accompanying the SIP submittal, that the State would adopt and submit for approval SIP revisions to apply PSD to newly regulated pollutants, and the State could have indicated a schedule for it to do so. Third, it is possible that more general assurances by the State to address the issue could have passed muster. In addition, there may be other ways to address this issue. The record does not indicate that Texas specifically identified the issue or identified any ways that Texas would address the issue. Moreover, as discussed earlier in this preamble, Texas failed to demonstrate that it had adequate legal authority to regulate these pollutants.

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. Comments and Responses on the Use of CAA § 110(k)(6)

Comment: One commenter supported EPA's use of CAA section § 110(k)(6) to correct its previous approval of the Texas PSD program. This commenter asserted that the use of this mechanism is appropriate in this case, where serious flaws in Texas's SIP have become glaringly apparent, and, if left uncorrected, would cause immediate harm. EPA agrees with this commenter's assessment that this action is necessary

to correct this error in the Texas program.

Several other commenters, however, challenged the use of section 110(k)(6) in this instance. Commenters stated that section 110(k)(6) of the Act has been understood and was intended by Congress to be used as authority to make corrections of a "technical" or ministerial nature, such as "typographical errors." This section was not, according to commenters intended as a means to make unilateral, substantive changes in SIPs or major policy changes. These commenters view EPA's action here as directly contrary to the Act's cooperative federalism scheme.

Response: For the reasons noted earlier in this preamble, the natural meaning of the term "error" in the error correction provision is broad and as a result, the provision applies by its terms to any mistake. The explicit legislative history of the provision—what Congress said in the various reports and statements accompanying its passages—is sparse and does not illuminate its meaning. Because there is nothing in the statute or legislative history that suggests that Congress intended a meaning narrower than the natural meaning of the term, the natural meaning of the term controls. Commenters' assertions that this provision is limited to "technical" errors or "typographical errors" are conclusory and wholly unsupported.

For the reasons discussed elsewhere in this preamble, Texas's SIP was flawed and as a result, EPA's action in approving that flawed SIP was in error.

As a result, this rulemaking action is simply the correction of an error, as authorized under CAA § 110(k)(6). Contrary to some comments, this action is not based on a policy shift in EPA's administration of the PSD program. Nor does this action upset federalism concerns or constitute a claim of authority to unilaterally revise any action on any SIP submittal. EPA does not read section 110(k)(6) to provide unlimited discretion to act on SIP submissions, only to provide authority to make error corrections.

Comment: Commenters went on to assert that other historical uses of CAA section 110(k)(6) were uncontroversial edits to remove Federal enforceability of regulatory requirements that had been included or retained inadvertently and were made at the state's request. In contrast, according to these commenters, this rule imposes new requirements contrary to the state's wishes.

Response: EPA's previous use of the error correction provision makes clear that EPA has corrected errors many years after they occurred, and that EPA has corrected errors that are broader than merely technical or typographical errors. In addition, EPA's most recent use of the error correction provision was in the PSD Narrowing Rule, in which EPA again corrected errors in SIP approvals that occurred many years ago, and which relied on as broad an application of section 110(k)(6) as in the present rulemaking. Moreover, in the GHG PSD Narrowing Rule, EPA relied on the error correction mechanism without having first been asked to do so by some of the affected states, and, in fact, in the face of negative comments by some of the affected states. Even so, the PSD Narrowing Rule was not challenged in Court by any party.

In any event, for the reasons noted earlier in this preamble, EPA's action in this rulemaking qualifies as an error correction within the meaning of CAA section 110(k)(6). Whether the affected state—or any other party—agrees or disagrees that the SIP that is the subject of the error correction is flawed is not a criteria under CAA section 110(k)(6).

Comment: A commenter raised several concerns about EPA's interpretation of other provisions of CAA section 110(k)(6). For convenience, the relevant provisions state: "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."

A commenter focused on the requirement that EPA's action must *be* "*in the same manner*" as the action that EPA is correcting, and argued that this requirement limits EPA to, as a substantive matter, applying the same standard to Texas's SIP today as it did to the SIP when it was approved in 1992 and using the same record; and as a procedural matter, taking the same action, which, in this case, prevents EPA from converting an approval to a disapproval.

Response: EPA disagrees with this reading of the phrase "in the same manner." This phrase is not defined in section 110(k)(6). As a matter of *Chevron* step 1, or, in the alternative, *Chevron* step 2, the phrase refers to Administrative Procedure Act or, if applicable, CAA section 307(d) procedures. Thus, if the original action were a notice-and-comment rulemaking under the Administrative Procedure Act, then the error correction must follow the same procedure.[76] We see no basis for reading the phrase "in the same manner" more narrowly to limit an error correction of an approval to be only another approval, and not a disapproval. That strained reading is inconsistent with the purpose of the section, which is to allow for the correction of errors, a process that may well require reversing the initial action if found to be in error. Although EPA sees no basis for the substantive requirements that the commenter reads into the phrase, the record for the present action—which includes the relevant documents in the record for the 1992 approval—makes clear that EPA's 1992 action was in error, and nothing in CAA section 110(k)(6) limits the record for an error correction more narrowly.

Comment: A commenter argued that *EPA ignored the phrase "revise such action*." The commenter believes that section 110(k)(6) affords EPA no discretion to "revise" an approval action into a disapproval but instead limits the Agency to revising the contents of "such action" that it previously undertook. The commenter asserted that EPA does not "revise" an action by substituting another action for it; rather, EPA must take the same type of action, a reading reinforced by the requirement that the Agency act "in the same manner as the [original action]." The EPA may not "reconsider" or "replace" a SIP-related action. The commenter indicated that in this way, section 110(k)(6) is not a mechanism for revisiting a decision but for correcting mistakes in an action—using this section to reverse an approval offends both the participation requirements and the principles of the Act's SIP provisions.

Response: Section 110(k)(6) authorizes EPA to "revise" the action it determines to be in error "as appropriate." The term "revise" is not defined in section 110(k)(6). Its natural meaning is to "change" or "modify." *Webster's II New Riverside University Dictionary* (1988) at 1005. As a matter of *Chevron* step 1, or, in the alternative, *Chevron* step 2, the term is broad enough to encompass changing or modifying an approval to a disapproval. This is particularly so in light of the authorization under section 110(k)(6) to revise the action in error "as appropriate." Used in this context, the term "appropriate" indicates EPA is under a constraint of reasonableness in

[76] By comparison, if the original action were not a notice-and-comment action (such as a classification under CAA section 172(a)(1)(B)), then the correction must follow whatever process applied to the original action.

revising the action, but is not under the other constraints that commenter suggests. Thus, if EPA has a basis for revising an approval to a disapproval, then EPA may do so on grounds that this type of revision is "appropriate."

Comment: A commenter stated that *EPA ignored the phrase "as appropriate*." The commenter stated that this language serves to "keep EPA within bounds" and explained that EPA may revise an earlier action only "as appropriate" to correct its error in undertaking the earlier action, and not to effect a change in policy. The commenter added the following reasons (which are discussed further in other sections of this document) that EPA's actions are not appropriate: (i) It is not "appropriate" to single out Texas's SIP submission for disapproval based on a purported deficiency that is present in other states' SIPs. (ii) It is not "appropriate" to exercise section 110(k)(6)'s error correction provisions where EPA is simultaneously exercising its powers under section 110(k)(5), which affords states procedural protections EPA has refused to afford under section 110(k)(6).

Response: The term "as appropriate" should be viewed as highlighting the significant discretion that EPA has under the error correction provision to "revise" the action it found to be in error, as discussed earlier in this preamble. EPA responds elsewhere in this rulemaking preamble to the specific reasons the commenter gives as to why the commenter believes EPA's action was not appropriate.[77] It should be noted here that the various considerations the commenter cites would suggest the commenter's agreement that the term "appropriate" allows EPA to consider a wide range of factors, that is, to exercise broad discretion.

Comment: One commenter questioned whether EPA had made a mistake because the action taken to approve the SIP was what EPA intended to do and was not done unintentionally.

Response: EPA acted purposefully in fully approving the Texas SIP, but that does not mean that the full approval did not carry any element of an inadvertent error. As noted elsewhere in this rulemaking preamble, EPA and Texas both failed to look down the road and recognize that in all likelihood, EPA would newly subject additional pollutants to regulation, and thereby trigger the application of PSD to those additional pollutants, so that Texas's SIP needed to—but did not—address that situation.

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 of its program to pollutants newly subject to regulation or provide assurances that it had legal authority to apply its program to such pollutants. 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, address the applicability of its program to newly regulated pollutants and did in fact provide the requisite assurances, 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 Texas should be considered to have addressed the issue and to have provided the appropriate assurances, then EPA should be considered to have based its approval on those assurances. For example, EPA stated in approving the Texas PSD program that EPA was relying on the 1989 Texas PSD 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).

C. 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. For one thing, 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 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 to the extent it has not addressed the applicability of its PSD program to each pollutant newly subject to regulation, including non-NAAQS pollutants, and because it has not provided assurances of adequate legal authority to apply its PSD program to such sources.

D. 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

[77] The commenter added that it is not "appropriate" to exercise section 110(k)(6)'s error correction provisions to change a SIP approval into a disapproval where the Agency has made no finding that the purported SIP submission deficiency will directly harm public health or welfare. Commenter appears to suggest that section 110(k)(6) should be read to include the constraint that the provision is available only if EPA finds that error it seeks to correct. EPA sees no basis in the terms, legislative history, or logic of section 110(k)(6), or in EPA's previous error-correction actions, for reading this constraint into section 110(k)(6).

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. 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 15,720, 15723 (discussing prior action taken to limit approvals); 67 FR 69,139 (taking final action to amend prior approvals to limit their duration); 67 FR 46,618 (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 address the applicability of its PSD program 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 address pollutants newly subject to regulation, including non-NAAQS pollutants).

1. Comments Received on Reconsideration Under Section 301(a)

Several commenters questioned EPA's ability to use section 301(a) given that EPA already has the authority to take this action through the SIP revision process. There is no gap for the Agency to fill with its general rulemaking authority, so, according to these commenters, EPA cannot use this section of the CAA to authorize this SIP revision without going through the notice and comment process required for a SIP revision. One commenter goes on to question whether the enactment of section 110(k)(6) would have been necessary if EPA had authority under section 301(a).

2. Response to Comments

EPA's inherent authority to reconsider its actions in conjunction with CAA section 301(a) is not limited by the availability of the SIP revision process. That process entails the state submitting a revised SIP submission and EPA acting on it, which is fundamentally different than EPA reconsidering its action on the initial SIP submission without the state needing to submit a SIP revision. In addition, the reconsideration authority is broader than the section 110(k)(6) authority because the former is not necessarily limited to the correction of errors. And if, as commenters argue, the section 110(k)(6) authority is limited to only technical or typographical errors, then the reconsideration authority is substantially broader. For these reasons, the reconsideration authority should not be considered to have been pre-empted or otherwise eliminated by the availability of either the SIP revision process or the error correction process.

As for reasons why Congress would have added section 110(k)(6) if the reconsideration authority already existed, several reasons present themselves. Congress may have intended to codify into the CAA the reconsideration authority, which otherwise would have remained in the case law. In doing so, Congress established the criteria and process for error corrections. In addition, three years prior to the enactment of the 1990 CAA Amendments, the U.S. Court of Appeals for the Third Circuit (3rd Circuit) handed down a decision in *Concerned Citizens of Bridesburg* v. *U.S. EPA,* 836 F.2d 777 (1987), which imposed severe limits on EPA's

authority to reconsider its actions. As discussed elsewhere in this preamble, although the legislative history is not explicit, section 110(k)(6) suggests by its terms that Congress intended the provision to in effect overturn that decision.

E. 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 77,698. 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 submittals—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—7 of the 13 states—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. An eighth state (Kentucky) took the same approach for one of its counties (Jefferson County), except that it selected the slightly later date of January 1, 2011.[78] Five states (including Kentucky for the rest of its state) 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 would be no permitting authority in place in those five states to issue GHG permits on January 2, 2011, when GHG-emitting sources became 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."[79] 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.[80] Moreover, Texas indicated that during 2011, some 167 construction or modification projects would be affected,[81] 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, has 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 and 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 approval and partial disapproval rulemaking at this time. This approach allowed EPA to implement a FIP immediately as an interim rule, instead of waiting until December, 2011, and as a result, EPA has been able to act as the permitting authority in Texas and in that capacity, allow Texas sources to avoid delays in construction or modification. This same approach allows EPA to continue to keep the FIP in place and continues to act as the permitting authority so that there are no gaps in coverage for sources to obtain permits.

[78] 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 75 FR 77,698 (December 13, 2010).

[79] Texas's 60-day letter, p. 1.

[80] 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).

[81] *See* Texas "Motion to Stay Three GHG Actions" 41, *Coalition for Responsible Regulation* v. *EPA,* No. 09–1322 (and consolidated cases).

With the interim final rule and 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 the SIP would be the basis for each of those actions.[82]

This is the 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.[83]

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]henever the Administrator finds" that the SIP is substantially inadequate. CAA section 110(k)(6) applies "[w]henever 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 currently 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. The FIP will remain in place until the state submits, and EPA approves, a SIP revision.

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.[84] 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 part of the FIP that concerns GHGs. 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, was 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

[82] 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.

[83] 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.

[84] 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.

EPA's request that Texas itself identify a deadline.[85] 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 77,710/2. 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 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," [86] 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 uncertainty over how to apply PSD requirements to GHG-emitting sources.[87] 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 DC 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.

F. 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.

1. Comments on the Relationship of This Rulemaking to Other States

Industry commenters, in addition to the State of Texas, raised concerns about this rule treating Texas differently than other states. Other states, such as Arizona, Arkansas, Connecticut, Florida, Idaho, and Kansas, do not have SIPs that automatically update to incorporate new requirements, and so regulate new pollutants in a "stepwise" fashion, according to these commenters. Moreover, these commenters argue that EPA's approval of Texas's SIP cannot be considered to have been in error because, they say, EPA approved other SIPs that, like Texas's, did not automatically apply PSD to each pollutant newly subject to regulation.

Several industry commenters also stated that they believe that EPA's rationale for this rule, read in conjunction with EPA's PSD Narrowing Rule 75 FR 8253682,536 (December 30, 2010) makes it impossible for a state to ever have an approvable SIP. This is because, according to these commenters, states can only have an approvable SIP if they automatically incorporate Federal requirements when EPA adopts them. However, the PSD Narrowing Rule was required because those states that do "impose PSD applicability on new pollutants in an unconstrained manner" in their SIPs do not ensure that states have adequate funding and personnel to implement the new SIP requirements, according to commenters.

2. Response to Comments

EPA disagrees with the comments that we are singling out Texas for unfair treatment for its failure to automatically update its SIP to incorporate new requirements. Texas is, in fact, unlike each of these other states. Texas, uniquely among all the states, has stated that it will not implement PSD requirements for GHGs either by revising or committing to revise its SIP. It is this refusal that has shined a spotlight on EPA's error in previously approving Texas's SIP, for the reasons discussed earlier in this preamble. Moreover, each of the other states identified by commenters has taken measures to ensure that permitting for GHG-sources in its state will be available. Arizona, Arkansas, Florida, and Idaho each have a FIP in place to allow EPA to issue permits to GHG-emitting sources. Connecticut has submitted a SIP revision to enable the state to assume responsibility for PSD permitting of these sources. Kansas already has an approved SIP that applies PSD to GHGs. Accordingly, it has never been necessary for EPA to inquire, and EPA has not inquired, into whether these states have flaws in their PSD SIPs. In addition, the error correction provision is discretionary: it provides that EPA "may" undertake an

[85] 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.

[86] Texas 60-day letter, p. 1.

[87] Texas 30-day letter.

error correction when it finds that its previous action was in error. Accordingly, even if EPA did inquire into the SIP PSD program approvals in these other states, EPA would not be required to issue an error correction for them. In light of the fact that these states are addressing their GHG-emitting sources as described previously, EPA sees no need at present to consider an error-correction action with respect to those states. Finally, EPA disagrees with the commenters' argument that EPA's approval of these several other PSD SIPs—despite their lack of an automatic updating mechanism—means that EPA's approval of Texas's PSD SIP was not in error. As discussed elsewhere in this rulemaking preamble, the Texas SIP was flawed because it did not address the applicability of PSD to pollutants newly subject to regulation, not because it did not automatically apply PSD to such pollutants. Commenters have not shown that the several other SIPs they discuss did not address the applicability of PSD to pollutants newly subject to PSD in some way other than automatic updating. And if any other of the SIPs, or even all of them, did not do so, then it is possible that those SIPs were flawed in the same manner as Texas's, and that in approving them, EPA repeated the same error that it made in approving Texas's SIP. But to reiterate, section 110(k)(6) is discretionary with EPA and EPA has no reason to review those SIPs.

EPA also disagrees with the commenters that contend that no SIP could possibly be approvable given the rationales presented for this rule and the SIP Narrowing Rule. In this action, EPA identifies as the flaw in the SIPs the failure to address the applicability of PSD to newly regulated pollutants (along with the failure to provide adequate assurances of legal authority to apply PSD to such pollutants). As noted earlier in this preamble, there are several ways that states could address this flaw, and although providing for automatic updating is one way—and the one that most states have adopted—it is not the only way. A state could, for example, commit to adopt a SIP revision to apply PSD to a newly regulated pollutant. In the course of addressing the applicability of PSD to a newly regulated pollutant, the state could address any associated resource issues. Moreover, as EPA explained in the SIP Narrowing rule, the flaw that needed correcting by that rule was the "combination of that unconstrained applicability and the failure of the SIP to plan for adequate resources for that applicability, *and to do so on the appropriate time-table.*" (emphasis added) 75 FR 82,542 (December 30, 2010). There are, in fact, some states that were able to revise their SIPs before January 2, 2011. Six other states and four districts within states were able to interpret their SIPs to regulate GHG emissions only above the Tailoring Rule thresholds, and needed no further action by EPA. There is, then, no "conundrum" for a state that does not adopt EPA regulations by reference.

G. Federal Implementation Plan

1. 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 partial 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.

2. 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 53,889/2.

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.

3. Substance of GHG PSD FIP

a. Components of FIP

The FIP consists of two components. The first mirrors the GHG PSD FIP that EPA promulgated 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 consists of the EPA regulations found in 40 CFR 52.21, including the 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 CO_2e 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 CO_2e, and (ii) existing sources that emit GHGs in the amount of at least 100,000 tpy CO_2e, 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 CO_2e).
>
> 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 53,889/3 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.

b. 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, Texas, in this case, for all other pollutants—will require 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. EPA delegated the authority to issue PSD permits to GHG-emitting sources to one state, and is working toward similar delegations in other states. In addition, EPA has provided training and guidance for permitting authorities in determining GHG BACT for these 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.

4. 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 53,889/2–3.

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, including Texas, 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.

In addition, if Texas does not submit a SIP revision by December 1, 2011, in response to the SIP Call, EPA intends to promulgate, on or about December 2, 2011, the FIP associated with the SIP call. The GHG provisions of the FIP promulgated with this error correction rulemaking will be fully consistent with the provisions in the FIP associated with the SIP call. The remaining components of the FIP promulgated with this error correction rulemaking,

which concern other non-criteria pollutants other than GHGs, will also remain in place.

5. 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. 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.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulations and Regulatory Review

Under Executive Orders (EO) 12866 (58 FR 51,735, October 4, 1993) and 13563 (76 FR 3,821, January 21, 2011), 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 EOs 12866 and 13563 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) and title V (see 40 CFR parts 70 and 71) under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0003 and OMB control number 2060–0336 respectively. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comments rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined in the U.S. Small Business Administration's (SBA) regulations at 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

Although this rule would lead to Federal permitting requirements for certain sources, those sources are large emitters of GHGs. After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities.

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 section. 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. The CAA specifies conditions under which states may request, and EPA may approve state implementation of CAA requirements. The CAA also specifies the action EPA is to take, including issuing a FIP, when states have not met their requirements under the CAA. This rulemaking does not change that distribution of power between the states and EPA. 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 identified in the Texas SIP 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 solicited comment on the proposal for this action. Comments from state government organizations are addressed within this preamble and supporting materials available in the docket for this rulemaking.

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 67,249, 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 19,885, 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 28,355 (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. This action will provide energy facilities in Texas that are large emitters of GHG a mechanism to get necessary PSD permits to construct or modify.

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 7,629, 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 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 May 1, 2011. 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).

VI. 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—led 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 is a determination is 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 July 5, 2011.

Pursuant to CAA section 307(d)(1)(B), this action is subject to the requirements of CAA section 307(d) to the extent it promulgates a FIP under CAA section 110(c). In addition, pursuant to CAA section 307(d)(1)(V), which authorizes the Administrator to determines that actions other than those specifically listed in CAA section 307(d)(1) are subject to the provisions of CAA section 307(d), EPA is making that determination for this action to the extent it constitutes an error correction under CAA section 110(k)(6); a rescission of EPA's previous approval and a limited approval and disapproval of Texas's PSD SIP, under CAA section 110(k)(3); or any other action.

IX. Statutory Authority

The statutory authority for this action is provided by sections 101, 110, 114, 116, 301, and 307(d) of the CAA as amended (42 U.S.C. 7401, 7410, 7414, 7416, 7601, and 7607(d)).

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: April 22, 2011.

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 52.2305 is added to read as follows:

§ 52.2305 What are the requirements of the Federal Implementation Plan (FIP) to issue permits under the Prevention of Significant Deterioration requirements to sources that emit greenhouse gases?

(a) The requirements of sections 160 through 165 of the Clean Air Act are not met to the extent the plan, as approved, for Texas does not apply with respect to emissions of the pollutant GHGs from certain stationary sources. Therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby made a part of the plan for Texas for:

(1) Beginning on May 1, 2011, the pollutant GHGs from stationary sources described in § 52.21(b)(49)(iv), and

(2) Beginning July 1, 2011, in addition to the pollutant GHGs from sources described under paragraph (a)(1) of this section, stationary sources described in § 52.21(b)(49)(v).

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

(c) In addition, the United States Environmental Protection Agency shall take such action as is appropriate to assure the application of PSD requirements to sources in Texas for any other pollutants that become subject to regulation under the Federal Clean Air Act for the first time after January 2, 2011.

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