

<http://www.epa.gov/otaq/stateresources/transconf/cursips.htm>.

SUPPLEMENTARY INFORMATION: This notice is simply an announcement of a finding that EPA has already made. EPA, Region 4, sent a letter to TDEC on July 20, 2010, stating that the MVEBs identified for Knoxville in Tennessee's maintenance SIP revision, submitted on July 14, 2010, are adequate and must be used for transportation conformity determinations in the Knoxville Area. Originally, on June 11, 2010, TDEC submitted its maintenance plan for parallel processing which allowed EPA to initiate our public comment period for adequacy of the MVEBs contained in Tennessee's maintenance plan.

EPA posted the availability of the Knoxville Area MVEBs on EPA's Web site on June 14, 2010, as part of the adequacy process, for the purpose of soliciting comments. The adequacy comment period ran from June 15, 2010, through July 14, 2010. During EPA's adequacy comment period, no comments were received on the Knoxville Area MVEBs. Through this notice, EPA is informing the public that these MVEBs are adequate for transportation conformity. This finding has also been announced on EPA's conformity Web site: <http://www.epa.gov/otaq/stateresources/transconf/pastsips.htm>. The adequate MVEBs are provided in the following table:

**KNOXVILLE, TENNESSEE 8-HOUR
OZONE MVEBs**
[Tons per day]

	2024
NO _x	36.32
VOC	25.19

Transportation conformity is required by section 176(c) of the Clean Air Act. EPA's conformity rule, 40 CFR Part 93, requires that transportation plans, programs and projects conform to state air quality implementation plans and establishes the criteria and procedures for determining whether or not they do so. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS.

The criteria by which EPA determines whether a SIP's MVEBs are adequate for transportation conformity purposes are outlined in 40 CFR 93.118(e)(4). We have also described the process for determining the adequacy of submitted SIP budgets in our July 1, 2004, final rulemaking entitled, "Transportation Conformity Rule Amendments for the

New 8-Hour Ozone and PM_{2.5} National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule Changes" (69 FR 40004). Please note that an adequacy review is separate from EPA's completeness review, and it should not be used to prejudice EPA's ultimate approval of Tennessee's 1997 8-hour ozone SIP revision for the Knoxville Area. Even if EPA finds a budget adequate, the SIP revision could later be disapproved.

Within 24 months from the effective date of this notice, the transportation partners will need to demonstrate conformity to the new MVEBs, if the demonstration has not already been made, pursuant to 40 CFR 93.104(e). See 73 FR 4419 (January 24, 2008).

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

Dated: September 3, 2010.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2010-22973 Filed 9-14-10; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2010-0620; FRL-9199-8]

Approval and Promulgation of Air Quality Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action approving revisions to the Texas PSD State Implementation Plan (SIP). EPA is approving a SIP revision submitted February 1, 2006, as amended by a SIP revision submitted July 16, 2010. This action makes no substantive changes to the Texas PSD SIP; it merely approves reorganization and renumbering of the Texas PSD SIP rules. Further, the July 16, 2010 submission corrects certain deficiencies identified in EPA's September 23, 2009 proposed disapproval. The EPA is approving these revisions pursuant to section 110 and part C of the Federal Clean Air Act (Act or CAA).

DATES: This direct final rule will be effective on November 15, 2010 without further notice, unless EPA receives relevant adverse comments by October

15, 2010. If EPA receives such comments, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R06-OAR-2010-0620, by one of the following methods:

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

- **U.S. EPA Region 6 "Contact Us"**

Web site: <http://epa.gov/region6/r6coment.htm> Please click on "6PD" (Multimedia) and select "Air" before submitting comments.

- **E-mail:** Mr. Stanley M. Spruiell at spruiell.stanley@epa.gov. Please also cc the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

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

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

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

Instructions: Direct your comments to Docket ID No. EPA-R06-OAR-2010-0620. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your

name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at (214) 665-7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

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

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

SUPPLEMENTARY INFORMATION:

Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

Outline

- I. What action is EPA taking?
- II. What did the State submit?
- III. What is the background for this action?

IV. What comments did EPA receive on the proposed disapproval of the 2006 SIP revision submittal?

V. What are the grounds for approval?

VI. Final Action

VII. Statutory and Executive Order Reviews

I. What action is EPA taking?

EPA is approving the revisions to the Texas SIP PSD Program (Program) that amend Title 30 of the Texas Administrative Code (30 TAC) 116.160—Prevention of Significant Deterioration Requirements. This includes SIP revisions to the Program as follows: The revision which relates to the PSD Program that Texas submitted February 1, 2006 (as adopted by the Texas Commission on Environmental Quality (TCEQ) on January 11, 2006), and a revision submitted July 16, 2010 (as adopted by TCEQ on June 2, 2010) that amends the 2006 submittal. We are approving these revisions as meeting the Major NSR PSD SIP requirements.

Specifically, we are approving the nonsubstantive reorganizing and renumbering of 30 TAC 116.160 as submitted in 2006 and as revised in 2010. Our final action ensures that the Texas PSD SIP remains the same in substance with improvement in clarity.

II. What did the State submit?

On September 23, 2009, EPA proposed to disapprove the SIP revisions submittals relating to Prevention of Significant Deterioration (PSD); Nonattainment NSR (NNSR) for the 1-Hour Ozone Standard, NNSR for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit (under Docket No. EPA-R06-OAR-2006-0133). See the proposal at 74 FR 48467, at 48472. We proposed to disapprove the submitted PSD revisions in 30 TAC 116.160 because:

- This 2006 SIP revision submittal removed from the State rules the incorporation by reference of the Federal PSD definition of “best available control technology (BACT)” as defined in 40 CFR 51.166(b)(12). The currently approved PSD SIP includes the Federal definition of PSD BACT. See 30 TAC 116.160(a); and
- The 2006 SIP submittal also removed from the State rules, the PSD SIP requirement at 40 CFR 52.21(r)(4) that the State previously had incorporated by reference. The currently approved PSD SIP mandates this requirement. See 30 TAC 116.160(a). This provision specifies that if a project becomes a major stationary source or major modification solely because of a relaxation of an enforceable limitation on the source or modification’s capacity to emit a pollutant, then the source or

modification is subject to PSD as if construction had not yet commenced. The State’s action in eliminating that requirement means the State’s rules will not regulate these types of major stationary sources or modifications as stringently as the Federal program or the current approved Texas PSD SIP.

The 2006 SIP revision submittal included a nonsubstantive reorganizing, and renumbering of the State’s PSD rules but for the removal of the two requirements described above. The reorganization and renumbering of 30 TAC 116.160 (submitted in 2006) includes the following:

- A revision to 30 TAC 116.160(a);
 - Deletion of the existing 30 TAC 116.160(b);
 - Addition of a new 30 TAC 116.160(b);
 - Deletion of the existing 30 TAC 116.160(c), including the removal of the two definitions of “building, structure, facility, or installation” and “secondary emissions” from 30 TAC 116.160(c), which had duplicated the definitions of those terms as currently defined in the SIP at 30 TAC 116.12(4) and (17), respectively;
 - Portions of the existing 30 TAC 116.160(a) and (b) were reorganized into a new and revised 30 TAC 116.160(c)(1), (2), and (3);
 - Moving the existing 30 TAC 116.160(d) into a new 30 TAC 116.160(c)(4); and
 - Finally, moving the existing 30 TAC 116.160(e) into new 30 TAC 116.160(d).
- EPA finds that these submitted changes are nonsubstantive and continue to meet the Act and EPA’s PSD SIP regulations, with the exception of the removal of the incorporation of the PSD BACT definition in 40 CFR 52.21(b)(12) and the removal of the incorporation of the provisions in 40 CFR 52.21(r)(4) PSD SIP requirement.
- On July 16, 2010, TCEQ submitted revisions to 30 TAC 116.160. These revisions revised the State’s rules as follows:
- Incorporated by reference the federal PSD BACT definition in 40 CFR 52.21(b)(12). See 30 TAC 116.160(c)(1)(A). This corrects a deficiency identified in the 2009 proposal.
 - Incorporated by reference the requirements of 40 CFR 52.21(r)(4). See 30 TAC 116.160(c)(2)(A). This corrects a deficiency identified in the 2009 proposal.
 - Incorporated by reference the requirements of 40 CFR 52.21(j)—Control technology review. See 30 TAC 116.160(c)(2)(C). This provision identifies the circumstances under which PSD BACT must be required for

the construction of a major stationary source and a major modification that is subject to PSD.

TCEQ adopted and submitted for the first time, incorporation by reference of the Federal PSD requirement at 40 CFR 52.21(j) for approval by EPA into the Texas PSD SIP to ensure that it is clear that major stationary sources and major modifications in attainment/unclassifiable designated areas must meet the PSD requirement by performing a PSD BACT analysis. The Texas NSR SIP includes not only the federal PSD BACT definition but also a requirement for a source to perform a State BACT analysis. See 30 TAC 116.111(a)(2)(C). EPA relied upon this SIP provision in its 1992 original approval of the Texas PSD SIP as meeting the PSD requirement of 40 CFR 52.21(j). See 54 FR 52823, at 52824–52825, and 57 FR 28093, at 28096–28096. Both Texas and EPA interpreted this SIP provision to require either a

Minor NSR BACT determination or a Major PSD BACT determination. Since EPA's approval of the Texas PSD SIP in 1992, there has been some confusion about the distinction between a State Minor NSR BACT definition and a PSD Major NSR BACT definition and the requirement that a source must perform the relevant PSD BACT analysis.¹ TCEQ's July 2010 submittal's inclusion of the PSD requirement of 40 CFR 52.21(j) is aimed at clarifying the Texas PSD SIP in this respect.

Based upon our review, we find that the 2010 SIP revision submittal corrects the deficiencies identified in the September 2009 proposed disapproval concerning the 2006 SIP revision submittal. Consequently, because Texas has corrected the deficiencies, we are now approving the PSD Program revisions submitted February 1, 2006 and as amended July 16, 2010. Our final action ensures that the substance of the Texas PSD SIP continues to remain the

same and approval of the two SIP revision submittals improves the clarity of the Texas PSD SIP. See sections III through V of this preamble, the proposal FRN, and the technical support document (TSD) for further information on the basis for approving this submitted Texas PSD Program. Therefore, EPA is approving the amendments to 30 TAC 116.160, as submitted on February 1, 2006 and as amended on July 16, 2010.

III. What is the background for this Action?

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

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

Title of SIP submittal	Date submitted to EPA	Date of state adoption	Regulations affected
Federal New Source Review Permit Rules Reform.	2/1/2006	1/11/2006	30 TAC 116.160—Prevention of Significant Deterioration Requirements. - The Rule was changed to reorganize existing SIP-approved rule. - This change resulted in removal of cross-references to 40 CFR 52.21(b)(12) and 52.21(r)(4) which are critical to administration and enforcement of PSD requirements. - The change included the removal of definitions of “building, structure, facility, on installation” and “secondary emissions” in 30 TAC 116.160(c)(1)–(2), respectively. The removal of these definitions is nonsubstantive because these terms are currently defined with the same definitions in the Texas SIP at 30 TAC 116.12(4) and (17), respectively.
Best Available Control Technology (BACT) in Prevention of Significant Deterioration (PSD) Permitting.	7/16/2010	6/2/2010	30 TAC 116.160—Prevention of Significant Deterioration Requirements. - Re-instatement of cross-references to 40 CFR 52.21(b)(12) and 52.21(r)(4). - Added cross-reference to 40 CFR 52.21(j)—Control technology review.

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

Section	Title	Date submitted	Date of state adoption	Comments
Chapter 116—Control of Air Pollution by Permits New Construction or Modification Subchapter B—New Source Review Permits Division 6—Prevention of Significant Deterioration Review				
Section 116.160	Prevention of Significant Deterioration Requirements.	2/1/2006	1/11/2006	Rule changed to reorganize existing SIP-approved rule.

¹ The January 1972 Texas NSR rules, as revised in July 1972, require a proposed new facility or modification to utilize “best available control technology, with consideration to the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility.” This definition of BACT is from

the Texas Clean Air Act. When EPA approved the Texas PSD program SIP revision submittals, including the State's incorporation by reference of the Federal definition of PSD BACT, in 1992, both EPA and Texas interpreted the use of the TCAA BACT definition to be for Minor NSR SIP permitting purposes only. EPA specifically found

that the State's TCAA BACT definition did not meet the Federal PSD BACT definition. We required the use of the Federal PSD BACT definition for PSD SIP permitting purposes. See the proposal and final approval of the Texas PSD SIP at 54 FR 52823 (December 22, 1989) and 57 FR 28093 (June 24, 1992).

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

Section	Title	Date submitted	Date of state adoption	Comments
		7/16/2010	6/2/2010	- This change resulted in removal of cross-references to 40 CFR 52.21(b)(12) and 52.21(r)(4) which are critical to administration and enforcement of PSD requirements. - Re-instatement of cross-references to 40 CFR 52.21(b)(12) and 52.21(r)(4). - Added cross-reference to 40 CFR 52.21(j)—Control technology review.

IV. What comments did EPA receive on the proposed disapproval of the 2006 SIP revisions submittal?

In response to our September 23, 2009, proposed disapproval of the submitted revisions to Texas' PSD Program, we received comments from the following: Baker Botts, L.L.P., on behalf of BCCA Appeal Group (BCCA); Baker Botts, L.L.P., on behalf of Texas Industrial Project (TIP); Bracewell & Guiliani, L.L.P., on behalf of the Electric Reliability Coordinating Council (ERCC); Gulf Coast Lignite Coalition (GCLC); Texas Chemical Council (TCC); Texas Commission on Environmental Quality (TCEQ); Members of the Texas House of Representatives; University of Texas at Austin School of Law—Environmental Clinic (the Clinic) on behalf of: Environmental Integrity Project, Environmental Defense Fund, Galveston-Houston Association for Smog Prevention, Public Citizen, Citizens for Environmental Justice, Sierra Club Lone Star Chapter, Community-In-Power and Development Association, KIDS for Clean Air, Clean Air Institute of Texas, Sustainable Energy and Economic Development Coalition, Robertson County: Our Land, Our Lives, Texas Protecting Our Land, Water and Environment, Citizens for a Clean Environment, Multi-County Coalition, and Citizens Opposing Power Plants for Clean Air.

Below is a summary of the comments and our responses.

Comment 1: TCEQ commented on the lack of a specific definition of PSD BACT and the absence of a requirement contained in 40 CFR 52.21(r)(4). TCEQ noted that although these references are currently missing from 30 TAC 116.160, its permitting actions are implemented in a manner that does not circumvent Federal New Source Review (FNSR) requirements and does not allow a control technology review to be conducted that results in a technology that is less than PSD BACT as defined in the federal rule. TCEQ agrees that if a project becomes a major source or major modification through the

relaxation of an enforceable limitation, PSD review is required, and TCEQ complies with that requirement in its permitting actions. The missing references are oversights, and TCEQ agreed to adopt revisions to 30 TAC 116.160 to include these provisions.

Response: EPA acknowledges TCEQ's description of how it implements the submitted Program. However, our evaluation considers whether a submitted SIP revision that removes a statutory requirement can still meet the requirements of the Act. In the proposal, EPA explained that the removal of a statutory requirement from a State's program renders a SIP revision unapprovable because the removal does not meet the requirements of the Act. PSD BACT is not only a defined statutory and regulatory term; it is also a central requirement of the Act. Accordingly, a state's submission of a revision that removes the requirement that all new major stationary sources or major modifications install, at a minimum, PSD BACT as defined by the Act creates a situation where the submitted SIP revision violates the Act and also would be a relaxation of the requirements of the SIP. In the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12) and the requirement contained in 40 CFR 52.21(r)(4). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 2: The Clinic supported EPA's proposed positions. The Clinic further comments that instead of implementing the top-down approach consistent with EPA's PSD guidance, TCEQ uses its "three-tier" guidance, a process that does not always require a detailed analysis of the most effective emission control alternatives and is less stringent than the top-down procedure. The Clinic maintains that Texas's definition and implementation of BACT are insufficient. This results in Texas implementing BACT such that it fails to

fulfill the technology forcing intent of the Act and results in weaker emission limitations—and thus more pollution. EPA must take immediate action to ensure that Texas is properly implementing the federal SIP-approved definition of BACT, including rejection of Texas's use of its current BACT guidance.

Response: In the July 16, 2010, SIP submittal TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). See 30 TAC 116.160(c)(1)(A), submitted July 16, 2010. By re-instating the federal definition of PSD BACT into the State's rules, the PSD Program now meets EPA's PSD SIP requirements and is consistent with the approved Texas PSD SIP. This final rulemaking only addresses the approvability of the Texas PSD SIP revision submittals. Therefore, those comments related to other EPA actions and the State's implementation of the PSD SIP are outside the scope of this rulemaking action.

Comment 3: Members of the Texas House of Representatives commented that Texas is applying a definition of BACT, and using a BACT determination process that is significantly less stringent than required by federal law. Consequently, Texas industrial facilities emit more pollution than similar facilities in other states. They further comment that use of federal BACT alone will not be sufficient for the State to achieve and maintain attainment of the NAAQS and protect the health and welfare of facilities downwind of these new sources. They recommend that EPA adopt procedures necessary to ensure that TCEQ has explicit authority and direction to analyze individual and cumulative effects of emissions from proposed significant point sources on regional ozone levels when considering a permit application. Analysis of ozone effects should include photochemical modeling of impacts to downwind areas under typical high ozone conditions.

Response: The comments that (1) the use of federal PSD BACT alone will not

be sufficient for the State to achieve and maintain attainment of the NAAQS and protect the health and welfare of facilities downwind of these new sources, and (2) the suggestion that EPA conduct a rulemaking, are outside the scope of this rulemaking action. The issue of how TCEQ implements the Texas PSD SIP to make its PSD BACT determinations is not the subject of this rulemaking action and therefore outside the scope of this action. Based upon TCEQ's July 2010 SIP revision, which re-instates into the TCEQ rules the federal PSD BACT definition, its PSD BACT definition is EPA's PSD BACT definition.

Comment 4: BCCA, TIP, ERCC, GCLC and TCC commented that Texas submitted a revision to 30 TAC 116.160(a) and a new section 116.160(c)(1) and (2) on February 1, 2006, as a SIP revision to the Texas PSD SIP. This SIP revision reorganized the earlier SIP-approved rules. These commenters refer to TCEQ's plans to address this matter in rulemaking that should resolve EPA concerns regarding the Texas PSD program. *See also Hall v. United States EPA*, 273 F.3d 1146, 1160 (9th Cir. 2001) stating that EPA must consider anticipated revisions in determining whether the State will achieve attainment.

Response: EPA reviews a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3). *See also BCCA Appeal Group v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). This includes an analysis of the submitted regulations for their legal interpretation. The Court of Appeals, in *Hall v. United States EPA*, stated that "the objective of EPA's analysis is to determine whether the ultimate effect of a state's choice of emission limitations is compliance with the NAAQS."² The court did not require EPA to consider anticipated revisions when evaluating particular revisions. The court only required that EPA must be able to conclude the "particular plan revision before it is consistent with the development of an overall plan."³ At the time of EPA's proposal, the anticipated revisions had not been submitted to EPA for approval as a SIP revision and therefore could not be considered. In this action, EPA has considered the subsequent revision to Texas' PSD program submitted July 16, 2010. Based upon our evaluation of the July 2010, SIP revision, we conclude

that Texas has corrected the deficiencies identified in the proposal.

Comment 5: BCCA and TIP commented that the term BACT has been defined by TCEQ in strict accordance with the statutory BACT requirement in the TCAA. Specifically, 30 TAC 116.10(3) defines BACT as "BACT with consideration given to the technical practicability and the economic reasonableness of reducing or eliminating emissions from the facility." ERCC commented that Texas has an adequate and legally defensible definition of BACT, which is allowable under case law, EPA guidance, and rulings from the Environmental Appeals Board. Contrary to EPA's statements in the proposed disapprovals, States have flexibility in their definition of BACT and implementation of BACT as long as the statutory factors in the BACT definition are present in the state's analysis. The commenters commented that EPA has made no finding that Texas' BACT definition is contrary to, or less stringent than, the Federal definition of BACT. Nonetheless, EPA is proposing the drastic action of disapproving the entire Texas PSD program. Such disapproval would also discard all the benefits of the 2002 NSR Reform Rules. They comment that EPA would place Texas permittees at a severe disadvantage to all other permittees throughout the country that have the benefit of the 2002 NSR reforms rules. GCLC commented that the Texas BACT assessment process is legally valid as it has been and continues to be in full compliance with FCAA requirements. Texas has a three-tiered BACT approach that has been previously approved by the EPA. This policy, as demonstrated in the TCEQ guidance document "Evaluating Best Available Control Technology (BACT) in Air Permit Applications" outlines BACT policy in the state. Drafted in April 2001 it has been the primary guidance document for both permittees and protestant for BACT assessment. It predates the Texas February 2006 submittal by almost five years and continues to be the primary guidance document regarding BACT after the submittals; BACT has been consistently applied by the TCEQ before and after the submitted changes to Chapter 116 of Title 30 of the TAC.

Response: EPA disagrees with the commenters about the term PSD BACT, the flexibility a state has in its definition of PSD BACT and that EPA has not made a finding that Texas' BACT definition is contrary or less stringent than the Federal definition of PSD BACT. As discussed in the September 23, 2009, proposed disapproval of the

submitted 2006 SIP revisions to 30 TAC 116.160, EPA in its original approval of the Texas PSD SIP, specifically found that the BACT definition (derived from the TCAA) did not meet the federal PSD BACT definition. *See* 54 FR 52823 (December 22, 1989) and 57 FR 28093 (July 24, 1992). For proposed and final approval of the original Texas PSD SIP, Texas chose to incorporate by reference the Federal PSD BACT definition and submitted it for approval by EPA as part of the Texas PSD SIP. Upon EPA's original approval of the Texas PSD SIP, both EPA and Texas interpreted the TCAA BACT definition as being the Minor NSR BACT definition for Minor NSR permits.⁴ *See* 74 FR 48467, at 48472, footnote 4, and footnote 1 in this action.

EPA's review was in accordance with the requirements of the CAA. EPA is not required to base its proposed disapproval on any determination that (a) depended on the definition as applied, and (b) yielded a determination less strict than would result from application of the "federal definition."

Under EPA's revised major NSR SIP regulations, as promulgated on December 31, 2002 (67 FR 80186) and reconsidered with minor changes on November 7, 2003 (68 FR 63021), to be approved as meeting the 2002 revised major NSR SIP requirements, a State submitting a customized major NSR SIP revision must demonstrate why its program and definitions are in fact at least as stringent as the major NSR revised base program. *See* 67 FR 80185, at 80241. Texas did not submit such a demonstration. Furthermore, in the July 16, 2010, SIP revision submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal. *See* response to comment 2 above for further information.

Comment 6: GCLC commented that TCEQ's three-tier approach to PSD BACT determinations meets the requirements of section 165 of the CAA, ensuring that facilities receiving PSD permits in the state are required to utilize PSD BACT.

⁴ In a separate action published in today's **Federal Register**, EPA is disapproving the submitted regulatory definition for BACT (derived from the TCAA) in 30 TAC 116.10(3) because it is not clear that this BACT applies only for Minor NSR. *See* that notice for further information. We wish to note that TCEQ has proposed revisions to the definition to clarify its use is only for Minor NSR but has not submitted it yet to EPA for action as a SIP revision.

² *Id.* at 1159.

³ *Id.* at 1160.

Response: The issue of how TCEQ implements the Texas PSD SIP to make its PSD BACT determinations is not the subject of this rulemaking action and therefore outside the scope of this action. The 2006 submitted revision, if approved, would have removed the PSD BACT definition (as defined by the Act) from the Texas PSD SIP. In the July 16, 2010, SIP submittal, however, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 7: BCCA, TIP, ERCC, and TCC commented that the Texas regulations have continuously carved out 40 CFR 52.21(j), concerning control technology review, which is the federal BACT requirement, from the Texas PSD regulations. This is true from 1992 when EPA first granted authority to Texas to administer PSD permitting. As part of the 1992 approval, EPA explained why the federal control technology review requirement of Section 52.21(j) could be properly excluded by Texas under the federal Clean Air Act. *See* 54 FR 52824–52825 (Dec. 22, 1989). EPA then stated in the final rule approving the Texas PSD program that the federal control technology review requirement, which requires BACT for PSD applications, was “not necessary for approval of the Texas Program.” *See* 57 FR 28093–28094 (June 24, 1992).

Response: The 2006 SIP revision submittal removed from the State rules the incorporation by reference of the Federal PSD definition of “best available control technology (BACT)” as defined in 52.21(b)(12). The currently approved Texas PSD SIP includes the Federal definition of BACT. *See* 30 TAC 116.160(a). This submitted SIP revision violates the Act and relaxes the requirements of the current Texas SIP. In the July 16, 2010, SIP submittal, however, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). TCEQ also incorporated by reference 40 CFR 52.21(j). TCEQ recognized that over the years since EPA’s original approval of the Texas PSD SIP, there was confusion about the difference between the PSD BACT definition and the requirement to conduct a PSD BACT determination versus the State’s BACT definition and the requirement to conduct a Minor NSR BACT determination. Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in

the proposal and in addition addressed a potential ambiguity.

Comment 8: TCC commented that one can search the entire Texas Clean Air Act, which is the sole authority under which TCEQ can issue any permits, and find no mention of PSD at all; again, the governing law establishes the need for BACT for all permits, major or minor. And the governing statute does not define BACT beyond its own terms, leaving substantial degrees of freedom for TCEQ to compel the best available control technology. TCEQ’s implementing rules also do not further define BACT at all, either, other than to emphasize the need for giving “consideration * * * to the technical practicability and the economic reasonableness of reducing or eliminating emissions from the facility.”

Response: *See* responses to Comments 5 and 7.

Comment 9: TCC commented that Texas accomplishes the PSD reviews required by Part C of Subtitle I of the federal Clean Air Act by including various applicability provisions in its rules, but the only effect of “triggering” PSD review is to require an increment analysis (the “significant deterioration” review) for all preconstruction permits for PSD projects. Again, BACT reviews are universal, and do not depend on triggering PSD. (This is one of the great strengths of Texas’s permitting program, not a weakness). The nature of the BACT review doesn’t change depending on whether the application triggers PSD; TCEQ determines BACT using its 3-tiered process regardless of the size of project under review.

Response: EPA disagrees. *See* response to Comment 5. Furthermore, the implementation by TCEQ of the PSD SIP is outside the scope of this rulemaking action.

Comment 10: TCC commented that EPA may not condition approval of Texas’s permitting programs on adherence to specific definitions. SIP approval of a PSD program is conditioned on accomplishing some very general statutory objectives, as outlined in Section 165(a) of the federal Clean Air Act, including mechanisms to ensure that each proposed major source or modification is subject to the best available control technology.⁵ Congress expressly left the particulars to each state.⁶ Not even EPA’s rules describing its expectations for approvable SIPs mandate adoption of the exact definitions. Variations are allowed “if the State specifically demonstrates that the submitted definition is more

stringent, or at least as stringent, in all respects” as those adopted by EPA.⁷ TCEQ of course has made that demonstration in its various SIP submittals over the years, but mostly by decades of actual BACT determinations made pursuant to its definition. EPA has not identified even one TCEQ BACT determination that yielded an inadequate result because of the different definitions. In fact, EPA has agreed that the TCEQ BACT review process is perfectly adequate.

Response: EPA disagrees. *See* response to Comment 5. Furthermore, TCEQ’s implementation of the PSD SIP is outside the scope of this rulemaking action.

Comment 11: ERCC commented that the proposed deficiencies fall far short of demonstrating an interference with achieving the national standard.

Response: As noted previously, EPA must evaluate the submitted Program based upon the content of the regulations and associated record that have been submitted and are currently before EPA for appropriate approval or disapproval action. Furthermore, Texas, as a state submitting a customized major NSR SIP revision, must demonstrate why its program and definitions are in fact at least as stringent as the major NSR revised base program. *See* 67 FR 80185, at 80241. Moreover, EPA lacks sufficient information to determine whether the 2006 submittal would not interfere with NAAQS attainment and RFP. *See* response to comment 5 above for further information. However, in the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12), the requirements of 40 CFR 52.21(r)(4), and the requirements of 40 CFR 52.21(j). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal. *See* response to comment 2 above for further information.

Comment 12: ERCC commented that the mere removal of a reference to the federal definition of BACT does not create a permitting deficiency or interfere with attainment. The mere statement that the Texas BACT definition differs from the federal regulation fails to explain how it interferes with the state SIP. Many States have BACT definitions in their EPA-approved SIPs that do not conform, word for word, to the BACT statutory language. *See* Connecticut—CONN. AGENCIES REGS. § 22a-174–1 (EPA effective date, February 27, 2003);

⁵ CAA § 165(a)(4); 42 U.S.C. 7475(a)(4).

⁶ CAA § 101(a)(3); 42 U.S.C. 7401(a)(3).

⁷ 40 CFR 51.166(b).

Maine—06–096 ME. CODE R. § 100–17 (EPA effective date, November 21, 2007); New Hampshire—N.H. CODE ADMIN. R. ANN. ENV–A: § 101.13 (EPA effective date, August 14, 1992); and Oklahoma—OKLA. ADMIN. CODE § 252:100–1–3 (EPA effective date, January 7, 2000).

Response: EPA disagrees. *See* responses to comments 5 and 11. Furthermore, in the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 13: ERCC commented that the both EPA's and Texas' BACT definitions require the consideration of technical limitations, such as energy and environmental concerns, as well as the economic reasonableness of the emissions limitation, in order to determine BACT. *Compare* 40 CFR 51.166(b)(12) with 30 TAC 116.111(2)(C). Further, both processes address the same fundamental concepts as expressed in the Clean Air Act. The key question is whether the "state permitting program provides a framework for adequate consideration of regulatory criteria and consistency within the PSD program." *In re ConocoPhillips Co.*, PSD Appeal 07–02 slip op. at 30 (EAB June 2, 2008) (quoting *In re Cardinal, FG Co.*, 12 E.A.D. 153 at 161 (EAB 2005)).

Response: *See* the response to comment 5. Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 14: ERCC commented that to the extent EPA is asserting that the TCEQ staff was required to follow the exact "top down" approach to BACT analysis, and that such an argument has already been disclaimed by EPA and the Environmental Appeals Board and rejected by the U.S. Supreme Court. As stated by EPA when it actually approved the Texas PSD program in 1992, EPA did require Texas 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. *See* 57 FR 28095 (June 24, 1992). During this same approval promulgation, EPA expressly confirmed that the State of Texas is not required to follow the EPA "top down" approach to BACT. *Id.* at 28095–6. Likewise in the case of *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 476

n. 7 (2004), the U.S. Supreme Court wrote: "Nothing in the act or its implementing regulations mandates top-down analysis." The ability to deviate from the top-down analysis is also supported by the Environmental Appeals Board, which has recognized in prior rulings the permitting authority's ability to vary from the NSR review manual as long as all regulatory criteria are considered and applied appropriately. *ConocoPhillips*, PSD Appeal 07–02 slip op. at 30 (EAB June 2, 2008) (citing *In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121 at 129–30 n. 14, 135 n.25). Absent a showing from EPA that the Texas definition of BACT somehow inescapably leads to failure to consider and apply the appropriate regulatory criteria, or inexorably leads to the NAAQS not being protected, EPA must defer to the State's authority under the Clean Air Act to address air quality issues. Texas' BACT definition has resulted in some of the most stringent pollution control emission rates in the United States. EPA has not identified one instance where application of Texas' BACT definition resulted in less pollution control than if EPA's top down analysis was used. The issue that EPA has identified is non-substantive and solely one of semantics.

Response: EPA's proposed disapproval is not based on an evaluation of the Texas three-tier approach; it is based on an evaluation of the submitted revision. *See* our response to Comments 4, 5 and 11. The comments on the approaches and implementation of the PSD SIP by TCEQ are outside the scope of this rulemaking action. Furthermore, in the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 15: GCLC commented that furthermore, EPA has voiced its support for Texas three-tier approach during negotiations with TCEQ over these issues. While responding to TCEQ submittals, the EPA on October 27, 2008, stated that it "agreed with many" of the statements made by TCEQ defending their BACT program in a June 13, 2008, letter.⁸ TCEQ statements included that, to its understanding, the

three-tiered approach is an acceptable and approved approach by the EPA. If the EPA did have concerns with that assessment, the EPA had the opportunity to voice them at that time or since Texas (and other states) began using this type of three-tiered approach.

Response: Implementation by the State of its PSD SIP is outside the scope of this rulemaking action.

Comment 16: TCC commented that EPA's proposal to disapprove this rule is based in part on false distinctions between what it refers to as "PSD BACT" and "Minor NSR BACT." Assuming such distinctions, EPA concludes that the Texas rules fail to clearly apply the "PSD definition of BACT" to all actions subject to PSD, and conversely fails to delimit the minor NSR definition to activities triggering only minor NSR. But there are no distinctions, legal or practical, in Texas BACT reviews.

Response: EPA disagrees. *See* our response to Comment 5. Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 17: BCCA and TIP commented that the preamble to the 2006 revisions to 30 TAC 116.160 in which the incorporations by reference of 40 CFR 52.21 were changed, demonstrate a consistency with the approach taken by the State in the preceding years. The preamble explains the incorporation by reference of certain sections of 40 CFR 52.21 and further states, "[o]ther definitions used for the PSD program or visibility in Class I areas program are currently in [TCEQ's] rules."⁹

Response: The 2006 revisions to 30 TAC 116.160 did not just "change" the incorporations by reference of 40 CFR 52.21; they removed two of them entirely. The result is that the submitted 2006 revision did not meet the Act's PSD requirements and EPA's PSD SIP regulations. Moreover, the State did not provide the requisite demonstration to show how its customized Major NSR SIP revision was at least as stringent as EPA's PSD SIP requirements. Furthermore, in the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12) and the provisions of 40 CFR 52.21(r)(4). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal. *See* response to comment 2 above for further information.

⁸ Letter from Carl E. Edlund, Director, EPA Multimedia Planning and Permitting Division to Mark Vickery, Executive Director, Texas Commission on Environmental Quality. (Oct. 27, 2008) available at http://www.tceq.state.tx.us/assets/public/permitting/air/Announcements/epa_response_10_27_08.pdf.

⁹ 31 Tex. Reg. 519 (Jan. 27, 2006).

Comment 18: BCCA and TIP commented that the appropriate BACT definition exists in Texas's rules, as demonstrated by EPA's past approval of those rules. All permits Texas has issued under the existing permitting program reflect the current TCEQ SIP-approved approach to BACT, and are valid and enforceable.

Response: EPA disagrees that the 2006 SIP revision submittal maintained the appropriate PSD BACT definition. See the response to Comment 5. Furthermore, in the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal. Comments on the implementation by the State of the PSD SIP are outside the scope of this rulemaking action.

Comment 19: TCC commented that Texas law does not create two different types of permits, one called a minor NSR permit and one called a PSD permit. There is only one kind of pre-construction permit described in the Texas Clean Air Act, a "preconstruction permit" under Texas Health & Safety Code § 382.05 18(b). The issuance of all such permits is conditioned on use of "best available control technology."

Response: EPA disagrees. See responses to comments 5 and 18. Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 20: TCC commented that the definitions do not determine stringency. The stringency of BACT determinations are not determined by definitions, anyway. Even the far wordier "federal definition" is but a litany of factors that go into what is inevitably a highly discretion-laden determination. A more "specific" definition, it may truly be argued, has the effect of being less stringent, because it limits the factors to be considered. Absent a definition of BACT beyond its own self-description, TCEQ is free to be even stricter than the wordier federal definition. Again, the proposed disapproval fails to identify even one determination that (a) depended on the definition applied, and (b) yielded a determination less strict than would result from application of the "federal definition."

Response: See response to comment 5.

Comment 21: TCC commented that EPA itself does not follow the "federal definition." EPA is in a difficult position to insist on word-for-word adoption

when it does not itself follow the federal definition. The definition EPA would impose on the states is not the one that Congress prescribes. Which federal definition would EPA like Texas to follow, the one in its rule or the one in its governing statute? In what way does either "federal definition" necessarily require BACT determinations any more strict than the Texas definition?

Response: The differences between the regulatory definition of PSD BACT at 40 CFR 52.21(b)(12) and the statutory definition of that term in section 169(3) of the Act are not significant and the regulatory definition of PSD BACT is consistent with the statutory definition. We addressed the reasons why the federal BACT definition is more stringent than the Texas definition in the proposal at 74 FR 48467, at 48472. Also see our response to comment 5 above for further information. To the extent this comment relates to TCEQ's implementation of the PSD SIP, it is outside the scope of this rulemaking action. Finally, based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 22: TCC commented that the proposed disapproval draws on distinctions without differences. The definition is designed to identify relevant factors that go into what is ultimately a highly discretion-laden determination. No matter the definition, the objective is the same. And no matter the definitions, the resources consulted for each BACT determination are the same. In Texas, for example, all BACT determinations are made using its 3-tier process, which elaborates in detail how TCEQ makes the determinations. All reviews are based on consideration of national determinations codified in the RACT/BACT/LAER Clearinghouse; EPA has agreed that this process yields results equivalent to its top-down approach, which itself is not compelled by any definition. In both cases, responsible agencies make discretionary determinations based on aggressive efforts to ensure that new technologies are applied when they become available to new sources. Pharisaical parsing over definitions does not accomplish sound BACT determinations, which instead result from good faith efforts by responsible regulators.

Response: EPA disagrees. See responses to comments 5, 7, and 14. TCEQ's implementation of the PSD SIP is outside the scope of this rulemaking action. Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 23: TCC commented that to the very extent there were differences in a result based on the definition; EPA would be prohibited from disapproving the definition. EPA presumes without proof a difference in result arising out of TCEQ's BACT definition. But, regardless, EPA cannot elect to approve the broader reach of the Texas program (e.g., application of BACT to all sources), but disapprove what it perceives to be a lesser definition of BACT. States are the primary architects of their implementation plans, and EPA is not free to change the state's choices by selective approvals of interrelated elements. Accordingly, the extent to which EPA would make any substantive changes in TCEQ's permitting program by selectively disapproving its BACT definition is the very extent to which it is forbidden to disapprove it. EPA must either accept the permit program or reject it in its entirety, and not cut it to pieces so that it looks like a ransom note.

Response: EPA disagrees. See response to Comments 5, 7, and 14. TCEQ's implementation of the PSD SIP is outside the scope of this rulemaking action. Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 24: The Clinic commented (under Docket No. EPA-R06-OAR-2006-0133) on EPA's proposed disapproval of TCEQ's rules that removed a requirement under 40 CFR 52.21(r)(4) that provides that if a project becomes a major stationary source or major modification solely because or relaxation of an enforceable limitation on the source or modifications capacity to emit the pollutant, then the source or modification is subject to PSD as though construction had not commenced. This provision prohibits the use of "sham" operational limits that a source may take to avoid PSD and provides an extra deterrent to facilities that may take such limits that they know they cannot achieve in order to avoid federal permitting. Approval of this deletion also violates the anti-backsliding provisions in 42 U.S.C. 7515 and would render the Texas SIP less stringent than federal requirements and inadequate for preventing significant deterioration of air quality.

Response: EPA appreciates the Clinic's support for the proposal. In the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal requirements of 40 CFR 52.21(r)(4). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies

identified in the proposal. See response to comment 2 above for further information.

V. What are the grounds for approval?

A. Adoption of Cross-Reference to 40 CFR 52.21(b)(12), Which Is the Federal Definition of Best Available Control Technology (BACT), and the Cross-Reference of 40 CFR 52.21(j) Which Implements the Requirement for a PSD BACT Analysis

The February 1, 2006, submittal of revisions to 30 TAC 116.160 removed the reference to the definition of federal PSD BACT in 40 CFR 52.21(b)(12). On September 23, 2009, EPA proposed to disapprove the 2006 submittal due in part to its removal of this definition. EPA observed that under the PSD Program, PSD BACT is a central requirement of the Act and that the State's submission of a revision that removes the requirement that all new major stationary sources and modifications meet, at a minimum, PSD BACT as defined by the Act creates a situation where the submitted SIP revision would violate the Act and also be a relaxation of the requirements of the Texas PSD SIP. See the proposed disapproval at 74 FR 48467, at 48472. On July 16, 2010, Texas submitted a revision to 30 TAC 116.160 that reinstates the federal PSD BACT definition in 40 CFR 52.21(b)(12). See submitted 30 TAC 116.160(c)(1)(A). The revision also includes a reference to 40 CFR 52.21(j) which implements the BACT definition. See submitted 30 TAC 116.160(c)(2)(A).

The adoption of the reference to the federal definition of PSD BACT in 40 CFR 52.21(b)(12) corrects a deficiency in the 2006 submittal because it reinstates a requirement that is a central requirement of the Act. Approval of this 2010 revision maintains the Texas PSD SIP as what EPA first approved in 1992.

The TCEQ also submitted on July 16, 2010, a revision to 30 TAC 116.160 that adds a reference to 40 CFR 52.21(j)—Control technology review. This provision was not referenced in the Texas PSD SIP approved in 1992. Texas chose to reference 40 CFR 52.21(j) because of the confusion over the years about the PSD versus the Minor NSR BACT determination requirements. It complements the reinserted federal definition of PSD BACT. Accordingly, EPA is approving the reinstatement of the reference to federal PSD BACT in 40 CFR 52.21(b)(21) and the addition of a reference to 40 CFR 52.21(j).

B. Adoption of Cross-Reference to 40 CFR 52.21(r)(4), Which Relates to PSD Review for Projects That Become Major Stationary Sources or Major Modifications Solely Because of Relaxation of an Enforceable Limitation on the Source or Modification Capacity to Emit a Pollutant

The February 1, 2006, submittal of revisions to 30 TAC 116.160 also removed the reference to 40 CFR 52.21(r)(4) that the State had previously incorporated into its PSD SIP. This provision specifies that if a project becomes a major stationary source or major modification solely because of a relaxation of an enforceable limitation on the source's or modification's capacity to emit a pollutant, then the source or modification is subject to PSD as if construction had not yet commenced. The removal of this requirement meant that the State's rules would not regulate these types of major stationary sources or major modifications as stringently as the federal program. See the proposed disapproval at 74 FR 48467, at 48472. On July 16, 2010, Texas submitted a revision to 30 TAC 116.160 that reinstates the reference to 40 CFR 52.21(r)(4). See submitted 30 TAC 116.160(c)(2)(C).

The adoption of the reference to 40 CFR 52.21(r)(4) in the July 2010 submittal corrects a deficiency in the 2006 submittal because it reinstates a requirement that is mandated in the federal program. Approval of this 2010 revision maintains the Texas PSD SIP to its status when EPA first approved the SIP in 1992. Accordingly, EPA is approving the reinstatement of the reference to 40 CFR 52.21(r)(4).

C. How EPA's action does not affect the substance of the Texas PSD SIP originally approved in 1992?

The 2006 and 2010 SIP revisions to 30 TAC 116.160 reorganized the sections but made no substantive changes to the approved SIP except that the 2006 submittal omitted references to the definition of PSD BACT in 40 CFR 52.21(b)(12) and the requirements of 40 CFR 52.21(r)(4) which resulted in the 2006 revisions not meeting the federal requirements. See sections IV.A and B above. The 2010 SIP revision submittal reinstates these provisions into the State's rules and corrects the above-identified deficiencies. Texas also added a reference to 40 CFR 52.21(j)—Control technology review—which complements the implementation of the definition PSD BACT. The specific changes are described in section II of this notice. A detailed outline of the

specific changes made to 30 TAC 116.160 by the 2006 and 2010 SIP revisions is available in the Technical Support Document which is in the docket for this action. Our evaluation of these changes demonstrates that the submitted changes to the Texas PSD Program are insignificant and with the changes submitted in 2010 essentially restore the Program to what it was in 1992. The 2006 revision also removed the definitions of "building, structure, facility, or installation" and "secondary emissions" in 30 TAC 116.160(c)(1) and (2), respectively. The removal of these definitions is not significant because these terms are also defined using the same definitions in the Texas SIP at 30 TAC 116.12(4) and (17), respectively, as approved at 74 FR 11851 (March 20, 2009).

For further information see:

- The 1989 proposed Texas PSD SIP approval at 54 FR 52823, at 52824–52825 (December 22, 1989);
- The final Texas PSD SIP approval at 57 FR 28093, at 28095–28096 (July 24, 1992);
- The proposed disapproval of the February 1, 2006, submitted revisions to 30 TAC 116.160 at 74 FR 48467, at 48472;
- The submitted SIP revisions to 30 TAC 116.160 dated July 16, 2010;
- The background for this action in section II of this preamble;
- The responses to comments 1 through 26 in section III of this preamble; and
- The technical support document for this action.

VI. Final Action

The EPA is approving certain revisions to the Texas PSD SIP, submitted February 1, 2006, and as amended July 16, 2010, which apply to 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction or Modification. EPA finds that the July 16, 2010, submittal corrects these deficiencies in the February 1, 2006, submission identified in the September 23, 2009, proposed disapproval of revisions to 30 TAC 116.160. These revisions submitted in 2006 were nonsubstantive except for the removal of the PSD BACT definition and the removal of the reference to 40 CFR 52.21(r)(4). With the restoration of the PSD BACT definition and the reference to 40 CFR 52.21(r)(4) and the addition of a reference to 40 CFR 52.21(j) in the Texas NSR Program, we find that the aspects of the submitted PSD Program covered in these submissions meet section 110 and part C of the Act.

EPA is publishing this rule without prior proposal because we view this as a noncontroversial amendment and anticipate no relevant adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the SIP revision if relevant adverse comments are received. This rule will be effective on November 15, 2010 without further notice unless we receive relevant adverse comment by October 15, 2010. If we receive relevant adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if we receive relevant adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

VII. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a

substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

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. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**.

This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 15, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon Monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen oxides, Ozone, Particulate matter, Sulfur oxides, Volatile organic compounds.

Dated: August 31, 2010.

Al Armendariz,

Regional Administrator, Region 6.

- Accordingly, 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart SS—Texas

- 2. The table in § 52.2270(c) entitled "EPA Approved Regulations in the Texas SIP" is amended under Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification, Subchapter B—New Source Review Permits, Division 6—Prevention of Significant Deterioration Review, by revising the entry for Section 116.160—Prevention of Significant Deterioration Review to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
*	*	*	*	*
Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification				
*	*	*	*	*
Subchapter B—New Source Review Permits				
*	*	*	*	*
Division 6—Prevention of Significant Deterioration Review				
Section 116.160	Prevention of Significant Deterioration Requirements.	6/2/2010	9/15/2010	[Insert FR page number where document begins].
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2009–1014–201026; FRL–9201–1]

Approval and Promulgation of Implementation Plans; Commonwealth of Kentucky; Prevention of Significant Deterioration and Nonattainment New Source Review Rules: Nitrogen Oxide as Precursor to Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve a revision to the Commonwealth of Kentucky's State Implementation Plan (SIP), submitted to EPA by the Kentucky Energy and Environment Cabinet, through the Kentucky Division for Air Quality (KDAQ), on February 5, 2010. The revision modifies Kentucky's prevention of significant deterioration (PSD) and nonattainment new source review (NNSR) permitting regulations in Kentucky's SIP to address permit requirements promulgated in the 1997 8-Hour Ozone National Ambient Air Quality Standards (NAAQS) Implementation Rule—Phase II (hereafter referred to as the "Ozone Implementation NSR Update"). The Ozone Implementation NSR Update revised permit requirements relating to the implementation of the 1997 8-hour

ozone NAAQS, specifically, incorporating nitrogen oxides (NO_x) as a precursor to ozone. EPA's approval of Kentucky's provisions to include NO_x as an ozone precursor into the Kentucky SIP is based on EPA's determination that Kentucky's SIP revision related to these provisions complies with Federal requirements. EPA is also addressing the general adverse comments received on EPA's proposal to approve NO_x as an ozone precursor for permitting purposes into the Kentucky SIP.

The February 5, 2010, SIP revision also included provisions to exclude facilities that produce ethanol through a natural fermentation process from the definition of "chemical process plants" in the NSR major source permitting program in the Kentucky SIP. EPA also received adverse comments for its proposal to approve these provisions. At this time, EPA is not taking final action on Kentucky's provisions to exclude facilities that produce ethanol through a natural fermentation process from the definition of "chemical process plants" in the NSR major source permitting program. EPA will consider the comments received regarding these provisions and take any final action for these provisions in a separate rulemaking.

DATES: *Effective Date:* This rule will be effective October 15, 2010.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2009–1014. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, *i.e.*, Confidential

Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Kentucky SIP, contact Ms. Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Ms. Bradley can be reached via telephone at (404) 562–9352 and electronic mail at bradley.twunjala@epa.gov. For information regarding NSR, contact Ms. Yolanda Adams, Air Permits Section, at the same address above. Ms. Adams can be reached via telephone at (404) 562–9214 and electronic mail at adams.yolanda@epa.gov. For information regarding 8-hour ozone NAAQS, contact Ms. Jane Spann, Regulatory Development Section, at the