



## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R06-OAR-2019-0043; FRL-10004-67-Region 6]**

### **Air Plan Approval; Texas; Revisions to Control of Air Pollution by Permits for New Construction or Modification**

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

**ACTION:** Final rule.

**SUMMARY:** Pursuant to the Federal Clean Air Act (CAA or the Act), the United States Environmental Protection Agency (U.S. EPA) is finalizing approval of revisions to the Texas (TX) State Implementation Plan (SIP) submitted on February 22, 2019, that revised the State's New Source Review (NSR) permitting rules contained in Title 30 of the Texas Administrative Code (TAC) Chapter 116 *Control of Air Pollution by Air Permits for New Construction or Modification*. Our final action on the February 22, 2019, submittal also addresses portions of an April 16, 2014, SIP submittal pertaining to the permitting of Greenhouse Gas (GHG) emissions that were subsequently invalidated by the U.S. Supreme Court. The February 22, 2019, submittal appropriately removes these provisions from the Texas SIP.

**DATES:** This rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. **EPA-R06-OAR-2019-0043**. All documents in the docket are listed on the <https://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute.

Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <https://www.regulations.gov> or in hard copy at the EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Layton, EPA Region 6 Office, Air Permits Section (ARPE), 1201 Elm Street, Suite 500, Dallas, TX 75270, 214-665-2136, [layton.elizabeth@epa.gov](mailto:layton.elizabeth@epa.gov). To inspect the hard copy materials, please schedule an appointment with Ms. Elizabeth Layton or Mr. Bill Deese at 214-665-7253.

**SUPPLEMENTARY INFORMATION:** Throughout this document “we,” “us,” and “our” means the EPA.

## **I. Background**

The background for this action is discussed in depth in our November 4, 2019, proposal (84 FR 59325). In that document we proposed to approve revisions to the Texas SIP submitted February 22, 2019, by the Texas Commission on Environmental Quality (TCEQ) that revise the State’s New Source Review (NSR) provisions pertaining to air quality permits for the control of air pollution by amending the criteria for air pollution control permits for new construction or modification, as well as make other non-substantive revisions. The February 22, 2019, submittal included the removal of provisions originally submitted on April 16, 2014, that relate to the permitting of Greenhouse Gas Emissions (GHGs) for “non-anyway” sources that were later invalidated by the Supreme Court in *Utility Air Regulatory Group (UARG) v. EPA* (134 S. Ct. 2427 (2014)). See the proposed rulemaking (84 FR 59325) for more details. We proposed to approve the removal of these provisions that were impacted by the Court’s ruling. The comments received on our proposed rulemaking are outlined in the section below.

## II. Response to Comments

We received four public comments on the proposal. One commenter (State of Texas) supported our proposed approval and agreed with the EPA's determination that the revisions to the Texas SIP were consistent with the CAA and the applicable federal rules and regulations relating to air pollution control. We received three anonymous public comments. One commenter opposed the approval of provisions relating to GHGs, another commenter opposed approving the Texas SIP, and one commenter opposed the approval of previously SIP-approved regulations containing provisions that waive permit renewal fees for members of the military on active duty stationed outside of the State of Texas. All public comments submitted are in the public docket to this rulemaking. Our responses to the comments are discussed below.

*Comment:* The State of Texas supported the EPA's proposed approval action and agreed with our determination that the revisions to the Texas SIP were consistent with the CAA and applicable federal rules and regulations pertaining to air pollution control.

*Response:* The EPA appreciates the supportive comment from the State of Texas. No changes will be made to the proposed rule as a result of the comment.

*Comment:* One anonymous commenter stated that the EPA should not approve portions of 30 TAC section 116.196(a) that specifically pertain to the exemption from permit renewal fees if a permit holder is on active duty in the U.S. Armed Forces and is serving outside the State of Texas. The commenter argues that if the permit holder is in fact serving in the military, then the TCEQ/EPA should require a secondary "responsible official" to submit timely permit renewal applications and the TCEQ/EPA should not grant exemptions from permit renewal fees as an

approved provision in the SIP. The commenter states that this provision should be considered a state-only provision and not be approved into the SIP.

*Response:* As a threshold matter, the EPA must respond to all significant comments received.

While considering significant comments, a determination must be made regarding the comment's relevance, i.e., if the subject matter of the comment is relevant to the specific action being reviewed and submitted for approval. The EPA is only required to respond to comments that are determined to be relevant, meaning in part that any such comment, after our consideration, could require a change in our proposed rule. Expressly, the EPA is required to address significant comments deemed relevant to the specific set of rules being proposed for action and then take action on that specific set of rules with consideration of those comments. We first note that the provisions quoted by the commenter are actually located at 30 TAC Section 116.310. In the current action, we did not propose for approval any provisions that relate to the waiver of permit renewal fees for members of the military serving outside of the State of Texas. Those provisions were submitted to the EPA on August 31, 1993, and were approved into the SIP by the EPA on March 10, 2006 (71 FR 12285). The public comment received by the commenter on a prior rulemaking is not relevant to the current rulemaking, and as such, no changes will be made in response to the comment received. Additionally, no challenge to that prior, final rulemaking action was filed and the timeframe has long passed to seek judicial review on that particular rulemaking. (See Administrative Procedure Act, 5 U.S.C. Sec. 704).

*Comment:* One anonymous commenter states that the "EPA should disapprove the regulation on GHGs," and goes on to discuss the potential factors that can generally affect the EPA's approval of environmental regulations (cost, duration, subject matter). Additionally, the commenter requests the EPA to take the opportunity to review GHG regulations on carbon dioxide. Lastly,

the commenter states that pending an official rulemaking on GHG's, EPA may not be able to make a "regulatory ruling in time for the 2022 planned deadline."

*Response:* See our response to the comment above related to the EPA's duty to respond to significant comments. The EPA has evaluated the comment, and we view the comment as not relevant to the specific subject matter at hand and is outside the scope of this rulemaking action. The general regulation and review of GHG's is not a part of the current action, nor germane to our final action and therefore, we are not required to respond to the comment. Further, the commenter does not provide context or detail to a "2022 planned deadline" therefore we are unable to discern the commenter's concern. However, we do note that we are bound by the U.S. Supreme Court's ruling, *UARG v. EPA* (2014), concerning the regulation of GHG's that is referenced in this action and our approval of the removal of the specific "Step 2" GHG provisions was based on the Court's ruling.

*Comment:* One anonymous commenter stated that the EPA should "disapprove the Texas SIPs" and supply the rationale behind why the state does not have the legal authority to do so on its own. Additionally, the commenter wants the EPA to examine interstate hydrocarbon transport, regulate GHG emissions under the CAA (specifically the NSR/PSD and 111(d) programs), as well as consider climate change and our demand for resources. The commenter also expresses the need to reduce the amount of carbon being burned and phase out conventional energy sources by 2020.

*Response:* See our responses above related to the EPA's duty to respond to significant comments. We do not agree that the EPA should disapprove the Texas SIP. We find that the State has submitted approvable SIP revisions and are thus approving them under the CAA that gives EPA the authority to do so. The comments related to regulating GHG's under NSR/PSD

and CAA 111(d), climate change, and reduction of carbon is outside the scope of this rulemaking action. We are therefore not required to respond to the comment. Again, in this action, we are acting consistent with the U.S. Supreme Court's ruling in *UARG v. EPA* (2014) and our approval of the removal of the specific "Step 2" GHG provisions is appropriate here.

### **III. Final Action**

We are approving revisions to the Texas SIP that revise NSR air permitting rules. We are also approving revisions to the Texas NSR rules related to the permitting of greenhouse gas emissions as being consistent with federal requirements. As explained in detail in the proposed rulemaking accompanying this action, we have determined that the revisions adopted on October 31, 2018, and submitted on February 22, 2019, were developed in accordance with the CAA and EPA's regulations, case law, policy and guidance for NSR permitting. Therefore, under section 110 of the Act, the EPA approves the following revisions to the Texas SIP in the following Sections of 30 TAC Chapter 116, submitted on February 22, 2019:

- Revisions to 30 TAC Section 116.114;
- Revisions to 30 TAC Section 116.160;
- Revisions to 30 TAC Section 116.164(a);
- Revisions to 30 TAC Section 116.196;
- Revisions to 30 TAC Section 116.198;
- Revisions to 30 TAC Section 116.310;
- Revisions to 30 TAC Section 116.611; and
- Revisions to 30 TAC Section 116.615

### **III. Incorporation by Reference**

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference the revisions to the Texas regulations described in the Final Action section above. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 6 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated in the next update to the SIP compilation.

#### **IV. Statutory and Executive Order Reviews**

Under the CAA, 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, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. 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 Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;

- 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 (Public Law 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 CAA; and
- Does not provide the 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, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct

costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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. The 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 **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. 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, Incorporation by reference, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: January 29, 2020.

**Kenley McQueen,**  
*Regional Administrator, Region 6.*

40 CFR part 52 is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

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

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

**Subpart SS – Texas**

2. In §52.2270, in paragraph (c), the table titled “EPA Approved Regulations in the Texas SIP” is amended by revising the entries for Sections 116.114, 116.160, 116.164, 116.196, 116.198, 116.310, 116.611, and 116.615 to read as follows:

**§52.2270 Identification of plan.**

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(c) \* \* \*

**EPA APPROVED REGULATIONS IN THE TEXAS SIP**

State citation	Title/Subject	State approval/Submittal date	EPA approval date	Explanation
* * * * *				
<b>Chapter 116 Revisions to Control of Air Pollution by Permits for New Construction or Modification</b>				
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<b>Subchapter B: New Source Review Permits</b>				
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Section 116.114	Application Review Schedule	10/31/2018	<b>[Insert date of publication in the Federal Register], [Insert Federal Register citation]</b>	
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Section 116.160	Prevention of Significant Deterioration	10/31/2018	<b>[Insert date of publication in the Federal Register], [Insert Federal Register citation]</b>	The PSD SIP includes 30 TAC Section 116.160(a) as adopted by the State as of 6/2/2010. The PSD SIP includes a letter from the TCEQ dated December 2, 2013, committing that Texas will follow a SIP amendment process to apply its PSD SIP to additional pollutants that are regulated in the future, including non-NAAQS pollutants. The PSD SIP includes a letter from the TCEQ dated May 30, 2014, clarifying the judicial review process for the Texas PSD permit program.
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Section 116.164	Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources	10/31/2018		The PSD SIP does NOT include 30 TAC Sections 116.164 (b).

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<b>Subchapter C: Plant-wide Applicability Limits</b>				
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Section 116.196	Renewal of a Plant-wide Applicability Limit Permit	10/31/2018		
Section 116.198	Expiration of Voidance	10/31/2018		
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<b>Subchapter D: Permit Renewals</b>				
Section 116.310	Notification of Permit Holder	10/31/2018		
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<b>Subchapter F: Standard Permits</b>				
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Section 116.611	Registration to Use a Standard Permit	10/31/2018		30 TAC Section 116.611(b) is SIP-approved as adopted by the State as of 11/20/2002. The SIP does NOT include 30 TAC Section 116.611(c)(3), (c)(3)(A), and (c)(3)(B).
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Section 116.615	General Conditions	10/31/2018		
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