



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2020-0159; FRL-10008-16-Region 6]

Air Plan Approval; Texas; Construction Prior to Permit Amendment Issuance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is proposing to approve a revision to the Texas (TX) State Implementation Plan (SIP) proposed January 29, 2020 and submitted for parallel processing by the State on January 30, 2020. The proposal amends certain air quality permitting rules located in Title 30 of the Texas Administrative Code (TAC), Section 116, Control of Air Pollution by Permits for New Construction or Modification. These revisions amend the State's New Source Review permitting regulations via the addition of new, proposed Section 116.118, *Construction While Permit Application Pending*. This proposed new section will allow applicants for certain permit amendments to begin construction after the executive director has completed a technical review and issued a draft permit including the permit amendment for public review and comment, i.e., prior to final permit issuance. Non-substantive, administrative-type, editorial changes, such as grammar, re-lettering, and reference revisions and/or corrections are also included in the revisions the EPA is proposing for approval.

DATES: Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2020-0159, at <https://www.regulations.gov> or via email to layton.elizabeth@epa.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://www.regulations.gov). The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact Elizabeth Layton, 214-665-2136, layton.elizabeth@epa.gov. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

Docket: The index to the docket for this action is available electronically at <https://www.regulations.gov>. While all documents in the docket are listed in the index, some information may not be publicly available due to docket file size restrictions or content (e.g., CBI).

FOR FURTHER INFORMATION CONTACT: Elizabeth Layton, EPA Region 6 Office, Air Permits Section, 214-665-2136, layton.elizabeth@epa.gov. Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office will be closed to the public to reduce the risk of transmitting COVID-19. We encourage the public to submit comments via <https://www.regulations.gov>, as there will be a delay in processing mail and no courier or hand

deliveries will be accepted. Please call or e-mail the contact listed above if you need alternative access to material indexed but not provided in the docket.

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

I. Background

Section 110(a)(2)(C) of the CAA requires states to develop and submit to the EPA for approval into the SIP, preconstruction review and permitting programs applicable to certain new and modified stationary sources of air pollutants for attainment and nonattainment areas that cover both major and minor new sources and modifications, collectively referred to as the New Source Review (NSR) SIP. The CAA NSR SIP program is composed of three separate programs: Prevention of Significant Deterioration (PSD), Nonattainment New Source Review (NNSR), and Minor NSR. The EPA codified minimum requirements for these State permitting programs including public participation and notification requirements at 40 CFR 51.160-51.164. Requirements for permitting of new stationary sources and major modifications in attainment areas subject to PSD, including additional public participation requirements, are found at 40 CFR 51.166. Requirements specific to construction of new stationary sources and major modifications in nonattainment areas are codified in 40 CFR 51.165 for the NNSR program. Additionally, 40 CFR 51.160 through 51.163 outline the federal requirements which apply to minor permit issuance, including the required administrative, public participation, and federally enforceable procedures.

On January 30, 2020, the Texas Commission on Environmental Quality (TCEQ) submitted on behalf of the State of Texas, a letter¹ requesting the parallel processing review of the January 29, 2020, proposed amendments to 30 TAC Section 116, Control of Air Pollution by Permits for New Construction or Modification, including proposed new Section 116.118, *Construction While Permit Application Pending*. Under the EPA’s “parallel processing” procedure, the EPA proposes a rulemaking action on a proposed SIP revision concurrently with State’s public review process. See 40 CFR §2.3 of Appendix V to part 51 for the requirements and procedure for parallel processing. The January 30, 2020, SIP revision request will not meet all the SIP approvability criteria and deemed complete until the State concludes the public process and submits the final, adopted SIP revision with a letter from the Governor or Governor’s designee to the EPA. The EPA is proposing to approve the January 29, 2020, proposed SIP revision upon completion of the State public process and final submittal to the EPA. If the State’s proposed SIP revision is not significantly or substantively changed, the EPA will finalize the rulemaking on the SIP revision as proposed after responding to any relevant comments received on our rulemaking. Final rulemaking action by the EPA will occur only after the final SIP revision has been fully adopted by the TCEQ and submitted formally to the EPA for approval as a revision to the Texas SIP. See 40 CFR Appendix V to part 51.

This action addresses the January 29, 2020, proposed revisions to the Texas SIP that amend the State’s minor NSR permitting rules by proposing the addition of new 30 TAC Section 116.118, *Construction While Permit Application Pending*, which allows an applicant for a permit amendment to begin construction, at their own risk, after the executive director has completed a technical review and issued a draft permit for public review and comment. Historically, the

¹ Please see January 30, 2020, letter addressed to the Regional Administrator at the U.S. EPA, Region 6 requesting parallel processing from TCEQ included in the docket to this rulemaking action.

permit applicant would not be able to begin construction until the final permit was issued. As specified in the new rule, the applicant assumes all risk when commencing construction under proposed new Section 116.118, and the applicant's investment (financial or otherwise) in any construction activities commenced prior to final permit issuance is prohibited from being used by the permitting authority as a factor when making the determination to issue the applicant's requested amendment. The new, proposed section does not allow for any pre-permit construction prohibited by federal law.

II. The EPA's Evaluation

On January 29, 2020, the TCEQ proposed revisions to the Texas SIP (Rule Project No. 2019-129-116-AI) which revise their rules that address the applicable requirements for air pollution control permits for new construction or modification under 30 TAC Chapter 116, Sections 116.110, 116.116, 116.710, and 116.721; and the addition of proposed new Section 116.118. These proposed revisions were submitted to the EPA with a request for parallel processing on January 30, 2020. The proposed revisions to 30 TAC Chapter 116 were partly in response to the passage of House Bill (HB) 2726, 86th Texas Legislature, 2019. This legislation revised Texas Health and Safety Code (THSC), Section 382.004, Construction While Permit Application Pending, to provide applicants for permit amendments the option to begin construction after the permitting authority has completed a technical review and issued the draft permit, but prior to final permit issuance.

The proposed January 29, 2020, revisions amend the Texas SIP at 30 TAC Subsections 116.110(a), 116.116(b), (e) and (f), 116.710(a), 116.721(a), and include the addition of new Section 116.118, comprised of Subsections 116.118(a)(1)-(8), (b), and (c)(1)-(2). The proposed revisions to Subsections 116.110(a), 116.116(b), 116.710(a) and 116.721(a) add a reference to

proposed new Section 116.118 to include the option to begin construction when a draft permit is issued. The proposed revisions to Subsections 116.116(e)(2)(B), (D) and (E), and (8)(A) are non-substantive, grammatical edits such as grammatical number and case changes. The proposed revisions to Subsections 116.116(e)(3), 116.116(f) and 116.721(d)(1) are also non-substantive, grammatical-type, editorial changes intended to improve readability by replacing the word “notwithstanding” with “regardless of.”

The language in Section 116.110 regarding *change in ownership, submittal under seal of Texas licensed professional engineer and responsibility for permit application*, originally approved at Subsections 116.110(d), (e) and (f), was part of a July 22, 1998, submittal and subsequently approved into the SIP on November 14, 2003 (68 FR 64543). However, in a July 14, 2014, final action, regarding revisions to the Texas NSR SIP addressing the Texas Minor NSR Flexible Permits Program, the EPA made an error in our amendatory language pertaining to 30 TAC Section 116.110 by excluding Subsection 116.110(d) from the SIP (See 79 FR 40666). In the July 14, 2014, final rule, we note the SIP approved version of 30 TAC Section 116.110 is the July 22, 1998, submission, which includes the aforementioned language at Subsections (d), (e), and (f). Additionally, in 2002, the State inserted new rule language at 116.110(c) regarding compliance history, which is not included in SIP, but required the re-lettering of the provisions listed above at Subsections 116.110(d), (e), and (f) to Subsections 116.110(e), (f), and (g), respectively. This re-lettering was adopted without changes by the State on August 23, 2002, but not yet submitted for SIP action. The TCEQ requested the EPA address this ministerial correction to the SIP and revise the table at 40 CFR 52.2270(c) to accurately reflect the inclusion of these provisions in the SIP with their appropriate re-lettering in the January 30, 2020, letter

requesting the parallel processing of this proposed rulemaking (letter is included in the docket for this proposed action).

The addition of proposed new Section 116.118 allows an applicant to begin construction at their own risk after the executive director has completed the technical review process and issued a draft permit for public review and comment in the purpose provisions at Subsection 116.118(a)(1). Subsections 116.118(a)(2)-(8) contain the proposed new section's applicability requirements and exclusions. Subsection 116.118(a)(2) excludes concrete batch plants located within 880 yards of property being used as a residence, from being eligible for pre-permit construction under Section 116.118. The applicability requirements of the new, proposed section are bound by and only authorize construction to the extent permissible under federal law. Subsection 116.118(a)(3) specifies that projects subject to federal PSD or NNSR permitting are not eligible for pre-permit construction under Section 116.118. Subsections 116.118(a)(4) and 116.118(a)(5) specify that Plant-wide Applicability (PAL) permits and projects triggering case-by-case determination of Maximum Achievable Control Technology (MACT) under the federal CAA Section 112(g), respectively, are not eligible for pre-permit construction under proposed new Section 116.118. Subsection 116.118(a)(6) excludes qualified facility changes implemented under Section 116.116(e) from the proposed pre-permit construction provisions at Section 116.118. Subsection 116.118(a)(7) specifies that requests, claims, registrations, or applications for a standard permit under 30 TAC Chapter 116 Subchapter F (*Standard Permits*) or permit by rule (PBR) under 30 TAC Chapter 106 (*Permits by Rule*) are not eligible for pre-permit construction under proposed Section 116.118. Subsection 116.118(a)(8) specifies that Section 116.118 does not relieve or exempt the applicant or project from any other applicable state or federal requirements, including requirements for public notice and participation, federal

applicability, emission control technology, and distance limitations. Compliance with the public notice requirements at 30 TAC Chapter 39 is required in Subsection 116.118(b) for any permit amendment applicant using the pre-permit construction provisions in Section 116.118.

Subsection 116.118(c)(1) clarifies that although Section 116.118 allows for pre-permit construction for eligible projects, operation of a facility is still strictly forbidden prior to final permit issuance. Subsection 116.118(c)(2) prohibits the State's permitting authority (TCEQ) from considering investment (of any kind) made by the permit amendment applicant in pre-permit construction under Section 116.118 as a factor when making the determination to grant the permit amendment requested in the application.

As discussed in detail above, new proposed Section 116.118 allows certain preconstruction activities prior to obtaining a final construction permit, provided that specific conditions are met. The EPA has preliminarily determined that proposed new Section 116.118, allowing for construction to commence after the issuance of the draft permit, but prior to final permit amendment issuance (under certain conditions), is consistent with the requirements of CAA sections 110(a)(2)(C) and 110(l), and federal regulations at 40 CFR 51.160—51.164, 51.165 and 51.166. Section 110(a)(2)(C) of the CAA requires that state SIPs include a program for regulating the construction and modification of stationary sources as necessary to ensure that the NAAQS are maintained. Federal regulations at 40 CFR 51.160(b) require states to have legally enforceable procedures to prevent the construction or modification of a source if it would violate any SIP control strategies or interfere with attainment or maintenance of the NAAQS. The proposed revisions to the Texas NSR permitting rules under proposed new Section 116.118 allow construction to commence only after the State has conducted a comprehensive technical review of the amendment application and issued a draft permit for public review and comment.

The permit amendment application must satisfy all applicable requirements in the technical review process before the State issues the draft permit and preliminary decision. The State's technical analysis includes, but is not limited to, evaluating the emission sources, confirming the applicant included air pollution control measures, which are at least as stringent as best available control technology (BACT), verifying the proposed emissions will not jeopardize the NAAQS, and ensuring the application satisfies all state and federal regulatory requirements. Therefore, the issuance of the draft permit provides the State's demonstration that the permit amendment will not jeopardize attainment or violate the NAAQS, thereby satisfying the federal requirements located in sections 110(a)(2)(c) and 110(l) of the Act, and the federal enforceability, public notice, responsible agency identification, and administrative procedural requirements at 40 CFR 51.160-51.163. The proposed Texas regulations also expressly forbid preconstruction activities that are not permissible under federal law². Further, other states' rules allowing for commencement of construction prior to final permit issuance where those rules applied exclusively to minor NSR have been approved by the EPA. These include the EPA's approval of analogous regulations into the Mississippi SIP on July 10, 2006, and the West Virginia SIP on October 5, 2018 (See 71 FR 38773 and 83 FR 50266, respectively).

The TCEQ's existing NSR permitting rules for both minor and major sources are approved by the EPA into the SIP and the proposed revisions to the State's minor NSR permit rules are consistent with the requirements of the CAA and EPA's regulations. When reviewing SIP submissions, the EPA's role is to approve state choices provided they meet the criteria of the CAA, and the applicable federal regulations pertaining to the specific submitted revision(s) being acted on. The EPA has reviewed the proposed changes to the Texas NSR regulations and

² See 40 CFR 51.165(a)(1)(xv), 51.166(b)(11), and 52.21(b)(11).

preliminarily finds them to be consistent with CAA sections 110(a)(2)(C) and 110(l), and the EPA's NSR regulations located at 40 CFR 51.160-51.164.

III. Proposed Action

The EPA has made the preliminary determination that the January 29, 2020, regulations proposed for adoption by the TCEQ, and submitted to the EPA for parallel processing on January 30, 2020, as proposed revisions to the Texas SIP and the State's minor NSR permit rules, are in accordance with the CAA and the EPA's regulations, policy, and guidance for NSR permitting. The EPA's analysis indicates the proposed revisions to 30 TAC Section 116 satisfy the federal requirements for air pollution control permits and will not cause or contribute to an increase in the NAAQS; thus, will not interfere with attainment or reasonable further progress. Therefore, pursuant to section 110(l) of the CAA, the EPA proposes approval of the following revisions, proposed on January 29, 2020, and submitted by the TCEQ on January 30, 2020 with a request for parallel processing:

- Revisions to 30 TAC Section 116.110 (except for Sections 116.110(a)(5), (c) and (d) that are not part of the Texas SIP);
- Revisions to 30 TAC Section 116.116;
- Addition of 30 TAC Section 116.118;
- Revisions to 30 TAC Section 116.710;
- Revisions to 30 TAC Section 116.721.

Additionally, the EPA proposes a ministerial change to 40 CFR 52.2270(c) to clarify that 30 TAC Section 116.110 Subsections (d) change in ownership, (e) submittal under PE seal, and (f) responsibility for permit application were approved on November 14, 2003, and include their appropriate re-lettering to 30 TAC Subsections 116.110(e), (f), and (g), respectively, from the January 30, 2020, parallel processing request.

The EPA is proposing this action in parallel with the state's rulemaking process. We cannot take a final action until the State completes its rulemaking process, adopts its final regulations, and submits these final adopted regulations as revisions to the Texas SIP. If during the response to comments process, the State rule is changed significantly from the proposed rule and the rule upon which the EPA proposed, the EPA may have to withdraw our initial proposed rule and re-propose based on the final SIP submittal.

IV. Incorporation by Reference

In this action, we are proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are proposing to incorporate by reference revisions to the Texas regulations as described in the Proposed Action section above. We have made, and will continue to make, these documents generally available electronically through *www.regulations.gov* (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. 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 proposes to approve 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 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 EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed 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).

List of Subjects in 40 CFR Part 52

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

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

Dated: April 14, 2020.

Kenley McQueen,

Regional Administrator, Region 6.

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