



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2021-0480; FRL-10676-03-R6]

Air Plan Approval; Texas; New Source Review Updates for Project Emissions

Accounting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is approving portions of a revision to the Texas State Implementation Plan (SIP) submitted by the Texas Commission on Environmental Quality (TCEQ) on July 9, 2021. The revision includes updates to the Texas Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) permitting programs to incorporate Federal New Source Review (NSR) regulations for Project Emissions Accounting (PEA).

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-2021-0480. All documents in the docket are listed on the <https://www.regulations.gov> website. 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. Publicly available docket materials are available electronically through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Adina Wiley, EPA Region 6 Office, Air Permits Section (ARPE), 214-665-2115, wiley.adina@epa.gov. 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 “we,” “us,” and “our” means the EPA.

I. Background

The EPA finalized the PEA Rule on November 24, 2020 (85 FR 74890) to clarify permitting requirements for existing major stationary sources. An existing major stationary source proposing a physical change or a change in the method of operation (i.e., a “project”) must determine whether that project is a major modification subject to major NSR preconstruction permitting requirements by following a two-step applicability test. The first step is to determine if the proposed project would result in a “significant emission increase” of a regulated NSR pollutant (Step 1). If there is, the second step is to determine if the project would also result in a “significant net emission increase” of that pollutant (Step 2).

The PEA Rule maintained this two-step applicability test while clarifying that both increases and decreases in emissions resulting from a proposed project can be considered in Step 1 of the NSR major modification applicability test.¹ More specifically, the PEA Rule made this clarification in language addressing the “hybrid test” for projects that involve a combination of new and existing units by replacing the phrase “sum of the increases” with the phrase “sum of the difference.”² The PEA Rule also explained that the revised term “sum of the difference,” would apply to “all emissions units” instead of “for each emissions unit” to better account for projects that involve multiple types of emission units.³ Finally, the PEA Rule added regulatory text to clarify that the term “sum of the difference” as used in the referenced paragraphs shall

¹ 85 FR 74893 (November 24, 2020).

² *Id.* at 74894.

³ *Id.*

include both increases and decreases in emissions as calculated in accordance with those paragraphs.⁴

When the EPA finalized changes in the PEA Rule, the Agency responded to adverse comments received on the changes as proposed. Since that time, two petitions for judicial review of the PEA Rule were filed in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).⁵ However, this does not impede finalization of separate actions, including this rulemaking approving revisions to the Texas PSD and NNSR regulations.

On March 6, 2023, the EPA proposed approval of portions of the July 9, 2021, Texas SIP submittal to update the PSD and NNSR permitting programs to provide for project emissions accounting (88 FR 13572).⁶ Based on relevant adverse comments, the EPA supplemented our proposed approval on October 11, 2024 (89 FR 82560), with respect to the EPA's evaluation of the Texas SIP submittal and the anti-backsliding requirements of the CAA sections 110(l) and 193.

II. Response to Comments

Comments on the EPA's March 6, 2023, proposed rulemaking were due by April 5, 2023. We received supportive comment letters from the TCEQ on April 4, 2023, and from Baker Botts L.L.P on behalf of the Texas Industry Project on April 5, 2023. We appreciate the commenters' support and will not further address these comments. We also received a comment letter and supplemental documents dated April 5, 2023, from Air Law for All submitted on behalf of the Center for Biological Diversity, Sierra Club Environmental Law Program, Natural Resources Defense Council, Environmental

⁴ *Id.*

⁵ See *Environmental Defense Fund v. EPA*, 21-1039 (D.C. Cir.); *State of New Jersey v. EPA*, 21-1033 (D.C. Cir. 2021).

⁶ EPA notes that the July 9, 2021, Texas SIP submittal also included revisions to, and repeal of, other provisions within 30 Texas Administrative Code Chapter 116 that were not relevant to Project Emissions Accounting. The EPA took separate action to finalize those revisions in the *Federal Register* at 88 FR 57882, August 24, 2023. See also the rulemaking docket EPA-R06-OAR-2022-0307.

Integrity Project, Powell Environmental Law LLC, Air Law for All Ltd., and Environmental Defense Fund. The comment letter opposes approval of the changes in the July 9, 2021, Texas SIP to provide for project emissions accounting in the Texas PSD and NNSR permitting program.

Comments on the October 11, 2024 (89 FR 82560), supplemental proposed approval were due by November 12, 2024. We received supportive comments from an anonymous commenter dated October 15, 2024, and the Texas Chemistry Council dated November 12, 2024; we appreciate the commenters' support and will not further address these comments. The TCEQ also submitted supportive comments on November 12, 2024, with specific clarifications to the EPA's evaluation of the minor NSR mechanisms approved in the Texas SIP.

Comment 1: The Commenter states that “[e]ven under EPA’s 2020 [PEA] rule, EPA cannot approve [Texas’s] plan revision without a requirement that a project consist of ‘substantially related’ activities.” The Commenter suggests that the July 9, 2021, submission fails to include a requirement that projects consist of substantially related activities.

The Commenter states that the EPA relies on its January 15, 2009, rulemaking⁷ (hereafter referred to as the 2009 NSR Aggregation Action, or the 2009 Action) in the PEA Rule to interpret “major NSR regulations as requiring that a project consist of ‘substantially related’ activities.” The Commenter asserts that the EPA cannot approve Texas’s SIP revision without requiring the State to revise its SIP to conform with the EPA’s interpretation of the 2009 action referenced in the PEA Rule. The Commenter further asserts that this requirement must be made part of the SIP so that it can be enforced by EPA and citizens pursuant to CAA sections 113 and 304. In the background section of its comments, the Commenter also states that this concern is “primarily a

⁷ See 74 FR 2376.

matter for the D.C. Circuit Court of Appeals,” where the PEA Rule is currently being challenged.

Response 1: The EPA requires NNSR and PSD SIP revisions to meet or exceed the minimum requirements codified at 40 CFR 51.165 and 51.166, respectively. The Texas SIP is approved as meeting the minimum PSD and NNSR program requirements.⁸

The Commenter focuses not on whether Texas’s proposed PSD and NNSR SIP revisions comply with the EPA’s minimum standards for PSD and NNSR plans codified at 40 CFR 51.165 and 51.166. Rather, the comments are directed at the substance of the PEA Rule itself. The Commenter, for example, explicitly takes the position that “EPA’s 2020 Rule is unlawful.”

The time for submitting comments on the PEA Rule was when the EPA notified the public that it was considering adopting that rule and requested the public’s input.⁹ The Commenter did not submit comments on the PEA Rule and the EPA thus views the comments as untimely comments on the PEA Rule itself.¹⁰ The EPA addressed concerns regarding project aggregation in response to comments by other parties in that rulemaking action. *See* 85 FR 74890, 74898-900 (November 24, 2020). As noted by the Commenter, these concerns are “primarily a matter for the D.C. Circuit Court of Appeals,” where the PEA Rule is currently being challenged by States and organizations other than the Commenter.

In the EPA’s March 6, 2023, notice of proposed rulemaking, we did not propose to revise the minimum standards within 40 CFR 51.165 or 51.166, and the EPA did not

⁸ *See* the approved Texas SIP at 40 CFR 52.2270.

⁹ *See* 84 FR 39244 (August 9, 2019).

¹⁰ As the Commenter also notes, litigation regarding the PEA Rule has been filed in the D.C. Circuit. The Commenter is not a party to that suit. Congress established a jurisdictional bar for judicial review of EPA rulemakings which states that “[a]ny petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the *Federal Register*, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.” CAA Subsection 307(b)(1). This language further indicates that submitting comments on a State’s implementation of a preexisting EPA rule is an improper method to challenge the EPA’s underlying rule – such comments (and any related judicial review) must be submitted on the underlying rule itself.

seek comment on the PEA Rule, which EPA finalized in 2020. Rather, the EPA explained that “we are proposing to approve the submitted revisions to the Texas SIP that update the PSD and NNSR permitting requirements to maintain consistency with the Federal NSR program requirements by adopting the provisions for PEA” and the EPA sought the public’s comments on this preliminary determination. *See* 88 FR 13752. The Commenter does not engage with the question of whether Texas’s proposed SIP revision (and the EPA’s proposal to approve this SIP revision) complies with the EPA’s minimum NSR standards, and therefore, these comments do not demonstrate that the EPA may not approve the SIP revision. The Commenter’s position is also based on an erroneous reading of the PEA Rule. The PEA Rule preamble states that “state and local air agencies with approved SIPs are and were not required to amend their plans to adopt the interpretation that projects should be aggregated when ‘substantially related.’” *See* 85 FR 74895, FN 57 (November 24, 2020).¹¹

Comment 2: The Commenter states that “EPA’s proposed approval violates the anti-backsliding provisions of the Act.” Specifically, the Commenter asserts that adopting the PEA Rule would weaken the stringency of Texas’s SIP. The Commenter asserts that Texas’s revision to the project emissions accounting portion of its rules is a “substantive change to previous applicability requirements” and that the EPA must therefore provide an air quality analysis demonstrating that the change to the Texas SIP will not violate section 110(l) and section 193 of the Act.

Response 2: The EPA published a supplemental notice of proposed rulemaking (SNPRM) on October 11, 2024 (89 FR 82560), to provide our evaluation of the July 9, 2021, Texas SIP revision anti-backsliding demonstration under CAA sections 110(l) and

¹¹ Footnote 57 cites to the memorandum from the EPA Administrator E. Scott Pruitt to Regional Administrators, titled “Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program,” March 13, 2018 (“March 2018 Memorandum”) available at: https://www.epa.gov/sites/production/files/2018-03/documents/nsr_memo_03-13-2018.pdf.

193. In this SNPRM we presented the TCEQ's anti-backsliding argument and evaluated the approved Texas minor NSR permitting mechanisms as substitute measures under CAA sections 110(l) and 193. We concluded in this SNPRM that the demonstration provided by the TCEQ and the Texas SIP-approved minor NSR program are adequate substitute measures to maintain the status quo air quality and protect human health and the environment.¹² The TCEQ submitted a comment letter on November 12, 2024, agreeing with the EPA's evaluation of the approved minor NSR mechanisms and providing additional information about the SIP-approved public notice provisions for permits by rule.

Comment 3: The Commenter asserts that the EPA should not act on the July 9, 2021, Texas SIP revision while pending litigation exists concerning the PEA Rule. The Commenter states that the EPA provides no explanation of the manner at which it would reverse an approved revision should EPA rescind, or a court vacate, the PEA Rule.

Response 3: The EPA disagrees with the Commenter that, while litigation is ongoing on the PEA Rule, EPA should not act on the Texas plan revision. The PEA Rule, published on November 24, 2020 (85 FR 74890), has been incorporated into the Federal regulations addressing major new source review. Texas's July 9, 2021, submission merely adopts provisions consistent with federally approved regulations. Implementation of this rule has not been stayed by the court. In the event the EPA or the court takes an action that affects the PEA Rule and therefore the EPA NSR regulations, the EPA has tools available to ensure that SIPs remain compliant with the EPA's rules.

III. Final Action

Pursuant to section 110 of the Act, we are approving the submitted revisions to the Texas SIP that update the PSD and NNSR permitting requirements to maintain consistency with the Federal NSR program requirements by adopting the provisions for

¹² See the discussion at 89 FR 82562 and 82563 (October 11, 2024).

PEA. Our analysis found that the submitted revisions are consistent with the CAA and the EPA's regulations, policy, and guidance for permitting SIP requirements. The EPA is approving the following revisions adopted on June 9, 2021, effective on July 1, 2021, submitted to the EPA on July 9, 2021:

- Revisions to 30 TAC Section 116.12 – Nonattainment and Prevention of Significant Deterioration Review Definitions,
- Revisions to 30 TAC Section 116.150 – New Major Source or Major Modification in Ozone Nonattainment Areas,
- Revisions to 30 TAC Section 116.151 – New Major Source or Major Modification in Nonattainment Area Other than Ozone, and
- Revisions to 30 TAC Section 116.160 – Prevention of Significant Deterioration.

IV. 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 as described in section III of this preamble, final action. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* (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 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 by reference in the next update to the SIP compilation.

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 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);
- Is not subject to Executive Order 14192 (90 FR 9065, February 6, 2025) because SIP actions are exempt from review 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 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- 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.

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).

This action is subject to the Congressional Review Act, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 7, 2025.

Walter Mason,
Regional Administrator, Region 6.

For the reasons stated in the preamble, the Environmental Protection Agency amends 40

CFR part 52 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(c), the table titled “EPA Approved Regulations in the Texas SIP” is amended by revising the entries for Sections 116.12, 116.150, 116.151, and 116.160 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				
* * * * *				
Section 116.12	Nonattainment and Prevention of Significant Deterioration Review Definitions	6/09/2021	[INSERT DATE OF PUBLICATION IN THE <i>FEDERAL REGISTER</i>], 90 FR [INSERT <i>FEDERAL REGISTER</i> PAGE WHERE THE DOCUMENT BEGINS]	
* * * * *				

Section 116.150	New Major Source or Major Modification in Ozone Nonattainment Area	6/09/2021	[INSERT DATE OF PUBLICATION IN THE <i>FEDERAL REGISTER</i>], 90 FR [INSERT <i>FEDERAL REGISTER</i> PAGE WHERE THE DOCUMENT BEGINS]	
Section 116.151	New Major Source or Major Modification in Nonattainment Area Other than Ozone	6/09/2021	[INSERT DATE OF PUBLICATION IN THE <i>FEDERAL REGISTER</i>], 90 FR [INSERT <i>FEDERAL REGISTER</i> PAGE WHERE THE DOCUMENT BEGINS]	
* * * * *				

Section 116.160	Prevention of Significant Deterioration	6/09/2021	<p>[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], 90 FR [INSERT FEDERAL REGISTER PAGE WHERE THE DOCUMENT BEGINS]</p>	<p>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.</p>
<p>* * * * *</p>				

* * * * *