

Texas Commission on Environmental Quality

Chapter 116 - Control of Air Pollution by Permits for New Construction or Modification.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 6 : PREVENTION OF SIGNIFICANT DETERIORATION REVIEW

As approved by EPA November 10, 2014 (79 FR 66626) effective November 10, 2014 (TXd161), Regulations.gov document EPA-R06-OAR-2013-0808-0027 [TX155.27].

Struck-out text NOT in SIP.

Outline:

§116.160. Prevention of Significant Deterioration Requirements.

As adopted by TCEQ March 26, 2014, effective April 17, 2014 (6-86).
Approved by EPA November 10, 2014 (79 FR 66626) effective November 10, 2014 (TXd161).

Regulations.gov document EPA-R06-OAR-2013-0808-0027 [TX155.27]

Section 116.160 Explanation:

The PSD SIP includes 30 TAC Section 116.160(a) and (b) 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

§116.161. Source Located in an Attainment Area with a Greater than De Minimis Impact.

As adopted by TNRCC June 17, 1998, effective July 8, 1998 (6-48).
Approved by EPA September 18, 2002 (67 FR 58697) effective October 18, 2002 (TXd34).

§116.162. Evaluation of Air Quality Impacts.

As adopted by TNRCC October 10, 2001, effective November 1, 2001 (6-56).
Approved by EPA July 22, 2004 (69 FR 43752) effective September 20, 2004 (TXd46).

§116.163. Prevention of Significant Deterioration Permit Fees.

6-61: As adopted by TCEQ September 25, 2002 effective October 20, 2002 (6-61), and submitted to EPA October 4, 2002.
Approved by EPA March 20, 2009 (74 FR 11851) effective May 19, 2009 (TXd101)

§116.164. Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources.

As adopted by TCEQ March 26, 2014, effective April 17, 2014 (6-86).
Approved by EPA November 10, 2014 (79 FR 66626) effective November 10, 2014 (TXd161).

Regulations.gov document EPA-R06-OAR-2013-0808-0027 [TX155.27]

Section 116.164 Explanation:

The PSD SIP does NOT include 30 TAC Sections 116.164(a)(3), (a)(4), (a)(5), and (b).

§116.169. Greenhouse Gases Program Transitions.

As adopted by TCEQ March 26, 2014, effective April 17, 2014 (6-86).

Approved by EPA November 10, 2014 (79 FR 66626) effective November 10, 2014 (TXd161).

Regulations.gov document EPA-R06-OAR-2013-0808-0027 [TX155.27]

Section 116.169 Explanation:

The PSD SIP does NOT include 30 TAC Section 116.169(b).

The PSD SIP includes a letter from the TCEQ dated January 13, 2014, regarding the TCEQ's authority to administer EPA-issued GHG PSD permits.

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SUBCHAPTER B: NEW SOURCE REVIEW PERMITS
DIVISION 6: PREVENTION OF SIGNIFICANT DETERIORATION REVIEW
§§116.160 - 116.164, 116.169
Effective April 17, 2014

§116.160. Prevention of Significant Deterioration Requirements.

Paragraphs (a) and (b) as adopted by TCEQ June 2, 2010, effective June 24, 2010 (6-77), and approved by EPA September 15, 2010 (75 FR 55978) effective November 15, 2010 (TXd118), Regulations.gov docket EPA-R06-OAR-2010-0620 [TX110].

Rest of section 116.160 as adopted by TCEQ March 26, 2014, effective April 17, 2014 (6-86), and approved by EPA November 10, 2014 (79 FR 66626) effective November 10, 2014 (TXd161), Regulations.gov document EPA-R06-OAR-2013-0808-0027 [TX155.27].

(a) Each proposed new major source or major modification in an attainment or unclassifiable area shall comply with the requirements of this section. The owner or operator of a proposed new or modified facility that will be a new major stationary source for the prevention of significant deterioration air contaminant shall meet the additional requirements of subsection (c)(1) - (4) of this section.

(b) The *de minimis* threshold test (netting) is required for all modifications to existing major sources of federally regulated new source review pollutants, unless the proposed emissions increases associated with a project, without regard to decreases, are less than major modification thresholds for the pollutant identified in 40 Code of Federal Regulations (CFR) §52.21(b)(23).

~~**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**~~
~~**DIVISION 6: PREVENTION OF SIGNIFICANT DETERIORATION REVIEW**~~
~~**§§116.160 - 116.164, 116.169**~~
~~**Effective April 17, 2014**~~

~~**§116.160. Prevention of Significant Deterioration Requirements.**~~

~~(a) Each proposed new major source or major modification in an attainment or unclassifiable area shall comply with the requirements of this section. In addition, each proposed new major source of greenhouse gases (GHGs) or major modification involving GHGs shall comply with the applicable requirements of this section. The owner or operator of a proposed new or modified facility that will be a new major stationary source for the prevention of significant deterioration air contaminant shall meet the additional requirements of subsection (c)(1) - (4) of this section.~~

~~(b) *De minimis* threshold test (netting):~~

~~(1) is required for all modifications to existing major sources of federally regulated new source review pollutants, unless the proposed emissions increases associated with a project, without regard to decreases, are less than major modification thresholds for the pollutant identified in 40 Code of Federal Regulations (CFR) §52.21(b)(23); and~~

~~(2) is required for GHGs at existing major sources if the proposed modification results in an emissions increase, without regard to decreases, as required in §116.164(a)(2) and (4)(B) of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).~~

(c) In applying the *de minimis* threshold test (netting), if the net emissions increases are greater than the major modification levels for the pollutant identified in 40 CFR §52.21(b)(23) and for GHGs in §116.164 of this title, the following requirements apply.

(1) In addition to those definitions in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) the following definitions from prevention of significant deterioration of air quality regulations promulgated by the United States Environmental Protection Agency (EPA) in 40 CFR §52.21 and the definitions for protection of visibility and promulgated in 40 CFR §51.301 as amended July 1, 1999, are incorporated by reference:

(A) 40 CFR §52.21(b)(12) - (15), concerning best available control technology, baseline concentrations, dates, and areas;

(B) 40 CFR §52.21(b)(19), concerning innovative control technology; and

(C) 40 CFR §52.21(b)(24) - (28), concerning federal land manager, terrain, and Indian reservations/governing bodies.

(2) The following requirements from prevention of significant deterioration of air quality regulations promulgated by the EPA in 40 CFR §52.21 are hereby incorporated by reference:

(A) 40 CFR §52.21(c) - (k), concerning increments, ambient air ceilings, restrictions on area classifications, exclusions from increment consumption, redesignation, stack heights, exemptions, control technology review, and source impact analysis;

(B) 40 CFR §52.21(m) - (p), concerning air quality analysis, source information, additional impact analysis, and sources impacting federal Class I areas;

(C) 40 CFR §52.21(r)(4), concerning relaxation of an enforceable limitation; and

(D) 40 CFR §52.21(v), concerning innovative technology.

(3) The term "facility" shall replace the words "emissions unit" in the referenced sections of the CFR.

(4) The term "executive director" shall replace the word "administrator" in the referenced sections of the CFR except in 40 CFR §52.21(g) and (v).

(d) All estimates of ambient concentrations required under this subsection shall be based on the applicable air quality models and modeling procedures specified in the EPA Guideline on Air Quality Models, as amended, or models and modeling procedures currently approved by the EPA for use in the state program, and other specific provisions made in the prevention of significant deterioration state implementation plan. If the air quality impact model approved by the EPA or specified in the guideline is inappropriate, the model may be modified or another model substituted on a case-by-case basis, or a generic basis for the state program, where appropriate. Such a change shall be subject to notice and opportunity for public hearing and written approval of the administrator of the EPA.

Adopted March 26, 2014

Effective April 17, 2014

§116.161. Source Located in an Attainment Area with a Greater than De Minimis Impact.

The commission may not issue a permit to any new major stationary source or major modification located in an area designated as attainment or unclassifiable, for any National Ambient Air Quality Standard (NAAQS) under FCAA, §107, if ambient air impacts from the proposed source would cause or contribute to a violation of any NAAQS. In order to obtain a permit, the source must reduce the impact of its emissions upon air quality by obtaining sufficient emission reductions to eliminate the predicted exceedances of the NAAQS. A major source or major modification will be considered to cause or contribute to a violation of a NAAQS when the emissions from such source or modification would, at a minimum, exceed the de minimis impact levels specified in §101.1 of this title (relating to Definitions) at any locality that is designated as nonattainment or is predicted to be nonattainment for the applicable standard.

Adopted June 17, 1998

Effective July 8, 1998

§116.162. Evaluation of Air Quality Impacts.

In evaluating air quality impacts under §116.160 of this title (relating to Prevention of Significant Deterioration Requirements) or §116.161 of this title (relating to Sources Located in an Attainment Area with a Greater Than De Minimis Impact), the owner or operator of a proposed new facility or modification of an existing facility shall not take credit for reductions in impact due to dispersion techniques as defined in Title 40 Code of Federal Regulations (CFR). The relevant federal regulations are incorporated herein by reference, as follows:

(1) 40 CFR §51.100(hh) - (kk) promulgated November 7, 1986;

(2) the definitions of "owner or operator," "emission limitation and emission standards," "stack," "a stack in existence," and "reconstruction," as given under 40 CFR §51.100(f), (z), (ff), (gg), promulgated November 7, 1986, and 40 CFR §60.15, promulgated December 16, 1975, respectively;

(3) 40 CFR §51.118(a) and (b), promulgated November 7, 1986; and

(4) 40 CFR §51.164, promulgated November 7, 1986.

Adopted October 10, 2001

Effective November 1, 2001

§116.163. Prevention of Significant Deterioration Permit Fees.

(a) If the estimated capital cost of the project is less than \$300,000 or if the project consists of new facilities controlled and operated directly by the federal government for which an application is submitted after January 1, 1987, and the federal regulations for Prevention of Significant Deterioration (PSD) of Air Quality are applicable, the fee is \$3,000.

(b) If the estimated capital cost of the project is \$300,000 or more and the PSD regulations are applicable, the fee is 1.0% of the estimated capital cost of the project. The maximum fee is \$75,000.

(c) Whenever a permit application is submitted under PSD requirements, there shall be no additional fee for the state new source review permit application.

(d) Certification of the estimated capital cost of the project shall be provided in accordance with §116.141(c) and (d) of this title (relating to Determination of Fees).

(e) A fee of \$75,000 shall be required if no estimate of capital project cost is included with a permit application.

Adopted September 25, 2002

Effective October 20, 2002

§116.164. Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources.

(a) Greenhouse Gases (GHGs) are subject to Prevention of Significant Deterioration review under the following conditions:

(1) New source, major for non-GHGs. The stationary source is a new major stationary source for a federally regulated new source review (NSR) pollutant that is not GHGs, and will emit or have the potential to emit 75,000 tons per year (tpy) or more carbon dioxide equivalent (CO₂e); or

(2) Existing source, major for non-GHGs. The stationary source is an existing major stationary source for a federally regulated NSR pollutant that is not GHGs, and will have a significant net emissions increase of a federally regulated NSR pollutant that is not GHGs, and a net emissions increase greater than zero tpy GHGs on a mass basis and 75,000 tpy or more CO₂e.

~~(3) New source, major for GHGs Only. The new stationary source that will emit or has the potential to emit greater than or equal to 100 tpy GHGs on a mass basis,~~

~~if the source is listed on the named source category list in 40 Code of Federal Regulations (CFR) §51.166(b)(1)(i), or greater than or equal to 250 tpy GHGs on a mass basis; and 100,000 tpy or more CO₂e.~~

~~(4) GHGs major modification at an existing source that is a major stationary source for GHGs.~~

~~(A) The existing stationary source emits or has the potential to emit greater than or equal to 100 tpy GHGs on a mass basis, if the source is listed on the named source category list in 40 CFR §51.166(b)(1)(i), or greater than or equal to 250 tpy GHGs on a mass basis; and 100,000 tpy or more CO₂e; and~~

~~(B) the stationary source undertakes a physical change or change in the method of operation that will result in a net emissions increase greater than zero tpy GHGs on a mass basis, and a net emissions increase of 75,000 tpy or more CO₂e.~~

~~(5) Existing source that is not major. The existing stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase greater than or equal to 100 tpy GHGs on a mass basis, if the source is listed on the named source category list in 40 CFR §51.166(b)(1)(i), or greater than or equal to 250 tpy GHGs on a mass basis; and 100,000 tpy or more CO₂e.~~

~~(b) New stationary sources with emissions of GHGs, or existing stationary sources that undertake a physical change or change in the method of operations that includes emissions of GHGs, that do not meet any of the conditions in subsection (a) of this section do not require authorization under this subchapter, Subchapter F of this chapter (relating to Standard Permits), Subchapter G of this chapter (relating to Flexible Permits), or Chapter 106 of this title (relating to Permits by Rule) for emissions of GHGs. Owners or operators of these sources must keep records sufficient to demonstrate the amount of emissions of GHGs from the source as a result of construction, a physical change or a change in method of operation do not require authorization under subsection (a) of this section. Records must be made available at the request of personnel from the commission or any local air pollution control agency having jurisdiction. Records must be maintained for a minimum of five years from the date of the construction, physical change, or change in method of operation.~~

Adopted March 26, 2014

Effective April 17, 2014

§116.169. Greenhouse Gases Program Transitions.

(a) Upon the effective date of the United States Environmental Protection Agency (EPA) approval of this chapter and rescission of the Federal Implementation Plan as

published in the May 3, 2011, issue of the Federal Register (76 FR 25178), the commission will accept transfer of and review applications previously filed with EPA for greenhouse gas prevention of significant deterioration permits. These applications will be subject to the applicable requirements of this chapter.

~~(b) Section 116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gas Sources) will not apply to greenhouse gases at a source that would not be subject to Prevention of Significant Deterioration Review for greenhouse gases under a change in federal law on or after March 26, 2014.~~

Adopted March 26, 2014

Effective April 17, 2014



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 2, 2013

Mr. Sam Coleman
Deputy Regional Administrator
U.S. Environmental Protection Agency, Region VI
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Dear Mr. Coleman,

On October 23, 2013, the Texas Commission on Environmental Quality (TCEQ or commission) approved the publication of proposed new and amended rules to apply its Prevention of Significant Deterioration (PSD) program to greenhouse gas (GHG) emitting sources. This action is the result of passage of House Bill 788 in the 83rd Legislature which added Section 382.05102 to the Texas Health and Safety Code (THSC).¹ To the extent that GHG emissions require authorization under federal law, this new section grants the commission authority to authorize emissions of GHGs in a manner consistent with Section 382.051. In addition, the legislation requires the commission adopt rules to implement Section 382.05102, including procedures to transition applications pending with the Environmental Protection Agency (EPA) to Texas, and to submit the rules for approval into the State Implementation Plan (SIP). If adopted, these rules will be submitted to EPA for approval into the SIP. In addition to the SIP rule revision process, the Federal Implementation Plan (FIP) for PSD GHG permitting must also be rescinded. In order to expedite federal approval and rescission of the FIP, the TCEQ requests that EPA "parallel process" these revisions to the Texas SIP in accordance with 40 Code of Federal Regulations (CFR) Part 51, Appendix V and as contemplated in EPA's May 3, 2011 *Federal Register* notice.²

These actions on the part of the TCEQ reflect the agency's efforts to work with EPA to have the FIP rescinded as that process is outlined in the May 3, 2011 *Federal Register* notice of the final partial SIP disapproval and FIP. In that notice, EPA stated that it will rescind the FIP if: "(i) Texas submits, and EPA approves, a SIP revision to apply Texas' PSD program to GHG emitting sources, (ii) Texas provides assurances that in the future, it will apply its PSD program to all pollutants newly subject to regulation, including non-NAAQS pollutants, and (iii) Texas provides 'necessary assurances' under CAA section

¹ Act of June 14, 2013, 83rd Leg., R.S., H.B. 788, § 2 (to be codified at Tex. Health & Safety Code § 382.05102).

² Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program, Final Rule, 76 *Fed. Reg.* 25178, (May 3, 2011)

110(a)(2)(E)(ii) that it ‘will have adequate...authority under State law’ to apply its PSD program to such pollutants.”³

As discussed above, the TCEQ is moving forward expeditiously on rules to apply its PSD permitting program to GHG emitting sources. Regarding the point concerning adequate legal authority, under the Federal Clean Air Act (FCAA) and Texas Clean Air Act (TCAA), the TCEQ is given broad authority over stationary sources of air pollution. The FCAA establishes a partnership between EPA and the states for the attainment and maintenance of national air quality goals. Under this partnership, “air pollution prevention ... at its source is the primary responsibility of the states...”⁴ States are to, “after reasonable notice and public hearing” submit plans that include a program to regulate modification and construction of any stationary source within the areas covered by such plan.⁵ Under state law, the TCEQ is provided with similarly broad authority. For instance, the TCAA, codified in Chapter 382 of the Texas Health and Safety Code, was created for the purpose of safeguarding the state’s air resources from pollution by controlling or abating air pollution and to do so consistent with the protection of public health, property and general welfare.⁶ In addition, the TCAA provides that “the commission shall...establish the level of quality to be maintained in the state’s air, and control the quality of the state’s air...”⁷ The commission is further directed to develop a comprehensive air control plan and adopt rules consistent with the policy and purpose of the TCAA.⁸

In order to fulfill the obligation to protect air quality in the state, the TCAA authorizes the commission to issue permits to construct or modify stationary sources.⁹ Before construction is commenced for a new facility or a modification to an existing facility, the commission must issue a permit if the facility will use the best available control technology, or BACT, and there is no indication from the information provided by the permit applicant that emissions will interfere with protection of public health and welfare.¹⁰ Under this permitting authority and the authority to develop rules to carry out its duties under the Act, the commission has adopted specific rules in order to implement the federal PSD permitting program. These EPA-approved rules are found in 30 Texas Administrative Code (TAC) Chapter 116, Subchapter B, New Source Review Permits. Chapter 116 includes requirements for BACT and impacts review among other things, consistent with the federal program rules. Through notice and comment rulemaking, TCEQ incorporated the federal PSD requirements into these rules in order

³ 76 *Fed. Reg.* at 25206

⁴ 42 U.S.C. § 7401(a)(4)

⁵ 42 U.S.C. § 7410(a)(2)

⁶ Tex. Health & Safety Code § 382.002

⁷ Tex. Health & Safety Code § 382.011

⁸ Tex. Health & Safety Code § 382.012

⁹ Tex. Health & Safety Code § 382.051

¹⁰ Tex. Health & Safety Code § 382.0518

to gain SIP approval in 1992;¹¹ and conducted numerous rulemakings to amend these rules as federal requirements changed.

As to applying TCEQ's PSD program to all pollutants newly subject to regulation, for many years, TCEQ has used its rulemaking authority under state law and the FCAA Section 110 SIP revision process to include new pollutants or newly promulgated requirements, in its PSD program. Under the TCAA, the commission is required to "adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under [THSC Chapter 382]."¹² The state Administrative Procedure Act contains the general rulemaking authority for state agencies.¹³ This law mandates that agencies adopt rules in a timely manner, requiring withdrawal of a proposed rule six months after publication of proposal if the agency fails to adopt or withdraw the proposed rule.¹⁴ Texas's SIP updating method has been long recognized by EPA in the several revisions it has approved relating to the state's PSD program.¹⁵ As far back as 1986, our predecessor agency, the Texas Air Control Board (TACB), expressed in writing to Region 6 that the agency's intent in incorporating by reference specific federal PSD requirements is not prospective rulemaking. At that time, the TACB Deputy Executive Director stated that any future revisions of state PSD rules to incorporate revisions requested by EPA, would be accomplished after public hearing and opportunity for public comment and participation.¹⁶ For instance, TCEQ submitted a SIP revision on September 29, 1988 to regulate PM₁₀ under PSD, a pollutant newly subject to regulation under the FCAA after EPA established a NAAQS for this pollutant in July 1987.¹⁷ This revision was approved by EPA as part of the 1992 approval of the Texas PSD program. As EPA has amended its permitting rules, TCEQ has acted accordingly to adopt rules in order to maintain its longstanding PSD program approval in the SIP. In a 1991 SIP revision, state rules were amended to reflect new federal NO_x PSD increments that were adopted by EPA in 1988. EPA approved this revision to the Texas SIP in 1994.¹⁸ After EPA promulgated the NSR Reform rules in 2002, TCEQ adopted corresponding rules and submitted them to EPA as a revision to the PSD

¹¹ Approval and Promulgation of Implementation Plan State of Texas Prevention of Significant Deterioration, Final Rulemaking, 57 *Fed. Reg.* 28093 (June 24, 1992)

¹² Tex. Health & Safety Code § 382.051(d)

¹³ Tex. Gov. Code, Chapter 2001

¹⁴ Tex. Gov. Code § 2001.027

¹⁵ See Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program, Interim Final Rule, 75 *Fed. Reg.* 82430, 82439 (December 30, 2010)

¹⁶ Letter from Steve Spaw, Deputy Exec. Director, TACB to William Hathaway, Dir. Air, Pesticides, and Toxics Division, U.S. EPA Region 6 (October 24, 1986)

¹⁷ See EPA's notice of proposed approval of Texas's PSD program, 54 *Fed. Reg.* 52823, December 22, 1989, for a discussion of this process

¹⁸ Approval and Promulgation of State Implementation Plans Texas; Prevention of Significant Deterioration, Nitrogen Dioxide Increments, Direct Final Rule, 59 *Fed. Reg.* 46556 (September 9, 1994)

Mr. Sam Coleman
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program. EPA approved the revision in 2012.¹⁹ More recently, commission rules were amended to incorporate PM_{2.5} implementation requirements after EPA ended the PM₁₀ surrogate policy for demonstrating compliance with the PM_{2.5} NAAQS PSD requirements.²⁰

As contemplated in the FCAA's state-federal partnership concept, a single permitting authority in Texas is preferred by all parties. This concept provides the most certainty and consistency in applying federal and state requirements to the regulated community. As found by the legislature in House Bill 788, Texas desires to continue to be the PSD permitting authority in this state in the future. Toward that end, we commit to EPA that, going forward, we will follow the same SIP amendment process used in the past that has met with EPA approval. We believe this process, which has worked well in the past, ensures the transparency and public scrutiny necessary for effective air quality regulation.

If you have additional questions, please contact me at (512) 239-3914.

Sincerely,



Zak Covar
Executive Director

Cc: Adina Wiley, U.S. Environmental Protection Agency, Region VI;
Lynde Schoellkopf, U.S. Environmental Protection Agency, Region VI;
Anne Idsal, Texas Commission on Environmental Quality, General Counsel;
Caroline Sweeney, Texas Commission on Environmental Quality, Deputy, Office of Legal Services;
Steve Hagle, Texas Commission on Environmental Quality, Deputy, Office of Air

¹⁹ Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Antibacksliding of Major NSR SIP Requirements for the One-hour Ozone National Ambient Air Quality Standard (NAAQS); Major Nonattainment NSR (NNSR) SIP Requirements for the 1997 Eight-hour Ozone NAAQS; and Major NSR Reform Program, Final Rule, 77 *Fed. Reg.* 65119 (October 25, 2012)

²⁰ 36 *Tex. Reg.* 2841, May 6, 2011; "In an effort to ensure the TCEQ meets the regulatory requirements of the FCAA the commission is adopting amendments to Chapter 101 and 30 TAC Chapter 106, Permits by Rule, to add specific definitions related to PM_{2.5} regulation and to address the known requirements for implementation."

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Zak Covar, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 30, 2014

Mr. Ron Curry
Regional Administrator
United States Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Dear Mr. Curry:

As part of U.S. Environmental Protection Agency's (EPA) review of the rules submitted by the Texas Commission on Environmental Quality (TCEQ) to implement Greenhouse Gas (GHG) Prevention of Significant Deterioration (PSD) permitting, you requested TCEQ address the administrative and judicial review processes for GHG PSD permits issued by the executive director or the commissioners that will apply upon EPA approval of the TCEQ's GHG PSD permitting program and rescission of the Federal Implementation Plan (FIP).

When applicants apply for a GHG PSD permit, they may file an application seeking authorization only for a GHG PSD permit, or they may file an application that is consolidated with applications for certain other authorizations; and notice of an opportunity for public comment is provided for both. Therefore, my response is organized to address these scenarios.

GHG PSD Permit Issuance by the Executive Director

Separate GHG PSD Application

If no timely comments are received, the executive director may issue the permit. If timely comments are submitted, the executive director may issue the permit on or after the date that his Response to Comments is filed.²

The Texas Clean Air Act exempts GHG PSD applications from the contested case hearing (CCH) process. Therefore, even if hearing requests are submitted, the executive director may issue the permit, as allowed by TCEQ rule.

To appeal a GHG PSD permit issued by the executive director, a person must exhaust the available administrative remedies, specifically by filing a Motion to Overturn (MTO).^{3, 4} No affected-person⁵ determination is necessary by TCEQ as prerequisite to the filing or the

¹ The use of the term "consolidated application" in this letter means that one application is filed for a GHG PSD permit, together with applications for one or more of the following types of permits: minor New Source Review (NSR), minor NSR flexible permit, non-GHG PSD, and nonattainment.

² 30 Tex. Admin. Code § 50.133.

³ *Id.*

Mr. Ron Curry
Regional Administrator
U.S. Environmental Protection Agency, Region 6
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commissioners' consideration of an MTO. If the commissioners grant the MTO, the application would be remanded to the executive director. If an MTO is denied by the commissioners or overruled by operation of law, the final order may be appealed to a Travis County District Court.⁶ If appealed to district court, the judge will, pursuant to statute, determine whether the appellant is a person affected by the decision of the TCEQ and thus whether the appellant has standing.⁷ In other words, if the legislature has eliminated contested-case hearings as an available administrative remedy (and thus obviated affected-person determinations by TCEQ), an affected person may still obtain judicial review if the person has exhausted the remedies that are available.

Consolidated GHG PSD Application⁸

The process for consolidated applications will be the same as it is for separate applications, unless a request for a CCH is received regarding the non-GHG portions of the application. If a CCH request is received, the entire application will be forwarded to the commissioners for consideration, which is discussed below.

GHG PSD Permit Issued by the Commission

Separate GHG PSD Application

If the commissioners issue a GHG PSD permit, a person must exhaust the available administrative remedies, specifically by filing a Motion for Rehearing (MFR) on the order issued by the commissioners, to appeal the decision.⁹

The commissioners may grant the MFR in whole or in part; if the commissioners grant the MFR, the decision or order is nullified.¹⁰ If the commissioners deny the MFR or if the MFR is overruled by operation of law, the final order may be appealed to a Travis County District Court.¹¹ If appealed to district court, the judge will, pursuant to statute, determine whether the appellant is a person affected by the decision of the TCEQ and thus whether the appellant has standing.¹² And, as noted above, the absence of an opportunity for a contested-case hearing and an affected-person determination by TCEQ do not determine whether a person has standing to file suit in district court challenging the issuance of a GHG PSD permit by the commissioners.

⁴ Information regarding MTOs was previously submitted to EPA with the amendments to the public participation rules for air quality permit applications at 35 *Tex. Reg.* 5198, 5201 (June 18, 2010).

⁵ As that term is defined in Tex. Water Code § 5.115(a) and TCEQ rule 30 Tex. Admin. Code § 55.103.

⁶ Tex. Health & Safety Code § 382.032, Tex. Water Code § 5.351.

⁷ *Id.*

⁸ See Footnote 1.

⁹ 30 Tex. Admin. Code § 50.119.

¹⁰ 30 Tex. Admin. Code § 80.272(d)(2).

¹¹ Tex. Health & Safety Code § 382.032, Tex. Water Code § 5.351.

¹² *Id.*

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Regional Administrator
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An administrative agency may establish a rehearing process by rule¹³ which the TCEQ has done in § 50.119. In § 50.119, the commission incorporated by reference the process found in § 80.272.¹⁴ It is important to note that the reference to § 80.272 in § 50.119 is included as a matter of drafting convenience only. When adopting both of these new rules in 1999, the commission elected to use the cross reference rather than repeating the requirements specified in § 80.272. Therefore, the procedural aspects of filing an MFR, such as the deadline and contents, are the same regardless of whether an application is subject to a CCH.

Consolidated GHG PSD Application

Unless the application is directly referred to the State Office of Administrative Hearings (SOAH) for a CCH at the request of the applicant or the executive director, any hearing requests for the non-GHG portion of the application will be considered by the commissioners.

If the commissioners deny the hearing requests, they may approve the application and issue all of the permits,¹⁵ which will be contained in a consolidated permit document.¹⁶

If the commissioners grant any hearing requests, the application and draft permit will be referred to the SOAH for a CCH on issues related to the non-GHG portion of the application and draft permit as allowed by statute and commission rules.¹⁷ If a CCH is held, SOAH will conduct an evidentiary hearing and prepare a Proposal for Decision (PFD) regarding the contested portion of the application and draft permit for consideration by the commissioners. When the PFD is considered by the commissioners in an open meeting, the commissioners will also consider the GHG PSD portion of the application and draft permit, and action will be taken on the entire application at one time.

After consideration of the PFD, the commissioners may approve the consolidated application and issue a consolidated GHG PSD permit document, or deny the application for such permits.

Each of these final actions by the commissioners on a consolidated application is subject to the MFR requirement.¹⁸ To appeal a final order of the commissioners, a person must first file an MFR. If the commissioners deny the MFR or if the MFR is overruled by operation of law, the final order may be appealed to a Travis County District Court.¹⁹ If appealed to district court, the

¹³ *Tex. Air Control Bd. v. Travis Cnty.*, 502 S.W.2d 213, 215 (Tex. Civ. App.—Austin 1973, no writ); see also *Sproles Motor Freight Line, Inc. v. Smith*, 130 S.W.2d 1087, 1088 (Tex. Civ. App.—Austin 1939, writ ref'd) (requiring plaintiff to exhaust administrative remedy created by rule; because writ was refused, opinion has precedential value of opinion by Texas Supreme Court).

¹⁴ 30 Tex. Admin. Code § 80.272.

¹⁵ 30 Tex. Admin. Code § 50.113(c)(2).

¹⁶ For example, the permit document will be for Air Quality Permit No. 12345 and GHG PSD TX Permit No. 101.

¹⁷ 30 Tex. Admin. Code § 50.115. See also 30 Tex. Admin. Code § 50.113(b), which provides that rules regarding action of the commission do not create a right to a CCH where the opportunity for a CCH does not exist under other law.

¹⁸ 30 Tex. Admin. Code § 50.119.

¹⁹ Tex. Health & Safety Code § 382.032, Tex. Water Code § 5.351.

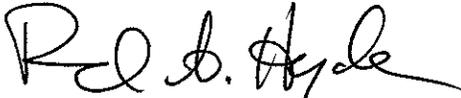
Mr. Ron Curry
Regional Administrator
U.S. Environmental Protection Agency, Region 6
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judge will, pursuant to statute, determine whether the appellant is a person affected by the decision of the TCEQ and thus whether the appellant has standing.²⁰

Conclusion

I am confident that the proposed rule changes together with the information submitted in this correspondence will ensure SIP approval of the rules adopted to implement GHG PSD permitting. If you have any questions or need further information, please contact me or Janis Hudson, Attorney in our Environmental Law Division at 512-239-0466.

Sincerely,



Richard A. Hyde, P.E.
Executive Director
Texas Commission on Environmental Quality

RAH/jbh

cc: Steve Hagle, P.E., Deputy Director, Office of Air
Mike Wilson, P.E., Director, Air Permits Division, Office of Air
Caroline Sweeney, Deputy Director, Office of Legal Services
Booker Harrison, Senior Attorney, Environmental Law Division, Office of Legal Services
Janis Boyd Hudson, Attorney, Environmental Law Division, Office of Legal Services

²⁰ *Id.*

Bryan W. Shaw, Ph.D., *Chairman*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 13, 2014

Mr. Sam Coleman
Deputy Regional Administrator
U.S. Environmental Protection Agency Region 6
1445 Ross Avenue
Dallas, Texas 75202

Dear Mr. Coleman:

On December 2, 2013, I wrote notifying you of the proposal and publication of new and amended rules to apply Texas Commission on Environmental Quality's (TCEQ) Prevention of Significant Deterioration (PSD) program to greenhouse gas (GHG) emitting sources in Texas. As part of that letter, I also requested that EPA expedite its review and approval of these rules through parallel processing and fully rescind the Federal Implementation Plan (FIP) that is currently in place regarding GHG PSD permitting authority in this state.

Consistent with a full rescission of the FIP, an integral part of transitioning authority over PSD permitting of GHG sources in Texas is the future administration of those permits that are issued by EPA. Based on previous discussions with your office, it is the TCEQ's understanding and intention that EPA would transfer this authority to our agency upon approval of our rules and rescission of the FIP. EPA has issued several GHG PSD permits in Texas and will likely issue several more before the FIP is lifted; however, our December 2 letter did not expressly address TCEQ's assumption of authority over these permits.

In 1987, TCEQ's predecessor agency, the Texas Air Control Board (TACB), adopted the PSD Supplement. Condition 1 of the PSD Supplement states that TACB will assume responsibility to enforce permits that were issued by EPA prior to TACB receiving authority to implement the PSD program. As an EPA-approved element of the Texas SIP, the PSD Supplement also applies to GHG PSD permits issued by EPA under the FIP.

Therefore, this letter confirms that, as part of and concurrent with EPA's approval of the proposed GHG PSD program rules into the Texas SIP, TCEQ is requesting continued approval to exercise its authority to administer the PSD program with respect to those sources located in Texas that have existing EPA-issued GHG PSD permits. This includes authority for the general administration of these existing permits, authority to process and issue any and all subsequent PSD permit actions relating to such permits

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including modifications, amendments or revisions of any nature and the authority to enforce such permits.

As we move towards our mutual goal of transitioning GHG permitting to Texas, please do not hesitate to contact me at (512) 239-1317.

Sincerely,



Richard A. Hyde, P.E.
Interim Executive Director

cc: Adina Wiley, U.S. Environmental Protection Agency, Region VI
Lynde Schoellkopf, U.S. Environmental Protection Agency, Region VI
Anne Idsal, General Counsel, Texas Commission on Environmental Quality
Caroline Sweeney, Deputy, Office of Legal Services, Texas Commission on
Environmental Quality
Steve Hagle, Deputy, Office of Air, Texas Commission on Environmental Quality